IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	ID# 0601021343
v.	)	
	)	
JAMAIEN MONROE,	)	
	)	
Defendant.	)	
	)	

Submitted: March 15, 2010
Decided: May 14, 2010

Upon Defendant's Motion for New Trial.
DENIED.

MEMORANDUM OPINION

Andrew J. Vella, Esquire, and Caterina Gatto, Esquire, Deputy Attorneys General, Department of Justice, Wilmington, Delaware, Attorneys for the State.

Jennifer-Kate Aaronson, Esquire, and Patrick J. Collins, Esquire, Aaronson, Collins and Jennings, LLC, Wilmington, Delaware, Attorneys for Defendant.

COOCH, J.

I. INTRODUCTION

Defendant's motion for new trial results from a February 2009 trial where Defendant was found guilty of non-capital Murder First Degree, three counts of Reckless Endangering First Degree, and two counts of Endangering the Welfare of a Child. Defendant's charges on which he was found guilty stemmed from the April 2, 2007 shooting of Andre ("Gus") Ferrell. Although Defendant was also charged with Attempted Murder First Degree and Possession of a Firearm During the Commission of a Felony stemming from a separate incident, alleged to have occurred on January 26, 2006, Defendant was acquitted of these charges.

At trial, the State sought to introduce evidence pursuant to D.R.E. 404(b) of a prior, uncharged robbery allegedly committed by Defendant on January 25, 2006 (the day before the acts that resulted in the attempted murder charge) as evidence of his "motive" to murder Ferrell. The State alleged that about fifteen months prior to Ferrell's murder, Defendant and some associates robbed Ferrell of a necklace. The State sought to introduce evidence of this "necklace robbery" as support for its theory that the supposed growing animosity between Defendant and Ferrell, after January 25, 2006 and continuing to April 2, 2007, eventually resulted in Defendant killing Ferrell.

This Court held a pretrial hearing on Defendant's motion in limine to exclude evidence of that necklace robbery. The State called three witnesses to testify that Defendant was involved in the robbery of Ferrell. The witnesses were Ronald Wright, Jonathan Wisher, and Kason Wright, and, based on their combined testimony, including especially a videotaped statement of Kason Wright to the police, where Kason Wright stated that he was with Defendant when Defendant robbed Ferrell, this Court ruled that the State could introduce evidence of Defendant's involvement in the robbery of Ferrell because, among other reasons, and as urged by the State, the Court concluded that the jury could possibly find that that evidence tended to establish a "motive" for Defendant to murder Ferrell. The Court held that the evidence of Defendant's involvement in the necklace robbery was "plain, clear, and conclusive."

However, Kason Wright unexpectedly refused to testify at trial and invoked his Fifth Amendment right against self-incrimination when he was called as a witness. Thus, the jury never heard either any live testimony of Kason Wright or his videotaped statement (sought to be introduced pursuant to 11 *Del. C.* § 3507). Wisher and Ronald Wright testified at the trial immediately before Kason Wright was to be called to testify.

The only issue raised by Defendant's motion for new trial is whether the jury appropriately heard "plain, clear, and conclusive" evidence of the prior uncharged necklace robbery at trial coming only from Wisher and Ronald Wright.

For the following reasons, this Court holds that the testimony of Jonathan Wisher and Ronald Wright, and without the testimony of Kason Wright, provided the requisite "plain, clear, and conclusive" evidence that could tend to show that Defendant was involved in the necklace robbery the day before the alleged attempted murder, and, thereby, had a motive to murder, or to attempt to murder, Andre Ferrell.

Additionally, and alternatively, this Court holds that even if the evidence from Jonathan Wisher and Ronald Wright about the necklace robbery was not "plain, clear, and conclusive," and therefore should have been excluded (or the jury otherwise instructed not to consider it), Defendant is not entitled to a new trial because (1) Defendant has waived any claim that evidence of the necklace robbery was not "plain, clear, and conclusive" by failing to have raised this issue at trial when Kason Wright refused to testify; (2) even if Defendant did not waive this argument, this Court's *Getz* instruction adequately remedied any problem; (3) Defendant was ultimately acquitted of Attempted Murder First Degree and the related Possession of a

Firearm During the Commission of a Felony, thereby suggesting a lack of prejudice to Defendant by the admission of the evidence; and (4) the admission of such evidence was not error because there was otherwise sufficient evidence to convict Defendant of Murder First Degree and the related charges.

Finally, this Court has examined the standards for admissibility of "other crimes, wrongs, or acts" pursuant to Rule 404(b) used in the federal courts and in other jurisdictions and concludes that the necklace robbery evidence in this case would have been admitted pursuant to standards of admissibility of 404(b) evidence in the federal courts and in most other states in that the State presented "sufficient evidence" through the testimony of Wisher and Ronald Wright (assuming, of course, that that latter standard was applicable in Delaware).[1]

Accordingly, Defendant's motion for a new trial is **DENIED**.

II. FACTS AND PROCEDURAL HISTORY

On November 14, 2007, Defendant was indicted for two separate shootings involving Ferrell.[2] Defendant was charged with Attempted Murder First Degree and various firearms offenses for the first incident that

[1] *See infra* Section IV(D) at pages 40-63.
[2] Def. Mot. for New Trial at 2.

occurred on January 26, 2006.[3] He was also indicted on Murder First Degree, firearms offenses, and multiple counts of Reckless Endangering First Degree and Endangering the Welfare of a Child for the shooting death of Ferrell on April 2, 2007.[4] The facts related to these incidents have previously been summarized by this Court as follows:

> The first incident took place on January 26, 2006 when Wilmington Police responded to complaints of shots fired in the area of East 23rd and Carter Streets. Police officers were unable to locate witnesses at the scene, but shortly thereafter, the victim, Andre Ferrell, of the shooting arrived at Wilmington Hospital with multiple gunshot wounds to his back. The shooter in this incident was identified as Defendant. A warrant containing multiple charges, including Attempted Murder First Degree, was issued for Defendant.
>
> Fifteen months later, on April 2, 2007, and after having evaded police apprehension on the warrant for his arrest, Defendant was allegedly implicated by witness identification in a second shooting on that date of the same victim. The victim died from the injuries he sustained. The incident on April 2, 2007 took place in the parking lot of Derr's Market near Newark and was investigated by the New Castle County Police.[5]

Defendant also filed a motion in limine to exclude evidence of the necklace robbery of Ferrell that occurred at the G&P Deli on the corner of 28th and North Market Streets in Wilmington on January 25, 2006.[6]

A. The Evidence at the Pretrial *Getz* Hearing

At the pretrial *Getz* hearing,[7] Kason Wright testified first and identified Jamaien Monroe as the defendant present in the courtroom.[8]

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[3] *Id.*
[4] *Id.*
[5] *State v. Monroe*, 2008 WL 3413335, at * 1 (Del. Super.) (holding that a joinder of offenses would not cause Defendant "actual prejudice").
[6] Def. Mot. for New Trial at 2.

Kason Wright testified that he was at the G&P Deli on the night in question, but stated that he knew nothing about the prior robbery of Ferrell and testified that he did not remember being interviewed by the Wilmington Police about the alleged necklace robbery.[9] Kason Wright testified:

> [The Prosecutor]. Have you ever been there – or specific day[?] Have you ever been there around G&P?
> A. Yes
> Q. January 26th you think you may have been around there?
> A. Yes.
> Q. And on any day, January 26th, do you remember seeing Jamaien Monroe there?
> A. No.
> Q. Do you remember talking to Jamaien Monroe?
> A. No.
> Q. Do you remember Jamaien Monroe going and trying to rob someone?
> A. No. I don't remember.[10]

In response to Kason Wright's answers, the State played a videotape (pursuant to 11 *Del. C.* § 3507) of Kason Wright being interviewed by Wilmington Police detectives on January 27, 2006 about the necklace robbery. Kason Wright testified that it was not him on the tape. During his interview with police, Kason Wright stated:

> Wright: I was in – I was in Chinese store smoking a blunt. Gus was in G&P. Main Dane said that he likes the chains. I say man, but, cross, man.
> Detective: Uh huh.

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[7] This hearing was conducted pursuant to *Getz v. State* for the purpose of determining whether the State could meet the prerequisites of admissibility under Delaware Rule of Evidence 404(b). *See Getz v. State*, 538 A.2d 726 (Del. 1988).
[8] Appx. to Def. Mot. for New Trial at 12.
[9] *Id.* at 6.
[10] *Id.* at 13.

Wright: Supposed to be Muslim. Don't wear crosses.
Detective: Uh huh.
Wright: Uh. So, Main Dane going up there, try to get him.
Detective: Uh huh.
Wright: So, all you hear is help, help, help. Gus beating Main Dane up.
Detective: Do you go out there and help him?
Wright: No. Hell No.
Detective: What happened?
Wright: I left it alone. I walked back like I didn't see it.
Detective: But what happened? But what happened?
Wright: Nothing ain't happen. The chain. Um, I see them – I seen them pick up a chain, run. I seen about two, three, four cars deep pull up. Start beating Main Dane ass, chasing him up Market Street.[11]

Jonathan Wisher next testified at the *Getz* hearing, stating that he was with Ferrell on January 25, 2006, the night of the necklace robbery, and that he drove Ferrell and Ronald Wright to the deli:[12]

[The Prosecutor]. You say all four of you where in the car. So it's you, Ron Ron, Gus
A. Sal.
Q. – and Sal.
At some point on the 25th did you guys stop at the G&P deli?
A. Yes, sir.
Q. Where is that?
A. 28th and Market.
Q. What was your purpose in stopping there?
A. I guess they was trying to get something to eat, Ronald Wright and Gus.
Q. So what happened when you stopped and were going to the G&P.?
A. They stopped, pulled over, and parked.
Q. They parked in front of the G&P or around the corner?
A. On the side of G&P.
Q. Is G&P on Market?
A. Yes.
Q. So you parked around the corner –
A. On 28th.
Q. On 28th?
A. Yes.

[11] *Id.* at 69-70. "Main Dane" was identified by Kason Wright as Defendant. *See* Op. Br. at 4.
[12] Appx. to Def. Mot. for New Trial at 16-19.

Q. Who all went into G&P?
A. Ronald and Gus.
Q. And you and Sal stayed behind?
A. Yes, sir.
Q. Where were you in the car?
A. I was in the passenger seat.

* * *

[The Prosecutor]. At that time did you see or recognize anyone outside of the car?
A. Not until I heard a bump on the side of the passenger door. I seen three fellows.
Q. Did you recognize any of the three guys?
A. Not really, except for my cousin.
Q. When you say cousin, Gus?
A. Gus.
Q. And two other guys?
A. And two other guys on him.
Q. When you heard this bump and you were on the inside the car and saw two other guys, what did you think?
A. Really, I thought it was him and Ron Ron playing around at first until I seen a third person. That's when I got out the car.
Q. What did you see when you got out of the car?
A. One guy fled with an object in his hand. And the other guy was tussling with Gus.
Q. Did you recognize the guy who ran off?
A. It was City. That was his alias.

* * *

Q. Do you remember what the other guy looked like?
A. I really can't say. It was just too much tussling going on.

* * *

[Wisher]: I really can't see what he looked like. It was too much tussling going on to where everybody was just – Gus and the other fellow was holding each other, like tussling, like wrestling.
Q. Was Gus wearing any jewelry that day?
A. Yes. He was wearing a necklace, a chain with a medallion on it.
Q. What happened with that chain during the tussling, if you remember seeing?
A. I guess the guy tried to take it from him to where he had it in his hand. And he tried to flee off with it, but at that point he had dropped it.
Q. After he dropped it, what did you do?
A. I was about to chase him until my cousin said – Gus said no, I got my chain back. And that was that.[13]

Wisher was not able to identify Defendant as the robber.

