IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	§	
	§	
v.	§	ID 0904025840
	§	SBI: 00
VICTOR RODRIGUEZ,	§	

Date Submitted: April 30, 2010
Date Decided: May 18, 2010

Upon the State's Motion in Limine. Denied.

MEMORANDUM OPINION

Melanie C. Withers, Esquire, and Mark Cutrona, Esquire, Deputy Attorneys General, Department of Justice, Georgetown, Delaware, Attorneys for the State.

John P. Daniello, Esquire, Georgetown, Delaware, Attorney for the Defendant.

STOKES, J.

Pending before me is the State's Motion in Limine seeking to introduce evidence of Defendant Victor Rodriguez's prior bad acts, related to various arsons, burnings and two unrelated convictions. Defendant opposes the motion. Consistent with the guidelines set forth in *Getz v. State*[1] and *DeShields v. State*,[2] the Motion in Limine is denied.

Defendant is charged with setting fires at five different locations in Milton, Delaware, on April 13, 2009, and April 24, 2009. He has been indicted as follows: five counts of Arson Second Degree; three counts of Criminal Trespass Third Degree; one count of Reckless Burning; and one count of Burglary Third Degree.

The State moves to introduce evidence of Defendant's prior convictions dating from 1994, 1995 and 2000, as follows: five counts of Reckless Burning; one count of Arson third Degree; two counts of Attempted Arson Second Degree; and one count of Attempted Arson in the First Degree. The State also moves to introduce evidence that Defendant has been the primary suspect in numerous additional uncharged fires that were set in Milton, Delaware, and Dover, Delaware. In addition, the State moves to admit evidence that Defendant made false reports to the emergency 911 system and was convicted of terroristic

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

[2]706 A.2d 502 (Del. 1998).

threatening in 2000.

The State argues that this evidence should be admitted because it shows a consistent pattern of setting fires, thereby helping to establish Defendant's identity, and also shows an escalation in the type of fire he set. Specifically, the State argues that Defendant began by setting contained fires in large plastic garbage cans or dumpsters, then started setting fires in vehicles and finally began to move either a dumpster or a vehicle next to a building to spread the fire and create more damage.

The Current Charges and Evidence Thereof

The following facts are those alleged by the State. Defendant is charged with setting three fires in the early morning hours of April 13, 2009. At approximately 4:00 a.m., a partially constructed house located on Reynolds Pond Road and owned by a Mr. and Mrs. Wall caught fire. Investigators from the Fire Marshall's Office examined the house and determined that the fire was deliberately set as the result of common combustibles such as cardboard being ignited with an incendiary device such as matches or a lighter. No evidence was found of an accelerant. At approximately 4:50 the same morning, firemen responded to a fire at a model home on Daniel Drive in the Milton Meadows development outside Milton. It was determined that the fire began in a five-gallon

plastic bucket that construction workers had used as trash can. The arsonist had placed the bucket against an exterior of the house and set it on fire. The can appeared to have contained combustible materials which were set aflame with an incendiary device. Two match books with missing matches were found near the back of the house. Bike tracks were discovered near the house, and it is undisputed that Defendant's main mode of transportation at all relevant times was a bicycle. A boot print was also found. Although the boot print was the same size and pattern as Defendant's work boots, the boot type was a common work boot pattern and was not tied to Defendant; nor was it shown that Defendant's employer, Allen's chicken processing plant, issued any type of boots to its employees. The bike tread was similar to the tread on Defendant's bike tires but did not show a distinctive pattern tying it to Defendant's bike.

At approximately 5:30 that morning, a fire was reported at the newly constructed but unoccupied Hampton Inn in Milford. The hotel sat on a secluded piece of land approximately half a mile off of Route 1. It was determined that the fire was started by igniting a cardboard box using an incendiary device. Again, there was no evidence of an accelerant having been used. The fire may have burned as long as