[13] *Id.* at 17-20. "City" was identified as Kason Wright.

The final witness was Ronald Wright. He testified at the *Getz* hearing as follows:

> [The Prosecutor]. Who all went to the G&P deli?
> A. Me, Gus, Jonathan Wisher, and Sal.
> Q. And did anyone – who went into G&P and did anyone stay behind?
> A. Me and Gus went into G&P, and Jonathan and Sal stayed in the car.
> Q. What did you guys do in G&P?
> A. Paid for our food, got our food.
> Q. Let's talk about prior to going into the G&P. First, were you in a car?
> A. Um-hmm.
> Q. Who was driving?
> A. Gus.
> Q. Where did you park – where did Gus park the car?
> A. On 28th, on the side of the Chinese store.
>
> * * *
>
> [The Prosecutor]. When you got – I'm sorry. On that day, was Gus wearing any jewelry?
> A. Yes. Two chains.
> Q. And when he got out of the car, was he wearing those two chains?
> A. Yes.
> Q. Can you describe the chains, if you can remember?
> A. One of the chains had a cross with diamonds in it. And the other one, I think it was just a basic chain, but it had little diamonds in the, like, the rope area. You know what I mean?
> Q. When you and Gus got out of the car to go into G&P, did you see anyone on the street that you recognized?
> A. Kason, a Philly boy that I was locked up with in the Plummer Center, and Jamaien.
> Q. When you say Jamaien, who are you referring to?
> A. The defendant.
>
> * * *
>
> [The Prosecutor]. So after you heard banging on the door, someone saying Gus is being robbed, what did you do?
> A. I went out to the car. I went around the corner on 28th.
> Q. What did you see?
> A. I seen Gus leaking from the back of his head.
> Q. When you say "leaking from the back of his head" –
> A. Bleeding.
> Q. Bleeding?
> A. Yeah.
> Q. All right. And where was Johnathan?
> A. Outside the car with him.
> Q. Where was Sal?

A. In the car.
Q. Was there anyone else out there besides Johnathan and Gus?
A. When I came out, I didn't see nobody else.
Q. Now, you've previously testified that when he walked into the G&P, Gus had two chains on him, and you described them. After you came outside, do you recall how many chains Gus had on him?
A. One. He ain't had it on.
Q. Did he have any chains on?
A. No. It was – when I got in the car, it was broken in half in the car.[14]

On cross-examination, Ronald Wright testified as follows:

[Ms. Aaronson]. You don't actually see this alleged robbery; right?
A. No.
Q. And a necklace, you didn't see a necklace on the ground at any point?
A. No.
Q. You didn't know the defendant by name or by face on January 25, 2006; correct?
A. Nope.
Q. And you are calling the defendant "Jermaine;" is that right?
A. Yes.

* * *

[Ms. Aaronson]. How did you find out the defendant's name?
A. It was in the paper.
Q. Was there a photo in the paper?
A. Yes, it was.
Q. And what was the newspaper article about?
A. Gus getting shot.
Q. What else?
A. Gus getting shot and murdered, two articles.
Q. And there's a photo of the defendant as the person that's arrested for it; right?
A. Yes.
Q. Now, you didn't call the police after the alleged robbery; right?
A. No.
Q. And Gus' head is bleeding?
A. Um-hmm.
Q. Did you go to the hospital?
A. Not that I recall.
Q. You don't call the police after this robbery, and Gus is injured and doesn't go to the hospital; is that right?
A. Right.
Q. You go to the police the next day; is that right?
A. No.

[14] *Id.* at 24-27.

Q. How about the 27th of January?
A. No.
Q. How about February ’06?
A. No.
Q. March ’06?
A. No.
Q. You wait until they find you a year and a half later; is that right?
A. Correct.

* * *

[Ms. Aaronson]. Okay. And when you give your statement to the police, you say that you see City, some Philly guy, and some other nigger; right? You have to say “yes” for the court reporter.
A. Yes.
Q. You don’t say Jamaien Monroe; right?
A. No.
Q. You don’t give any description of the other nigger that you saw out there, as you’ve described him; right?
A. No, ma’am.[15]

After considering the testimony of all three witnesses, including the out-of-court videotaped statement of Kason Wright, this Court ruled that evidence of the prior uncharged robbery was admissible in that the State had met its burden pursuant to *Getz* of establishing the prior necklace robbery by “plain, clear, and conclusive” evidence, and that the evidence was relevant for the limited purpose of showing Defendant’s motive for his attempt to murder, and later to murder, Ferrell.[16] This Court noted that the requirement of “plain, clear, and conclusive” evidence could be established by

[15] *Id.* at 27-32.
[16] Trans. of Feb. 24, 2009 Trial at 76-85.

eyewitness testimony and that the "credibility of that testimony ultimately becomes a jury question." [17]

B. The Evidence of the Necklace Robbery at Trial

On February 25, 2009, the State called Ronald Wright and Jonathan Wisher to testify, and both witnesses testified in a manner essentially consistent with their testimony at the pretrial hearing.[18]

However, when Kason Wright was called to testify, he refused to testify at all and invoked his Fifth Amendment right against self-incrimination.[19] This Court engaged in a colloquy about this issue with Kason Wright outside the presence of the jury, and appointed counsel for Kason Wright.[20] After conferring with newly-appointed counsel, Kason Wright continued to refuse to testify.[21] As a result of Kason Wright's refusal to testify, the jury never heard his § 3507 statement that this Court had heard at the pretrial hearing and on which, in part, the Court had based its ruling.

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[17] *Id.*
[18] Appx. to Def. Mot. for New Trial at 34.
[19] *Id.* at 35.
[20] *Id.* at 36.
[21] *Id.* at 42.

C. The Evidence of the Attempted Murder

At trial, the State presented evidence of the January 26, 2006 attempted murder of Ferrell.[22] Aaron Mummert testified on behalf of the State that he was in Rodney Square waiting for a bus when Ferrell drove up in a Dodge Intrepid.[23] Mummert testified that he got into Ferrell's car and rode with him to 22nd Street and Carter Street in Wilmington.[24] At that point, Mummert saw an SUV with its door cracked, and further testified that

> I looked back while we was driving past. I seen Jamaien loading up the .38 that was all silver. And [a] dude was chitchatting with [Ferrell] to catch [his] attention to make him slow down. And, like, as I turned around to go tell [Ferrell] to pull off, because I seen Jamaien with a gun, as I turned around, that's when we heard the gunshots, and we just pulled off.[25]

Mummert testified that one of the bullets had hit Ferrell and that Ferrell had blood on his shirt.[26] In an interview with police, Mummert was able to pick Defendant from a photo lineup and identified Defendant as the shooter.[27] However, and despite Mummert's pretrial identification of Defendant, he equivocated on that identification at trial:

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[22] The Court need not elaborate on the facts of this part of the case since Defendant was acquitted of the Attempted Murder First Degree charge and the related Possession of a Firearm During the Commission of the Felony charge allegedly occurring on January 26, 2006.
[23] Trans. of Feb. 26, 2009 Trial at 4-7.
[24] *Id.* at 6.
[25] *Id.* at 8.
[26] *Id.* at 11-12.
[27] *Id.* at 13-14.

> [Mr. Collins]: We will get to that in a second. What's I'm asking you is, what you're saying when you say "either this nigger right here or some bro," is it could be the person you pointed to; right?
> A: Yes.
> Q: Or it could be a different person?
> A: Yes.
> Q: And the different person would be – would that be a person who is not among those photos of the head shots?
> A: It wasn't in the lineup.
> Q: So basically what you're telling Detective Chaffin is that it could be this person or it could be a different person who is not among these picture[s] that he's showing you; right?
> A: That's what I told him. My mind was blurred. But he asked me to point him out as best I could, so I did, off of what I remember I seen during that incident on 23rd and Carter.[28]

No physical evidence was ever recovered by the police linking Defendant to the shooting on January 26, 2006.

D. The Evidence of the Murder

The State introduced copious evidence linking Defendant to the April 2, 2007 murder of Ferrell. Among other evidence, the State called Shameka Brown, Ferrell's girlfriend. Brown testified that she had worked at TGI Friday's with Ronise Saunders, Defendant's girlfriend.[29] Brown made an in court identification of Defendant.[30]

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[28] *Id.* at 58.
[29] Trans. of Mar. 4, 2009 Trial at 7-8.
[30] *Id.* at 8-10. Brown identified Defendant as Ronise's boyfriend. She testified that she did not know Defendant's name at the time of the murder.

Brown testified that she had gone to Derr's Market near Newark with Ferrell so that Ferrell could purchase a shirt.[31] She stated that after arriving at Derr's Market, she saw Defendant arrive in Ronise's car.[32] She further testified that when Ferrell came back from Derr's Market with the shirt he had just purchased, she saw Defendant come from behind and shoot Ferrell.[33] Brown testified that:

> [The Prosecutor]. Do you remember what Gus [Ferrell] did, what happened to Gus after you heard the gun fire, what did you see?
> A. Well, I seen, I seen him run off, and then Gus just dropped on the ground.
> Q. When you saw him run off, who do you mean?
> A. Jamaien run off.
> Q. Can you describe what he was wearing?
> A. It was a white T-shirt, blue jeans, it either could have been like long jeans that came all the way down, or it could have been like capris that the guys wear now that's like, almost at the ankle, had different pleats in it, it was like red, blue, white around.
> Q. Were you able – from your vantage point in the car were you able to see at least part of his face?
> A. Yes.
> Q. When you were able to see – as you were able to see part of his face, did you recognize him?
> A. Yes.
> Q. Who did you recognize him as? I know you've said Jamaien.
> A. Right.
> Q. Prior to that, up until that moment did you know what his name was?
> A. No.
> Q. And you've said Jamaien here in court. How do you know that name, how is it that you've come to know that name?
> A. Because I had went to, on 13 with the holding cell, or whatever the case is, I had seen a lineup, and then after I had pointed the lineup out somebody had mentioned about Jamaien.
> Q. But prior to that you didn't know his name?
> A. No.

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[31] *Id.* at 15-16.
[32] *Id.* at 17-20.
[33] *Id.* at 22.

Q. Who did you know him as?
A. Ronise[’s] boyfriend.[34]

The State also called Katharine Ann Meier, a customer in Derr’s Market, who was an eyewitness to the murder. Meier was able to pick Defendant from a photo lineup and testified that she was able to see the side of Defendant’s face as he fled the scene.[35] Although Meier did not know Defendant’s name, she was able to give the police an accurate description of Defendant and testified, consistently with Brown, that Defendant was wearing “[a] red and white baseball cap, a white T-shirt, and jeans.”[36]

The State also called Kimberly Klosowski and Dimonyell Bateman. Both witnesses were unable to identify Defendant, but testified that they heard gunshots and then saw a man dressed in a white T-shirt and red hat fleeing from Derr’s Market.[37] Klosowski was specifically able to identify a “brown skin[ned]” man who was about Defendant’s height wearing a “red baseball cap, white T-shirt, and a pair of jeans.”[38]

The State presented evidence of Defendant’s attempted flight from police on October 1, 2007 immediately before he was arrested as evidence of

[34] *Id.* at 24-25.
[35] *Id.* at 145-47.
[36] *Id.* at 141.
[37] Trans. of Mar. 4, 2009 Trial at 29-46.
[38] *Id.* at 46.

Defendant's consciousness of guilt. Sergeant James Unger of the New Castle County Police Department testified as follows:

> [Mr. Unger]: As my partner yelled up the stairs for the subject, that we could hear banging around upstairs to come down, the units that had covered the rear of the apartment observed a black male run towards the slider, the sliding glass doors in an attempt to flee out of the rear. However, when he observed the officers around the back, he came towards the front . . .
> [The Prosecutor]: What happened as the person was coming out of the window?
> A: Came out of the window onto a small roof. And at that point he was commanded to put his hands in the air and come down to the ground.
> Q: And did he eventually come down to the ground?
> A: Yes.
> Q: Was he apprehended?
> A: Yes.
> Q: Placed into custody?
> A: Yes.
> Q: Is that the same person here today?
> A: Yes.
> Q: Can you identify him?
> A: Seated at the defense table in the suit, tan suit.[39]

E. The State's Closing Argument

The State, in its closing argument, sought to tie all the accusations against Defendant together and to demonstrate that increasing hostility between Defendant and Ferrell eventually resulted in Ferrell's murder.

Even though Kason Wright's § 3507 statement played at the pretrial hearing was not presented to the jury, Defendant never moved at trial, when it became evident that the jury would not hear any testimony, live or on videotape, from Kason Wright, to reargue the Court's earlier *Getz* ruling that

[39] Trans. of Mar. 6, 2009 Trial at 157-59.

had allowed the State to present evidence of the prior uncharged necklace robbery of Ferrell for the purpose of showing motive. Thus, the State argued to the jury that this evidence helped establish Defendant's motive to kill Ferrell:

> [The Prosecutor]: On January 25, 2006, Jamaien Monroe tried to rob Andre Ferrell. He was unsuccessful. On January 26, 2006, Jamaien Monroe tried to kill Andre Ferrell. He was unsuccessful. On April 2, 2007, Jamaien Monroe killed Andre Ferrell. He was successful.
>
> On April 2, 2007, Jamaien Monroe finished what he set out to do back in January of 2006. He finished what he set out to do in the parking lot of Derr's Market . . .
>
> The evidence in this case, ladies and gentlemen, the State is going to suggest that there are two significant events that happened on January 25 – two. The first happens outside the G & P Deli at 28th and Market here in this city. Well, we know that, on that day, it's Gus Ferrell, Ronald Wright, Johnathan Wisher, and a guy named Sal are driving around in Gus's car and, at some point, they decide they're going to the G & P Deli to get some food . . .
>
> So, we know that Ronald Wright and Gus go into the deli, they get their food. Gus pays and he leaves. Ronald Wright doesn't get his food until a couple seconds later . . . So, while Ronald is in the deli, outside is Jonathan Wisher. Now, Jonathan Wisher is in the car with Sal. He tells you he's fading in and out of sleep. He hears some bumps on the car that kind of draws his attention . . . He didn't think anything of it until he got a closer look and saw it wasn't Gus and Ronald Wright it's Gus and some other guys fighting. . .
>
> But what's important here is that Jonathan Wisher tells you, Kason Wright is running away, he's got a semiautomatic handgun in his hand. Ladies and gentlemen, they tried to rob Gus and they were unsuccessful. He got his chain back. You heard the testimony. He got the chain back. . . . That's the first significant event, the attempted robbery.[40]

This Court instructed the jury with respect to the necklace robbery as follows:

EVIDENCE OF ANOTHER ALLEGED ACTS

[40] Trans. of Mar. 12, 2009 Trial at 7-10.

> Ladies and gentlemen of the jury, you have heard evidence concerning certain acts allegedly committed by the Defendant on January 25, 2006. These acts are in addition to the alleged acts on January 26, 2006 and on April 2, 2007 which form the basis of the crimes for which the Defendant is now on trial.
>
> You may not consider evidence relating to these another acts allegedly committed by the Defendant on January 25, 2006 for which he is not now on trial for the purpose of concluding that he is of a certain character, or possesses a certain character trait, and that he was acting in conformity with that character or character trait with respect to the crimes charged in this case. Similarly, you must not use the evidence to infer or conclude that the Defendant is a bad person, or that he has a predisposition to commit criminal acts, and that he is therefore probably guilty of the charged crimes.
>
> You may, however, use evidence relating to this other act allegedly committed by the Defendant on January 25, 2006 only to help determine issues relevant to the charged crimes. The State contends that the evidence relates to proof of the Defendant's motive to commit the crimes on January 26, 2006 and on April 2, 2007 for which he is now on trial. You may consider such evidence for this purpose only.
>
> As with any other evidence adduced at trial, you, the jurors, are the sole finders of fact, and it is within your sole discretion to determine what, if any, weight the evidence ought to be given, so long as your use of the evidence does not conflict with the prohibitions I have just explained to you.

The jury found Defendant guilty of Murder First Degree, three counts of Reckless Endangering First Degree, and two counts of Endangering the Welfare of a Child. Defendant was acquitted of Attempted Murder First Degree and also acquitted of one count of Possession of a Firearm During the Commission of a Felony associated with the charge of Attempted Murder First Degree.

III. THE PARTIES' CONTENTIONS

In support of his motion for new trial, Defendant argues that, without the testimony of Kason Wright, the State did not have evidence of the

uncharged necklace robbery that was "plain, clear, and conclusive." Defendant asserts that evidence of the prior uncharged necklace robbery was "central" to the State's theory of the case, and "the State was able to set forth a compelling narrative for the jury comprised of uncharged and charged misconduct: an attempted necklace robbery leads to a retaliative shooting, which leads to an attempted murder, which leads ultimately to a murder."[41] Defendant argues that "[a]s events played out at trial . . . the very basis for the Court's ruling was eviscerated when Kason Wright invoked his Fifth Amendment right to remain silent."[42]

Defendant argues that allowing evidence of the necklace robbery was not harmless error. Defendant asserts that this Court must "consider the trial as a whole and determine the magnitude of the effect of the improper evidence on the verdict."[43] Defendant argues that evidence of the necklace robbery was the centerpiece of the State's motive . . . theory . . . ."[44] Thus, Defendant argues that "[s]ince the necklace robbery was the [linchpin] of the State's theory of the case, its influence was so substantial that the grant of a new trial is necessary, regardless of the other evidence presented."[45] Defendant contends that without the necklace robbery evidence, the State

[41] Def. Mot. for New Trial at 15.
[42] *Id.*
[43] Def. Supp. Resp. at 3.
[44] *Id.* at 5.
[45] *Id.* at 3 (citing *Kotteakos v. United States*, 328 U.S. 750, 764 (1946)).

did not have sufficient evidence to prove that Defendant committed Murder First Degree beyond a reasonable doubt because none of the State's witnesses got a clear view of Defendant's face and all hesitated to identify Defendant as the shooter.[46]

In response, the State argues that it produced "plain, clear, and conclusive" evidence to support the Court's decision to allow evidence of the prior uncharged necklace robbery.[47] The State asserts that the combined testimony of Jonathan Wisher and Ronald Wright was enough to satisfy the "plain, clear, and conclusive" standard because "[t]he courts have consistently held that eyewitness testimony can be used to establish this requirement."[48] The State also argues that "it appears that the jury was not prejudiced by the 404(b) testimony because they returned a verdict of not guilty on the attempted murder charges from January 26, 2006."[49]

Additionally, the State argues that evidence of the prior uncharged necklace robbery, even if improperly admitted, "does not warrant granting a new trial."[50] The State asserts that the evidence in this case, even without evidence about the alleged "necklace robbery," was "sufficient to sustain a

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[46] *Id.* at 5-6.
[47] St. Resp. to Mot. for New Trial at 6.
[48] *Id.*
[49] *Id.* at 8.
[50] St. Supp. Resp. at 2.

conviction[,]"[51] and that "the jury was properly instructed on the State's burden of proof for each count of the [i]ndictment."[52] The State argues that

> [t]he jury was clearly able to evaluate all of the evidence presented and was not so overwhelmed with the evidence regarding the robbery that they found that the Defendant acted in conformity therewith. What is more telling is that they found the Defendant not guilty of all charges relating to the attempted murder which occurred just one day after the necklace robbery. If there was any error in admitting the testimony regarding the necklace robbery, it was clearly harmless and caused no prejudice to the Defendant.[53]

IV. DISCUSSION

A. Introduction

The only issue raised by Defendant's motion for new trial is whether the jury appropriately heard "plain, clear, and conclusive" evidence of the prior uncharged necklace robbery at trial coming only from Wisher and Ronald Wright.

"Both the Sixth Amendment to the United States Constitution and Article I, § 7 of the Delaware Constitution guarantee defendants in criminal cases the right to have their cases brought before an impartial jury."[54] A motion for new trial is governed by Superior Court Criminal Rule 33 and

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[51] *Id.* at 2 (citing *State v. Johnson*, 587 A.2d 444, 451 (Del. 1991)).
[52] *Id.* at 3.
[53] *Id.*
[54] *Flonnory v. State*, 778 A.2d 1044, 1052 (Del. 2001).

provides that this Court may grant Defendant a new trial if "required in the interests of justice."[55]

"It [is] well established that evidence of other crimes [is] not, in general, admissible to prove that the defendant committed the offense charged."[56] Despite this general prohibition on evidence of "other crimes, wrongs or acts," which in this case was the alleged necklace robbery, Delaware Rule of Evidence 404(b) provides:

> 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.

Thus, "evidence of prior misconduct is admissible when it has 'independent logical relevance' and when its probative value is not substantially outweighed by the danger of unfair prejudice."[57] Specifically, the Delaware Supreme Court has set forth the following guidelines that must be applied when determining the admissibility of "other crimes, wrongs, or acts" pursuant to D.R.E. 404(b):

> (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.

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[55] *State v. Burroughs*, 2009 WL 5874290, at * 2 (Del. Super.).
[56] *Getz v. State*, 538 A.2d 726, 730 (Del. 1988).
[57] *Id.*

> (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) 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.[58]

Additionally, this Court should also examine the additional factors outlined in *DeShields v. State* in "applying the Rule 403 balancing test [(factor five of *Getz*)] to Rule 404(b) evidence."[59] The additional nine *DeShields* factors are as follows:

> (1) the extent to which the point to be proved is disputed;
>
> (2) the adequacy of proof of the prior conduct;
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> (3) the probative force of the evidence;
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> (4) the proponent's need for the evidence;
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> (5) the availability of less prejudicial proof;

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[58] *Id.* at 734.
[59] *Deshields v. State*, 706 A.2d 502, 506 (Del. 1998).

> (6) the inflammatory or prejudicial effect of the evidence;
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> (7) the similarity of the prior wrong to the charged offense;
>
> (8) the effectiveness of limiting instructions;
>
> (9) the extent to which prior act evidence would prolong the proceedings.[60]

Here, the State offered evidence of the prior uncharged necklace robbery to establish motive, a permissible purpose under D.R.E. 404(b).[61] Additionally, there is no contention raised in Defendant's motion for new trial that the evidence presented at the pretrial hearing was not "plain, clear, and conclusive."[62] Thus, this Court must only determine whether the evidence presented to the jury during the trial, which did not include the testimony of Kason Wright, was "plain, clear, and conclusive."

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[60] *Id.* at 506-07.

[61] 29 Am.Jur.2d *Evidence* § 438 (2008) ("Motive is a well-accepted method of proving the ultimate facts necessary to establish the commission of a crime, without reliance upon an impermissible inference from bad character.").

[62] This Court assumes, without deciding, that this Court must revaluate a *Getz* ruling where (as here) evidence is adduced at a *Getz* hearing but does not materialize at trial. *But see State v. Cohen*, 634 A.2d 380, 386 (Del. Super. 1992) (noting that "[t]his Court recognizes that *Getz* holds that at trial a judge first must determine evidence of other crimes can be shown by evidence which is plain, clear and conclusive. Once the judge makes that preliminary evidentiary decision, *Getz* does not hold that the State has to then prove such acts to the fact finder by such a standard."). Neither the State nor the Defendant has argued that "plain, clear, and conclusive" evidence is necessary only at the time of the *Getz* hearing.

B. The Testimony of Ronald Wright and Jonathan Wisher was Sufficient to Establish Proof of the Necklace Robbery by "Plain, Clear, and Conclusive" Evidence

This Court concludes that the testimony of Ronald Wright and Jonathan Wisher alone was sufficient to establish proof of the necklace robbery by "plain, clear, and conclusive" evidence.

It is well established that eyewitness testimony can be used to establish the requirement that evidence of a prior crime be "plain, clear, and conclusive."[63] It is then the role of the jury to determine the credibility of the eyewitness testimony.[64] Defendant correctly argues that neither Ronald Wright nor Jonathan Wisher testified that either saw Defendant rob Ferrell by grabbing his necklace. Only Kason Wright acknowledged (in his prior out-of-court statement) that "Main Dane" (Defendant) confronted Ferrell to steal Ferrell's necklace on January 25, 2006.

Wisher testified that he was with Ferrell on the night of the necklace robbery and that he drove Ferrell and Ronald Wright to the deli.[65] Wisher

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[63] *Pope v. State*, 632 A.2d 73, 77 (Del. 1993); *Renzi v. State,* 320 A.2d 711, 712 (Del. 1974).
[64] *Howard v. State,* 549 A.2d 692, 694 (Del. 1988).
[65] Appx. to Def. Mot. for New Trial at 16-17.

stated that he remained in his car while Ferrell went into the deli.[66] He stated that he heard a "bump" on his car and subsequently saw an unidentified person fighting with Ferrell.[67]

He also saw an individual fleeing up the street. Wisher stated that he began to chase the individual fleeing up the street, but stopped when Ferrell stated that he had gotten his necklace back.[68] Wisher was not able to identify Defendant as the robber of Ferrell's necklace and apparently was not able to place Defendant at the scene of the robbery.[69]

Ronald Wright testified that he went into the deli with Ferrell and that Wisher remained in the car.[70] He stated that while he was in the deli he saw Kason Wright, "a Philly boy that I was locked up with in the Plummer Center" and Jamaien Monroe.[71] Although Ronald Wright apparently did not know Defendant by the name of Jamaien Monroe at the time of the robbery, he was able to make an in court identification of Defendant and identified him as the same person he saw on the night of the necklace robbery.[72]

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[66] *Id.*
[67] *Id.* at 18-19.
[68] *Id.* at 20.
[69] Wisher specifically stated that Kason Wright was accompanied by an "unidentified" individual, but Wisher testified that he did not know the name of the unidentified individual.
[70] Appx. to Def. Mot. for New Trial at 24.
[71] *Id.* at 25.
[72] *Id.*

Ronald Wright further testified that Ferrell left the deli while he stayed behind.[73] He stated that he heard someone shouting that Ferrell was being robbed and came outside to see Ferrell bleeding from his head.[74] Ronald Wright did not actually see the robbery take place and was not able to identify Defendant as the individual who actually took the necklace from Ferrell.[75] He testified that he learned Defendant's name about a year and a half later from reading a newspaper article and told police that Defendant was the "other nigger" he saw on the night of the robbery.[76]

Despite the fact that neither Wisher nor Ronald Wright actually saw Defendant commit the robbery, both were able to place Defendant at the scene of the necklace robbery. Additionally, Wisher was able to testify that Kason Wright was fleeing up the street while another individual was "tussling" with Ferrell.

Based on this testimony, this Court finds that there was "plain, clear, and conclusive" evidence through the testimony of Jonathan Wisher and Ronald Wright that tended, if believed by the jury, to show that Defendant was involved in the necklace robbery and that the incident could tend to show a motive for Defendant to attempt to murder, or to murder, Ferrell.

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[73] *Id.* at 25-26.
[74] *Id.* at 29.
[75] *Id.* at 28-30.
[76] *Id.* at 27-32.

Numerous Delaware cases involving eyewitness testimony have held that the requirement of "plain, clear, and conclusive" is a credibility question for the jury.[77] It was up to the jury to assess the testimony of both Ronald Wright and Jonathan Wisher, determine the credibility of the testimony, and draw any permissible inferences from that testimony.[78]

Defendant argues that this case is "factually analogous to the [case of] *State v. Slade*."[79] In *Slade*, the State was concerned prior to trial that an eyewitness (Jamison) might refuse to testify at trial that the defendant had confessed to him about committing the crime.[80] Despite this uncertainty, the State referenced the eyewitness's statements during its opening statement:

> Now according to...Jamison's statement to the police, the police did come to...[Jamison's apartment soon after the victim was shot] and they knocked on the door, but the [D]efendant and...Jamison, because they knew there was guns and drugs in the...[apartment], never answered the door. You will also hear... Jamison say while he was in the apartment with the [D]efendant, the [D]efendant admitted to him that he had killed...[the victim]. In detail, he confessed. He confessed about how he had shot him first in the hip, and then, when he was on the ground, jumped over the body and shot him in the head. Several hours later, the [D]efendant is still in a panic because he's got the murder weapon with him He tells...[Jamison] he's got to get the gun out of the...[apartment].

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[77] *See, e.g., Pope v. State*, 632 A.2d 73 (Del. 1993) (holding that "the testimony of various eyewitness accounts and Pope's flight from the scene provided 'conclusive' evidence of that uncharged misconduct.); *Howard v. State*, 549 A.2d 692 (Del. 1988) (holding that "[t]he trial judge properly ruled that [eyewitness] testimony plainly, clearly and conclusively proved the "other crimes." [The eyewitness's] credibility was for the jury to assess."); *see also Renzi v. State*, 320 A.2d 711, 712 (Del. 1974).

[78] *See Howard*, 549 A.2d at 694.

[79] Def. Mot. for New Trial at 12.

[80] *State v. Slade*, 2002 WL 1503702, at * 1 (Del. Super.).

> And apparently, he did, because later that day...his aunt finds the gun under the seat in her car.[81]

Although the State told the jury about the eyewitness's testimony and the defendant's confession to that eyewitness, the eyewitness then refused to testify.[82] This Court ultimately granted a mistrial because the State had told the jury about significant incriminating testimony in its opening statement that failed to materialize at trial.[83]

Slade is inapposite. Here, the State did not outline any aspect of Kason Wright's testimony in opening statement. In *Slade*, the State's opening statement was detailed and graphic. Thus, unlike *Slade*, there was no need for a mistrial (and none was requested) when Kason Wright refused to testify because there had been no reference to the jury in the State's opening statement about testimony that never was produced.

Even though neither Wisher nor Ronald Wright testified that either saw Defendant rob Ferrell, evidence of that robbery was "plain, clear, and conclusive" because those two eyewitnesses testified that Defendant was present when Ferrell was robbed, and the jury was permitted to assess the credibility of that testimony, draw permissible inferences, including whether Defendant had a motive to attempt to murder, or to actually murder, consider

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[81] *Id.* at * 2.
[82] *Id.* at * 3.
[83] *Id.*

other evidence in the trial, and consider whether Defendant was, indeed, involved in the necklace robbery. Even without the testimony of Kason Wright, evidence of the prior uncharged necklace robbery was "plain, clear, and conclusive."[84]

C. Even if Evidence of the Necklace Robbery was not "Plain, Clear, and Conclusive" Defendant is Not Entitled to a New Trial

Even if evidence of the necklace robbery from Wisher and Ronald Wright was not "plain, clear, and conclusive," Defendant is not entitled to a new trial.

i. Defendant has Waived any Argument that Evidence of the Necklace Robbery was not "Plain, Clear, and Conclusive"

Defendant has waived any argument that the evidence presented before the jury concerning the necklace robbery was not "plain, clear, and conclusive" because Defendant failed to renew his motion in limine to

[84] Although this Court reevaluated its *Getz* ruling where additional evidence had been adduced at a *Getz* hearing that did not materialize at trial, this Court notes that *State v. Cohen* indicates that evidence must be "plain, clear, and conclusive" only at the time of the *Getz* hearing. *State v. Cohen*, 634 A.2d 380, 386 (Del. Super. 1992). A strict application of this holding in *Cohen* would eliminate the issue presented in the present case.

exclude the Jonathan Wisher/Ronald Wright testimony after Kason Wright refused to testify.[85]

This Court had ruled at a pretrial hearing that, based in part on the testimony of Kason Wright, evidence of the necklace robbery was admissible. Defendant did not seek reargument of that ruling at any time after Kason Wright refused to testify at trial. Defendant also allowed the State to comment on the necklace robbery during closing argument without objection.

Although the jury already had heard evidence about the necklace robbery from Wisher and Ronald Wright (before it became known that Kason Wright would not testify), a renewed motion in limine or other objection at trial would have potentially allowed this Court to instruct the jury to disregard evidence of the necklace robbery if this Court had then determined that the testimony of Kason Wright was necessary to establish the necklace robbery by "plain, clear, and conclusive" evidence.

The Delaware Supreme Court has previously stated that "[a] trial judge's prompt curative instructions are presumed to cure error and

[85] *See Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986) (stating that the Delaware Supreme Court "will generally decline to review contentions not raised below and not fairly presented to the trial court for decision . . . Thus, failure to object to the admissibility of evidence in the trial court may preclude a party from raising the objection for the first time on appeal.").

adequately direct the jury to disregard improper matters for consideration. Juries are presumed to follow the trial judge's instructions."[86] Defendant did not seek any such instruction from this Court at any time after Kason Wright refused to testify.

Thus, this Court alternatively holds that even if evidence of the necklace robbery was not "plain, clear, and conclusive," Defendant's motion for new trial must be denied because Defendant has waived any argument against admitting evidence of the necklace robbery by having failed to raise the issue during the trial immediately after Kason Wright refused to testify, or at any other during the trial.

ii. Even if Defendant Has not Waived his Argument Concerning the Court's Decision to Allow Evidence of the Necklace Robbery, the Curative Instruction Included as Part of the Jury Instructions Remedied Any Potential Problem

Even if (1) evidence of the necklace robbery was not "plain, clear, and conclusive," and (2) Defendant did not waive this argument by failing to raise the issue at trial, the jury instruction given by the Court remedied any problem.

This Court instructed the jury in part as follows:

EVIDENCE OF ANOTHER ALLEGED ACTS

[86] *McNair v. State*, 2010 WL 779993, at * 4 (Del. Supr.).

> Ladies and gentlemen of the jury, you have heard evidence concerning certain acts allegedly committed by the Defendant on January 25, 2006. These acts are in addition to the alleged acts on January 26, 2006 and on April 2, 2007 which form the basis of the crimes for which the Defendant is now on trial.
>
> You may not consider evidence relating to these another acts allegedly committed by the Defendant on January 25, 2006 for which he is not now on trial for the purpose of concluding that he is of a certain character, or possesses a certain character trait, and that he was acting in conformity with that character or character trait with respect to the crimes charged in this case. Similarly, you must not use the evidence to infer or conclude that the Defendant is a bad person, or that he has a predisposition to commit criminal acts, and that he is therefore probably guilty of the charged crimes.
>
> You may, however, use evidence relating to this other act allegedly committed by the Defendant on January 25, 2006 only to help determine issues relevant to the charged crimes. The State contends that the evidence relates to proof of the Defendant's motive to commit the crimes on January 26, 2006 and on April 2, 2007 for which he is now on trial. You may consider such evidence for this purpose only.
>
> As with any other evidence adduced at trial, you, the jurors, are the sole finders of fact, and it is within your sole discretion to determine what, if any, weight the evidence ought to be given, so long as your use of the evidence does not conflict with the prohibitions I have just explained to you.

This jury instruction told the jury that it could only consider the necklace robbery evidence in connection with the State's contention that Defendant had a motive to attempt to murder or to murder Ferrell. This instruction helped ensure that any use by the jury's of the necklace robbery evidence complied with D.R.E. 404(b). Thus, even if evidence of the

necklace robbery was not "plain, clear, and conclusive," this instruction told the jury that the evidence could not be used for any non-motive purpose.[87]

iii. The Significance of Defendant's Acquittal of Attempted Murder

Defendant's acquittal of attempted murder further supports this Court's finding that the jury did not use evidence of the necklace robbery for an impermissible purpose.

Defendant was on trial for both Attempted Murder First Degree and Murder First Degree. The charge of Attempted Murder First Degree occurred one day after the alleged necklace robbery, whereas the incident concerning the charge of Murder First Degree occurred fifteen months later. The close proximity in time between the alleged necklace robbery and the attempted murder suggests that the necklace robbery was likely more of a motive for the attempted murder, rather than for the murder of Ferrell fifteen months later.

Notably, the jury found Defendant not guilty of Attempted Murder First Degree and Possession of a Firearm During the Commission of a

[87] *Bohan v. State*, 990 A.2d 421, 423 (Del. 2010) ("a curative instruction may provide a 'meaningful and practical alternative obviating the need for a mistrial'") (citations omitted); *Ney v. State*, 1998 WL 382645, at * 2 (Del. Supr.) ("We have consistently held that a proper curative instruction dissipates the threat of prejudice from improper admission of evidence.");

Felony. This verdict suggests that the jury carefully weighed all the evidence and was able to differentiate between the attempted murder charges and the murder charges. The fact that Defendant was acquitted of the charge occurring immediately after the necklace robbery appears to demonstrate the effectiveness of the 404(b) jury instruction.

iv. Even if Evidence of the Necklace Robbery Should Not Have Been Permitted, Allowing the State to Produce Such Evidence was "Harmless Error"

Pursuant to Superior Court Criminal Rule 52(a):

> Harmless error. -- Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Stated differently, "where the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction, error in admitting the evidence is harmless."[88]

Here, the April 2, 2007 murder case against Defendant was strong. The facts are set forth in greater detail *supra*, but among other evidence, the State presented eyewitness testimony from Shameka Brown, a friend of Ronise Saunders, Defendant's girlfriend. Brown stated that she saw Defendant arrive at Derr's Market in Ronise's car.[89] Brown also testified

[88] *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991) (citing *Collins v. State*, 420 A.2d 170 (Del. 1980)).
[89] Trans. of Mar. 4, 2009 Trial at 17-20.

that she was able to see part of Defendant's face when he shot Ferrell from behind.[90] Finally, Brown was able to pick Defendant out of a photo lineup at the police station and identified him as the killer.[91]

Additionally, the State presented eyewitness testimony from Katherine Ann Meier. Meier was able to corroborate Brown's testimony about what Defendant was wearing.[92] Meier also was able to give police a description of Defendant and affirmatively identified Defendant as the killer in a photo lineup.[93]

Although Defendant argues that the identifications provided by these two witnesses were equivocal because the witnesses hesitated to identify Defendant and only partially saw the shooter's face,[94] the witnesses did testify that Defendant was the shooter, and Defendant had the opportunity to cross-examine them about these assertions.

The State also produced evidence from two other witnesses, Kimberly Klosowski and Dimonyell Bateman. Both witnesses saw a person resembling Defendant fleeing from Derr's Market. Additionally, the State

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[90] *Id.* at 24-25.
[91] *Id.*
[92] *Id.* at 141.
[93] *Id.* at 145-47.
[94] Def. Supp. Resp. at 5-7.

produced evidence of Defendant's attempted flight from an apartment immediately prior to his arrest by police.

Defendant argues that the absence of a murder weapon or DNA evidence demonstrates that evidence of the necklace robbery was essential to the State's case.[95] Defendant is correct that there was no murder weapon or DNA evidence, but the State did produce witnesses that saw the shooting. Presumably, the jury relied on these witnesses in finding Defendant guilty of Murder First Degree.

Finally, this Court's finding that any potential error was harmless is in part supported by the fact that the jury acquitted Defendant of Attempted Murder First Degree. As previously discussed, evidence of the necklace robbery more likely supported the State's assertion that Defendant was guilty of attempted murder rather than the murder fifteen months later because of the close proximity in time between the necklace robbery and the attempted murder. The fact that the jury acquitted Defendant of attempted murder is significant because it underscores that there was significantly more evidence to convict Defendant of Murder First Degree, and the related April 2, 2007 charges. The jury could have found Defendant guilty of both Attempted Murder First Degree and Murder First Degree. The fact that the

[95] *Id.* at 5.

jury found Defendant guilty only of Murder First Degree suggests that the jury was able carefully to parse the evidence and to come to a reasoned conclusion that Defendant was guilty of Murder First Degree beyond a reasonable doubt. There was sufficient evidence for a jury to so find.

D. Alternatively, the "Necklace Robbery" Evidence in this Case Would have Been Admitted in the Federal Courts and Most Other States Pursuant to a "Sufficient Evidence" Standard

i. Introduction

"Rule 404(b) has engendered a tremendous amount of litigation and has inspired more judicial opinions, and arguably more confusion, than any other section of the Rules."[96] In Delaware, the "plain, clear, and conclusive" standard for admitting evidence pursuant to D.R.E. 404(b) was apparently first articulated by the Supreme Court in 1974 in *Renzi v. State*[97] and has remained the standard in Delaware ever since. However, since *Renzi* and *Getz*, there has been an unmistakable migration by many state courts, and by all federal courts, away from a "plain, clear, and conclusive" or a "clear and

[96] Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence after Sixteen Years – The Effect of "Plain Meaning" Jurisprudence, The Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857, 904 (1992). For a brief history behind the adoption of F.R.E. 404(b), see generally Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b),* 78 Temp. L. Rev. 201 (2005).

[97] *Renzi v. State*, 320 A.2d 711, 712 (Del. 1974).

convincing evidence" standard to a "sufficient evidence" standard.[98] This "sufficient evidence" standard has been said by one commentator to be "sound as a matter of construction, and today that view is the clear majority position."[99]

Of course, the Delaware Supreme Court, not this court, is the proper court to decide if Delaware should replace the "plain, clear, and conclusive" standard with the "sufficient evidence" standard. However, this Court

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[98] 1 Edward Imwinkelried, *Uncharged Misconduct Evidence* § 2:9 (2009) [hereinafter Imwinkelried, *Uncharged Misconduct Evidence*]; *see also* Stephan A. Saltzburg, Michael Martin, and Daniel J. Capra, *Federal Rules of Evidence Manual* (9th Ed. 2006) (stating that "[i]n the early years of the Federal Rules, many Courts required 'clear and convincing evidence' that a criminal defendant committed an uncharged act before proof of the act could be admitted. However, the Supreme Court rejected this standard as unduly stringent, and inconsistent with the language of 104(b) . . ."). This Court notes that the phrase "substantial proof" and "sufficient evidence" appears to be used interchangeably by the authorities when discussing the modern standard. This Court has employed the term "sufficient evidence" since that was the term used in *Huddleston v. United States* discussed *infra* Section IV(D)(ii).

[99] Imwinkelried, *Uncharged Misconduct Evidence*, *supra* note 98.

> Until recently, the prevailing [] view was that the proponent must establish the defendant's identity by some variation of clear and convincing evidence. Depending upon the jurisdiction, the courts declared that the proof must be: clear, clear and convincing, plain, clear and convincing, plain, clear, and conclusive, true and convincing, or clear, cogent, and convincing. By using these expressions, the courts attempt to convey the thought that the burden is heavier than a mere preponderance of the evidence but lighter than proof beyond a reasonable doubt. These courts demand "a great deal of evidence" connecting the defendant to the act. Unfortunately, the term is ambiguous. Perhaps the core meaning of the term is a high degree of probability.

See also Graham C. Lilly, *An Introduction to the Law of Evidence* § 5.13 (3rd Ed. 1996) [hereinafter Lilly, *An Introduction to the Law of Evidence*]

> [T]he basic test for the admission of evidence is satisfied if the evidence has a tendency to make a fact more probable than not, or, when relevance is conditioned on the existence of a fact (such as the commission of another crime), the underlying fact normally must be supported by evidence sufficient to allow the trier to find its existence.

alternatively has concluded that if Delaware were to follow the "sufficient evidence" standard, the evidence of "other crimes, wrongs, or acts" (i.e. the testimony of Jonathan Wisher and Ronald Wright) would also have been admitted pursuant to D.R.E. 404(b).[100]

Although the Delaware Rules of Evidence are modeled after the Federal Rules of Evidence,[101] the standard of Delaware Rule of Evidence 404(b) concerning the admissibility of "other crimes, wrongs, or acts" is significantly more restrictive than the federal approach and the approach of most other jurisdictions, many of which had previously adopted a "clear and convincing" or a "plain, clear, and conclusive" standard, but now utilize the "sufficient evidence" standard.[102]

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[100] Graham C. Lilly, Daniel J. Capra, and Stephen Saltzburg, *Principles of Evidence* § 3.6 (5th ed. 2009) [hereinafter Lilly et al., *Principles of Evidence*] (stating that "the standard of conditional relevance is not difficult to meet. For example, if the government could present an eyewitness to the prior event, this will ordinarily satisfy the standard of conditional relevance even if the judge is not convinced that the witness's recollection is accurate.").

[101] *See Atkins v. State*, 523 A.2d 539, 542 (Del. 1987) (stating that the "Delaware [] Rules of Evidence are modeled upon the Federal Rules of Evidence.").

[102] Imwinkelried, *Uncharged Misconduct Evidence*, *supra* note 98.

> Since the adoption of the Federal Rules of Evidence, the judicial support for the clear and convincing standard has weakened. The proponents of that standard argued that the courts may continue to apply the prior standard as a gloss on Federal Rule of Evidence 403. There is a strong contrary argument, though. No Federal Rule expressly codifies a requirement for clear and convincing proof. Moreover, Federal Rule of Evidence 402 reflects a bias for the admission of relevant evidence and against the erection of new exclusionary barriers. It is true that Rule 403 permits a trial judge to balance probative value against probative danger and exclude evidence on that basis. However, Congress probably contemplated that the judge would apply Rule 403 and balance on an ad hoc, case-by-case basis. It is questionable whether

ii. Rule 404(b) Evidence in the Federal Courts

The starting point for any discussion about the modern approach governing admissibility of a party's (usually a defendant's) "other crimes, acts, or wrongs" is *Huddleston v. United States*,[103] a case decided by the United States Supreme Court just two months after the Delaware Supreme Court rearticulated the "plain, clear, and conclusive" standard in the seminal case of *Getz v. State*.[104] In *Huddleston*, the United States Supreme Court, in an unanimous decision, resolved a split between the federal circuit courts as to the appropriate standard to apply when deciding whether to admit evidence of a defendant's "other crimes, acts, or wrongs," by holding "that such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."[105]

In *Huddleston*, the petitioner had been charged with one count of selling stolen goods in interstate commerce, and one count of possessing

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> Rule 403 can be relied upon as the basis of announcing a categorical rule that the defendant's identity must always be proved by clear and convincing evidence.

[103] 485 U.S. 681 (1988).
[104] *Getz* was decided on February 29, 1988; *Huddleston* was decided on May 2, 1988.
[105] *Huddleston*, 485 U.S. at 685.

stolen property in interstate commerce.[106] The only issue before the trial court was whether the petitioner knew the goods had been stolen.[107]

The government sought to introduce two "similar acts" where petitioner had received stolen property. "The District Court allowed the Government to introduce evidence of 'similar acts' under Rule 404(b), concluding that such evidence had 'clear relevance as to [petitioner's knowledge].'"[108]

After his conviction, the petitioner appealed and ultimately argued before the Supreme Court that the District Court had not applied the appropriate standard in determining whether to have admitted evidence of his prior crimes under F.R.E. 404(b).[109] The Court of Appeals for the Sixth Circuit had previously affirmed the District Court's holding.[110]

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[106] *Id.* at 682-83.
[107] *Id.* at 683.
[108] *Id.*
[109] *Id.* at 684-85. The petitioner had originally argued that the Government needed to prove the "other crimes, wrongs, or acts" by "clear and convincing proof." However, at oral argument before the United States Supreme Court, the petitioner conceded that such a position was "untenable" in light of another recent Supreme Court decision. *See Bourjaily v. U.S.*, 483 U.S. 171 (1987) (holding that "existence of conspiracy and defendant's participation in it need be proven only by preponderance of evidence in order for statements of coconspirator to be admitted[.]"). The petitioner in *Huddleston* had previously contended that the government must prove the prior act occurred by a "preponderance of the evidence" prior to its admission.
[110] The Court of Appeals for the Sixth Circuit originally reversed and remanded, but, on rehearing, the Court of Appeals vacated its prior opinion and affirmed the judgment of the District Court. *Huddleston v. United States*, 811 F.2d 974 (6th Cir. 1987).

The *Huddleston* Court held that the appropriate standard to apply in determining whether to admit evidence of "other crimes, wrongs, or acts" pursuant to F.R.E. 404(b) was "that such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."[111] The Supreme Court rejected petitioner's contention that the government need to prove the "other crimes, wrongs, or acts" by a "preponderance of the evidence" as "inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b)."[112] The *Huddleston* Court held that

> Article IV of the Rules of Evidence deals with the relevancy of evidence. Rules 401 and 402 establish the broad principle that relevant evidence-evidence that makes the existence of any fact at issue more or less probable-is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter Rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character. The text contains no intimation, however, that any preliminary showing is necessary before such evidence may be introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.[113]

The Supreme Court in *Huddleston* also rejected the petitioner's claim that Rule 404(b) required a preliminary finding by the trial court that the

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[111] *Huddleston*, 485 U.S. at 685.
[112] *Id.* at 687.
[113] *Id.*

prior act occurred by a "preponderance of the evidence."[114] The Supreme Court reasoned that Rule 404(b) made no mention of such a showing and that a greater emphasis should be placed on the admissibility of evidence rather than on the restrictions.[115] The Supreme Court concluded:

> We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402-as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.[116]

Thus, after the Supreme Court's decision in *Huddleston*, commentators have noted that:

> the trial court [does] not itself have to make a preliminary finding that the government ha[s] prove[n] by a preponderance of the evidence [the existence of a prior bad act]. Rather, the [federal] trial court 'simply examines all the evidence in the case and decides whether the jury could

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[114] *Id.* at 689 ("We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a)."). Federal Rule of Evidence 104(a) is identical to Delaware Rule of Evidence 104(a). *State v. Cohen*, 1992 WL 131773, at * 2 (Del. Super.).

[115] *Huddleston*, 485 U.S. at 689-90.

[116] *Id.* at 691; *see also* 2 *Weinstein's Federal Evidence* § 404.21[2][a] (2nd Ed. 2009) ("The Supreme Court noted that a defendant is protected against unfair prejudice not by a preliminary finding from the trial judge, but by the requirements of Rule 404(b), the relevance requirement of Rule 402 as enforced through Rule 104(a), and the balancing required by Rule 403.").

> reasonably find the conditional fact . . . by a preponderance of the evidence.'[117]

The federal courts then immediately abandoned any "plain, clear, and conclusive" standard, "clear and convincing evidence" standard, or some variation thereof. For example, the Third Circuit now utilizes a four-part test based on *Huddleston* to determine whether evidence is admissible pursuant to F.R.E. 404(b). Specifically, the Third Circuit requires:

> (1) the act must be offered for a proper evidentiary purpose; (2) the act must be relevant in accordance with 402; (3) the evidence must survive a weighing of its probative value against its prejudicial effect under Rule 403; and (4) the trial court must give a limiting instruction concerning the purpose for which the evidence may be used.[118]

The Third Circuit has also stated that the burden is on the government to show a proper evidentiary purpose, and the government must "clearly articulate how the other crimes evidence fits into a chain of logical inferences[.]"[119] The 404(b) jury instruction that likely would have applied if this case had been governed by the rules and procedures of the Third Circuit would have read as follows:

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[117] *Weinstein's Federal Evidence*, *supra* note 116 at § 404.21[2][a]; *see also* Lilly et al., *Principles of Evidence*, *supra* note 100 at § 3.6 (stating that "the use of other (collateral) misconduct evidence is yet another illustration of the principle of conditional relevance.").

[118] *See, e.g., U.S. v. Mastrangelo*, 172 F.3d 288, 295 (3d Cir. 1999). These factors appear very similar to the *Getz* factors, but excluding the requirement that evidence of a "other crimes, wrongs, or acts" must be "plain, clear, and conclusive." For a discussion of how *Huddleston* is applied in other federal courts, see 29 Am.Jur.2d *Evidence* § 418 (2008).

[119] *Mastrangelo*, 172 F.3d at 295.

> You have head testimony that the defendant [was involved in a prior robbery of Andre Ferrell].
>
> This evidence of other act was admitted only for a limited purpose. You may only consider this evidence for the purpose of deciding whether the defendant had a motive to commit the acts charged in the indictment.
>
> You may consider this evidence to help you decide [whether it was the defendant who shot at Andre Ferrell on January 26, 2006 and whether it was the defendant who killed Andre Ferrell on April 2, 2007]
>
> Do not consider this evidence for any other purpose.
>
> Of course, it is for you to determine whether you believe this evidence, and, if you do believe it, whether you accept it for the purpose offered. You may give it such weight as you feel it deserves, but only for the limited purpose that I described to you.
>
> The defendant is not on trial for committing these other acts. You may not consider the evidence of these other acts as a substitute for proof that the defendant committed the crimes charged. You may not consider this evidence as proof that the defendant has a bad character or any propensity to commit crimes. Specifically, you may not use this evidence to conclude that because the defendant may have committed the other act, he must also have committed the acts charged in the indictment.
>
> Remember that the defendant is on trial here only for [murder first degree and attempted murder first degree], not for these other acts. Do not return a guilty verdict unless the government proves the crimes charged in the indictment beyond a reasonable doubt.[120]

With respect to Delaware following a comparable federal rule of evidence, the Delaware Supreme Court has stated that:

> [a]lthough not bound by the Supreme Court's interpretation of [a rule of evidence] in construing our identical [rules of evidence], we have repeatedly noted that construction of identical rules by the federal judiciary is accorded "great persuasive weight" in our interpretation of the Delaware counterparts. [121]

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[120] *Third Circuit Model Jury Instructions (Criminal)* § 2.23 (West 2009).

[121] *See Smith v. State*, 647 A.2d 1083, 1088 (Del. 1994); *see also Ricketts v. State*, 488 A.2d 856, 857 n. 2 (Del. 1985) ("The Delaware Study Committee, which drafted the D.R.E., has stated that the historical materials surrounding the promulgation of the Federal Rules and the F.R.E. official notes and comments, 'should be considered as being

Here, of course, the "identical rule [404(b)]" was "constru[ed]" by the United States Supreme Court. Interestingly, apparently no Delaware Supreme Court case has ever addressed *Huddleston*.[122] This is somewhat surprising since *Huddleston* was decided twenty-two years ago, and at least one treatise has identified a significant departure by the states (and, of course, also the federal courts) from the more restrictive "plain, clear, and conclusive" standard or some variation thereof,[123] and has stated that the so called "sufficient evidence" standard adopted in *Huddleston* is now "the clear majority position."[124]

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part of the comments prepared by the Delaware Study Committee and a court should refer to these materials in construing these rules.' "). The 1980 Delaware Study Committee Prefatory Note to the D.R.E. states:

> The Committee, in preparing these rules for adoption in Delaware, made an early policy decision to follow the Federal Rules of Evidence wherever possible. In the interests of uniformity, a departure from the language of the Federal Rules of Evidence, it was agreed, was to be made only for compelling reasons. In cases of doubt as to the wisdom of particular language in the Federal Rules of Evidence, the doubt was to be resolved in favor of adopting the language of the Federal Rules of Evidence . . .
>
> The Committee, in opting to follow the Federal Rules of Evidence whenever possible, took cognizance of the fact that the Federal Rules are now in effect for the United States District Court for the District of Delaware. It was believed that the possibility for forum shopping between the federal courts and the Delaware courts should be minimized. It was also recognized that a large body of case law is developing based on the Federal Rules, not only in the federal courts, but also in the courts of the growing number of states which have adopted the Federal Rules as their rules.

[122] "KeyCiting" *Huddleston* on Westlaw indicates that no Delaware Supreme Court case has ever discussed *Huddleston*.
[123] Imwinkelried, *Uncharged Misconduct Evidence*, *supra* note 98.
[124] *Id.*

In 1992, this Court, discussing *Huddleston*, noted that "[i]t is noteworthy that the United States Supreme Court[,] in interpreting the Federal Rule 404(b) relating to other crimes evidence[,] has abandoned the need for a [federal] trial judge to determine that such evidence meets any standard of proof such as plain, clear and conclusive or preponderance of the evidence."[125]

iii. Most States Now Apply the "Sufficient Evidence" Standard

Numerous jurisdictions have moved to the *Huddleston* standard as the better and more reasoned standard.[126] For example, in the recent case of

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> [t]he official Reporter for the Federal Rules, the late Professor Edward Cleary, expressed his view that any requirement for an enhanced burden such as clear and convincing evidence is no longer good law under the Federal Rules. Citing this treatise, the United States Supreme Court adopted Professor Cleary's view in *Huddleston* in 1988 . . . .

[125] *State v. Cohen*, 1992 WL 131773, at * 2 (Del. Super.) (discussing the phrase "plain, clear, and conclusive" in connection with a sentencing instruction). This Court also cited *Huddleston* in *State v. Hunter*. 1989 WL 40904 (Del. Super.) (holding that 404(b) evidence was admissible pursuant to *Getz* in that the evidence was "plain, clear, and conclusive."). The *Hunter* Court noted that the *Getz* and *Renzi* standard "appears to be a higher standard than the sufficient evidence standard announced in *Huddleston*." *Hunter* did not comment on whether Delaware should adopt *Huddleston*, and did not apply the standard as an alternative as this Court has done.

[126] *See Ayagarak v. State*, 2003 WL 1922623, at * 4 (Alaska Ct. App.) ("Evidence Rule 403 allows trial courts to exclude bad acts evidence if the prejudice outweighs the probative value of the evidence. And if there is not sufficient evidence for a jury to find that the defendant committed the prior bad act, the trial judge should exclude that evidence for failing to meet the predicate requirements under Evidence Rule 104."); *State v. Knight*, 722 N.E.2d 568 (Ohio Ct. App. 1998) ("Evidence of other acts is admissible if there is substantial proof that the other acts were committed by the defendant, and those acts tend to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."); *Pavlick v. Commonwealth*, 497 S.E.2d 920 (Va. Ct.

State v. Aaron L,[127] the Connecticut Supreme Court declined to apply the "clear and convincing" standard for "other crimes, wrongs, or acts" and, instead, applied *Huddleston*.[128] The Connecticut Supreme Court stated:

> Generally, [the] ... Rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced.... The text contains no intimation, however, that any preliminary showing is necessary before such evidence may be introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility . . .[129]

App. 1998) (stating that *Huddleston* is consistent with Virginia law); *State v. Winter*, 648 A.2d 624, 632 (Vt. 1994) (stating that Vermont follows *Huddleston*); *Clemens v. State,* 610 N.E.2d 236, 242 (Ind.1993) (stating that Indiana law is in "accord" with *Huddleston*); *see also People v. Hansen,* 729 N.E.2d 934 (Ill. App. Ct. 2000) (stating that a party seeking to introduce evidence of "other crimes, wrongs or acts" must produce evidence that the prior event occurred and that the defendant participated in its commission); *State v. Gano,* 988 P.2d 1153 (Haw. 1999) (stating that under 104(b) the judge "neither weighs credibility nor makes a finding that the [proponent] has proved the conditional fact by a preponderance of the evidence."); *State v. Hayward,* 963 P.2d 667 (Or. 1998) (noting that Oregon follows a three part test to determine whether evidence is admissible pursuant to Rule 404(b): "Was the evidence independently relevant for a noncharacter purpose; was there sufficient proof that the conduct occurred; and did the probative value of the conduct outweigh the danger of unfair prejudice under [Rule 403]."); *State v. Bickham,* 917 S.W.2d 197, 198-99 (Mo.App.1996) (requiring "substantial evidence" that the defendant committed a prior crime); *State v. Kay,* 927 P.2d 897 (Idaho 1996) (applying *Huddleston*); *Daniel v. Commonwealth,* 905 S.W.2d 76, 78 (Ky.1995) (requiring a three part test to determine admissibility of evidence pursuant to Rule 404(b) (1) "[i]s the evidence relevant for some purpose other than to prove criminal predisposition of the accused?" (2) "[i]s proof of the other crime sufficiently probative of its commission to warrant introduction of the evidence against the accused?" (3) "[d]oes the probative value of the evidence outweigh its potential for prejudice to the accused?"); *State v. Haskins,* 411 S.E.2d 376 (N.C. Ct. App. 1991) (following *Huddleston*); *State v. Delgado,* 815 P.2d 631 (N.M. 1991) (applying *Huddleston*); *Commonwealth v. Odum,* 584 A.2d 953 (Pa. Super. Ct. 1990) (requiring proof by "substantial evidence").

[127] *State v. Aaron L,* 865 A.2d 1135, 1152-53 (Conn. 2005) (stating that "more than one half of the jurisdictions in the country similarly have rejected a heightened standard of proof for the admission of ["other crimes, wrongs, or acts"].").

[128] In *Aaron L,* the defendant had urged the Connecticut Supreme Court to adopt the "clear and convincing" standard, but the Court refused. *Id.*

[129] *Id.*

The Connecticut Supreme Court elaborated on *Huddleston* by noting that "[w]hether evidence is admissible is a question of law that is determined according to the rules of evidence. Whether the burden of persuasion has been met and weight to be accorded to the evidence are questions of fact to be determined by the trier of fact."[130] Thus, the Connecticut Supreme Court held that:

> we disagree . . . that a heightened standard of proof is necessary to protect defendants adequately from the highly prejudicial nature of prior misconduct evidence. We are confident that our trial courts will be vigilant in protecting defendants from the admission of such prejudicial matter when its probative value is outweighed by its prejudicial effect.[131]

Similarly, in *State v. Schindler*, the Wisconsin Court of Appeals chose to apply the *Huddleston* standard as the appropriate standard under the Federal Rules of Evidence.[132] In *Schindler*, the trial court had allowed the

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[130] *Id.* at 1152 n. 26.

[131] *Id.* at 1153. The equivalent Connecticut Code of Evidence Rule 403 differs slightly from Delaware Rule of Evidence 403 in that Delaware requires that the probative value be "substantially outweighed" by prejudicial effect. The Connecticut Rule requires that:

> Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The comparable Delaware Rule of Evidence provides:

> Although 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. (emphasis added).

Many states do not seem to include the word "substantially" in their variations of Rule 403.

[132] *State v. Schindler*, 429 N.W.2d 110, 113 (Wis. App. 1988).

State to introduce evidence of a child victim's leg and rib fracture, both of which were caused by the defendant.[133] The defendant argued that the trial court erred in admitting evidence of "other crimes, wrongs, or acts" because the trial court should have heard the evidence and determined that the State did not show prior abuse by "clear and convincing" evidence.[134]

The Wisconsin Court of Appeals rejected the defendant's arguments and held *Huddleston* to be the appropriate standard.[135] The Court of Appeals stated that "[u]niformity with the proposed Federal Rules of Evidence was the overriding principle when the Wisconsin Evidence Code was drafted."[136] Accordingly, the Court of Appeals held that the trial court was only required to examine the evidence in the case and determine whether a "jury could reasonably find that the defendant caused the victim's leg and rib fractures . . . ."[137]

Also, and illustratively, in *State v. Wright*, the Supreme Court of South Dakota held that *Huddleston* was applicable.[138] In *Wright*, the State had sought to introduce evidence of prior child abuse by the defendant, and the trial court ruled that two prior instances of child abuse by the defendant

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[133] *Id.* at 112.
[134] *Id.*
[135] *Id.* at 113.
[136] *Id.*
[137] *Id.*
[138] *State v. Wright*, 593 N.W.2d 792, 796 (S.D.1999).

were admissible.[139] The defendant appealed his conviction to the Supreme Court, and the Supreme Court took that opportunity to reexamine its Rule 404(b) principles.[140] The South Dakota Supreme Court held that, although prior South Dakota decisions had viewed Rule 404(b) as a rule of exclusion, Rule 404(b) is actually a rule of inclusion. The *Wright* Court held that, pursuant to *Huddleston*, no preliminary showing is necessary to introduce evidence of "other crimes, wrongs, or acts" and stated that "[a]s the [Federal] Advisory Committee cautioned, 'it is anticipated that with respect to permissible uses of such evidence, the trial judge may exclude [similar acts] *only* on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion, or waste of time.'"[141] Thus, the South Dakota Supreme Court held that the appropriate way to limit evidence of "other crimes, wrongs, or acts" was an application of Rule 403.[142]

iv. Some Jurisdictions, However, After *Huddleston*, Still Require a Heightened Standard of Proof

Despite the practice in the federal courts after *Huddleston* and the trend of many jurisdictions since *Huddleston* to abandon a heightened standard of proof such as "plain, clear, and conclusive" or "clear and

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139 *Id.*
140 *Id.* at 797.
141 *Id.* at 797 (citing Fed. R. Evid. 404(b) Advisory Committee Note) (emphasis added).
142 *Id.*

convincing evidence" as a prerequisite for admission of evidence of "other crimes, wrongs, or acts," some jurisdictions have chosen not to follow the lead of *Huddleston* and have held, even after considering *Huddleston*, that evidence of "other crimes, wrongs, or acts" must be established by "clear and convincing" evidence.[143]

Thus, for example, in *State v. Terrazas*, a majority of the Arizona Supreme Court reaffirmed its holding in *State v. Hughes* (a case relied upon by the *Renzi* Court) that evidence of "other crimes, wrongs, or acts" must be established by "clear and convincing" evidence.[144] In *Terrazas*, the defendant had been charged with theft of an automobile.[145] The State sought to introduce evidence of the defendant's prior uncharged thefts of three other automobiles.[146] Prior to the decision by the Arizona Supreme Court, the

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[143] Delaware's "plain, clear, and conclusive" standard seems to be higher than other states that apply the "clear and convincing" standard. "[C]onclusive [could mean] irrefutable or decisive." *State v. Cohen*, 1992 WL 131773, at * 1 (Del. Super.). The American Heritage Dictionary defines "plain" as "easily understood; clearly evident." "Clear" is defined as "[p]lain or evident to the mind; unmistakable . . . free from doubt or confusion; certain." "Convincing" is defined as "[] bring to belief by argument and evidence; cause to believe with certainty." *The American Heritage Dictionary* (2nd ed. 1991).

[144] *State v. Terrazas*, 944 P.2d 1194 (Ariz. 1997). *Renzi* cited *State v. Hughes*. *Renzi v. State*, 320 A.2d 711, 712 (Del. 1974) (citing *State v. Hughes*, 426 P.2d 386 (1967)). However, no rationale was stated in *Renzi* as to why the "plain, clear, and conclusive" standard was preferable to an available alternative.

The only other case cited by *Renzi* as authority for a "plain, clear, and conclusive" standard was *Kraft v. United States*, 238 F.2d 794 (8th Cir. 1956), but that standard is no longer applicable in the federal courts.

[145] *Terrazas*, 944 P.2d at 1195.

[146] *Id.*

Arizona Court of Appeals had held in *State v. Terrazas* that *Huddleston* should apply and, thus, upheld the trial court's decision to admit the State's evidence of the prior uncharged thefts after the State "produc[ed] sufficient proof to permit [the] fact-finder to conclude, by a preponderance of the evidence, that the prior act occurred and that the [defendant] committed the act."[147]

The Arizona Supreme Court reversed both the trial court and the Court of Appeals and held that *Huddleston* was inapplicable.[148] That Court noted that no Arizona court had ever affirmatively determined whether to apply *Huddleston*, even though the Arizona rules of evidence were modeled after the Federal Rules of Evidence.[149] In holding that Arizona would continue to apply the *Hughes* standard requiring "clear and convincing evidence," the *Terrazas* Court reasoned that "[n]o conflict is present between the Rules of Evidence and the *Hughes* standard; the standard does not change the Rules, but merely provides a standard that must be met to admit the evidence under the Rules."[150] The Court also noted that "[t]o

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[147] *Id.* 1196 (citing *State v. Terrazas*, 930 P.2d 464, 467 (Ariz. App. 1996)).
[148] *Id.* 1198.
[149] *Id.* at 1196-97.
[150] *Id.* at 1197. The *Terrazas* Court noted that "[i]n 1977, Arizona adopted the Federal Rules of Evidence. Even so, 'we are not bound by the United States Supreme Court's non-constitutional construction of the Federal Rules of Evidence when we construe the Arizona Rules of Evidence.'" *Id.* at 1196 (quoting *State v. Bible*, 858 P.2d 1152, 1183 (Ariz. 1993)). Delaware appears more inclined to follow the United States Supreme

allow a lesser standard in a criminal case is to open too large a possibility of prejudice." [151]

However, despite the majority's reasoning, the dissenting justice in *Terrazas* noted that "[p]reliminary questions concerning the admissibility of conditionally relevant evidence, such as 'other act' evidence, are resolved under 104(b)."[152] The dissent noted that "[t]here is no *per se* exclusionary rule for 'other act' evidence offered for a proper purpose[,]"[153] and that:

> Logic, too, counsels against engrafting a clear and convincing standard onto Rule 104(b). Rule 104(b) applies to both criminal and civil cases. If "evidence sufficient to support a finding of the fulfillment of the condition" means evidence proved by clear and convincing evidence, then the standard for *admissibility* in civil cases would be higher than the ultimate burden of proof. This makes no sense. Nor would it make sense to use a different standard in civil cases: the common language of Rule 104(b)-"evidence sufficient to support a finding"-would then have two different meanings.[154]

Court's construction of a rule of evidence. *Compare id. with Smith v. State* , 647 A.2d 1083, 1088 (Del. 1994) (stating that "construction of identical rules [of evidence] by the federal judiciary is accorded 'great persuasive weight' in our interpretation of the Delaware counterparts.").

[151] *Terrazas*, 944 P.2d at 1198. Notably, *Aaron L*, a case discussed *supra*, specifically rejected *Terrazas*.

[152] *Id.* at 1202 (Martone, J., dissenting).

[153] *Id.* The dissent also disagreed with two concurring justices that read Rule 404(b) as a rule of exclusion. Delaware favors the same inclusionary approach to Rule 404(b) favored by the dissent in *Terrazas*. *Getz v. State*, 538 A.2d 726, 731 (Del. 1988) (holding that Delaware favors an inclusionary approach to D.R.E. 404(b)).

[154] *Terrazas*, 944 P.2d at 1202 (Martone, J., dissenting)

Thus, the dissent concluded that *Huddleston* should be the appropriate standard to apply in light of the similarity between the Arizona Rules of Evidence and the Federal Rules of Evidence.[155]

Other jurisdictions similarly, require (like Delaware), and even after consideration of *Huddleston,* a heightened standard of proof before evidence of "other crimes, wrongs, or acts" is admissible.[156] Indeed, one

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[155] This Court has analyzed the *Terrazas* holding at some length, given the *Renzi* Court's reliance on *State v. Hughes*.

[156] As Professor Imwinkelried has noted:

> [S]everal states have rejected *Huddleston*. Although its versions of Rules 104 and 404 are identical to the federal provisions, the Colorado Supreme Court has refused to follow *Huddleston*; that court has ruled that "the admissibility of other-crime evidence must be determined as a preliminary fact by the trial court under CRE 104(a) rather than CRE 104(b)." Likewise, appellate courts in Florida and West Virginia have balked at following *Huddleston.* In 1997, Arizona joined ranks with Florida and West Virginia. In Minnesota, that state's version of Rule 404(b) was amended to commit the decision to the trial judge and to require the trial judge to apply the standard of clear and convincing evidence. Similarly, in Nebraska, subdivision (3) was added to Rule 27, 404 to prescribe the clear-and-convincing-evidence standard. In 2003, Tennessee Rule of Evidence 404(b) (3) was amended to mandate the clear-and-convincing standard.

Imwinkelried, *Uncharged Misconduct Evidence*, *supra* note 98; *See State v. McGinnis*, 455 S.E.2d 516, 526-57 (W.Va. 1994) (rejecting the "clear and convincing" standard, but adopting a "preponderance of the evidence" standard. Notably, West Virginia also applies the *Huddleston* factors as well.); *see also State v. Jackson*, 625 So.2d 146, 149 (La. 1993) (adopting "clear and convincing evidence" standard*); Phillips v. State*, 591 So.2d 987, 989 (Fla. App. 1991) (same); *Harrell v. State*, 884 S.W.2d 154, 159 (Tex. Crim. App. 1994) (adopting beyond a reasonable doubt standard of proof).

It appears that only Alabama follows the same standard used in Delaware. *See Hinkle v. State*, 2010 WL 1170626 (Ala. Crim. App. 2010) (stating that evidence must be "plain, clear, and conclusive") (citing *Averette v. State*, 469 So.2d 1371, 1374 (Ala. Cr. App. 1985)). However, in contrast to *Hinkle*, another Alabama case, *Akin v. State*, citing *Huddleston*, stated that "'evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.'" *Akin v. State*, 698 So.2d 228, 235 (Ala. Crim. App. 1996). *Akin* has not been explicitly overruled, so it is unclear to this Court what the precise standard is in Alabama.

commentator has noted that "the reaction to *Huddleston* has been . . . mixed."[157] Also, both the American Bar Association Criminal Justice Section and its House of Delegates have opposed the result in *Huddleston*.[158]

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[157] Edward J. Imwinkelried, *"Where There's Smoke, There's Fire": Should the Judge or the Jury Decide the Question of Whether the Accused Committed an Alleged Uncharged Crime Proffered Under Federal Rule of Evidence 404?*, 42 St. Louis U. L.J. 813, 817-818 (1998) [hereinafter Imwinkelried, *Where There's Smoke, There's Fire*] (stating that "the state court response to Huddleston has been sharply negative.").

> Like the courts, the commentators are divided. The commentators have urged various revisions of the law governing the standard of proof for the defendant's identity. Some commentators believe that the judge should apply the enhanced standards such as clear and convincing proof only when the defendant's act is a crime rather than a tort or moral wrong. Other commentators contend that the judge should vary the standard, depending upon the prejudicial character of the evidence. Thus, a judge might apply the clear and convincing standard to proof of an uncharged murder but the preponderance standard to proof of an uncharged speeding violation. Finally, some commentators believe that this species of evidence is so prejudicial that both the judge and jury ought to rule on the evidence and that both judge and jury should use an enhanced standard such as clear and convincing evidence. Rational arguments can be made for these commentators' proposals, but to date these proposals have garnered no judicial support.

Imwinkelried, *Uncharged Misconduct Evidence*, *supra* note 98; *see also* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 107 (2nd ed. 1994) ("Requiring clear and convincing evidence of prior acts helps insure that the risks are run only where it is clear that the acts really occurred and the evidence really ought to affect the case. For these reasons, some states have refused to follow *Huddleston*, although the decision finds some support in state courts, and there have been calls for revisions to the Rules to throw out *Huddleston*.") (citations omitted).

[158] Imwinkelried, *Where There's Smoke, There's Fire*, *supra* note 157.

> This topic is so important that although the Supreme Court's 1988 decision in *Huddleston* settles this issue in federal practice, the controversy over the issue has continued. In particular, the *Huddleston* decision has been criticized. Many commentators argue that uncharged misconduct evidence is so prejudicial that defendants need the protection of a higher standard for proving their identity as the perpetrator of the uncharged act. The American Bar Association's Criminal Justice Section has urged the use of the clear and convincing proof standard, and the A.B.A. House of Delegates endorsed the Section's position. When the Uniform Rules of Evidence were recently

V. CONCLUSION

In conclusion, this Court concludes that the evidence of the prior necklace robbery would have been admissible in the federal courts[159] and in

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> amended, Rule 404(c)(2)(A) was revised to prescribe "clear and convincing evidence" as the standard of proof.

Imwinkelried, *Uncharged Misconduct Evidence*, *supra* note 98.

This Court notes that criticism of *Huddleston* has led to at least two states amending their rules of evidence to expressly require a higher burden of proof before evidence of a prior bad act is admissible. *See* 50 M.S.A., Rules of Evid. Rule 404(b) (West 2010) ("In a criminal prosecution, such evidence shall not be admitted unless 1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; 2) the prosecutor clearly indicates what the evidence will be offered to prove; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant."); Neb. Rev. Stat. § 27-404(3) (West 2010) ("When such evidence is admissible pursuant to this section, in criminal cases evidence of other crimes, wrongs, or acts of the accused may be offered in evidence by the prosecution if the prosecution proves to the court by clear and convincing evidence that the accused committed the crime, wrong, or act. Such proof shall first be made outside the presence of any jury."). Indeed, one commentator has proposed that a section be added to Federal Rule of Evidence 404 to read as follows:

> **Methods of Proving Character**. When character evidence is admissible pursuant this Rule, proof may be made only through opinion testimony or by evidence of specific instances of conduct, if the court determines by clear and convincing evidence that the person committed the act in question. Character may not be proven with reputation evidence.

See Paul R. Price, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330 (1997).

[159] For a sampling of how federal courts have applied the *Huddleston* standard, see generally, *U.S. v. Bowe*, 221 F.3d 1183 (11th Cir. 2000) (holding that "other crimes, wrongs, or acts" are admissible if a jury could find by a preponderance of the evidence that those acts occurred); *U.S. v. Herndon*, 982 F.2d 1411 (10th Cir. 1992) (holding that "other crimes, wrongs, or acts" are admissible without a preliminary finding by the trial judge); *see also U.S. v. Hooshmand*, 931 F.2d 725 (11th Cir. 1991); *U.S. v. Boise*, 916 F.2d 497 (9th Cir. 1990); *U.S. v. Drew*, 894 F.2d 965 (8th Cir. 1990); *U.S. v. Ramirez*, 894 F.2d 565 (2nd Cir. 1990); *U.S. v. Elizondo*, 920 F.2d 1308 (7th Cir. 1990); *U.S. v.*

most other states pursuant to the "sufficient evidence" standard. Pursuant to the Third Circuit's application of *Huddleston*, (1) the prior necklace robbery was properly offered to show motive; (2) the act was conditionally relevant and proven by sufficient evidence; (3) the probative value of the evidence was not "substantially outweighed" by undue prejudice; and (4) a limiting instruction was given to the jury.[160]

This Court, having applied the "plain, clear, and conclusive" standard in Delaware for admissibility of the necklace robbery evidence, notes further that *Huddleston* held that relevant evidence should be construed broadly and can be appropriately limited by Rule 403.[161] This Court further observes

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DeGeratto, 876 F.2d 576 (7th Cir. 1989); *U.S. v. Cardall*, 885 F.2d 656 (10th Cir. 1989); *U.S. v. Flores Perez*, 849 F.2d 1 (1st Cir. 1988); *U.S. v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988); *U.S. v. Schleicher*, 862 F.2d 1320 (8th Cir. 1988).

[160] *U.S. v. Mastrangelo*, 172 F.3d 288, 295 (3d Cir. 1999).

[161] *Huddleston v. United States*, 485 U.S. 681, 691 (1988); *see* 29 Am.Jur.2d *Evidence* § 423 (2008) (noting that "[t]he language of the Rule tilts toward the admission of evidence in close cases. In determining whether probative value is substantially outweighed by the danger of unfair prejudice, the balance should generally be struck in favor of admission when the evidence indicates a close relationship between the other acts, crimes, or wrongs and the offense charged in the present case."); *see also* Lilly, *An Introduction to the Law of Evidence*, *supra* note 99 at § 5.13 (Professor Lilly appears to favor application of the nine *Deshields* factors (which were derived from the third edition of this treatise) to Rule 404(b) evidence as adequate protection against undue prejudice). A more recent treatise by Professor Lilly suggests six factors (rather than the nine factors recited in *DeShields*) "that counsel against the admission of uncharged misconduct evidence (although one or even several may not be decisive) . . .

> (1) An acquittal of a collateral crime;
>
> (2) The inflammatory nature of the bad act;
>
> (3) The similarity of the collateral bad act to the charged crime;

that any issues of "conditional relevance" are addressed by Rule 104(b), which does not appear to impose any heightened burden of proof in a criminal case as opposed to civil cases before evidence of prior unchanged crimes may be admitted as evidence.[162]

As the Delaware Supreme Court noted in *Getz*:

> Even under an inclusionary approach, evidence of prior criminal acts must meet the threshold test of relevancy, i.e., the uncharged misconduct must be logically related to the material facts of consequence in the case.[163]

For all the reasons set forth above, this Court has determined that the State produced evidence of the necklace robbery that was "plain, clear, and conclusive."

> (4) The availability of other evidence to prove the particular point toward which evidence of the collateral bad act would, of admitted, be directed;
>
> (5) The defensive claims of the accused; including whether or not the point to be proved by the collateral evidence is disputed;
>
> (6) The length of time between the act of uncharged misconduct and the act charged – generally speaking, the greater the time gap, the less probative is the act of uncharged misconduct in proving matters such as intent, plan, knowledge, etc.

Lilly et al., *Principles of Evidence*, *supra* note 100 at § 3.6.

[162] "[M]ost state supreme courts have not had an occasion to revisit the question of the standard of proof for establishing the defendant's identity as the perpetrator of an uncharged act. Consequently, the battle remains to be fought in many jurisdictions." Imwinkelried, *Uncharged Misconduct Evidence*, *supra* note 98.

[163] *Getz v. State*, 538 A.2d 726, 731 (Del. 1988).

Alternatively, and if the *Huddleston* approach were deemed to apply, the State produced "sufficient evidence" of the necklace robbery.

Accordingly, Defendant's motion for new trial is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch

oc: Prothonotary
cc: Investigative Services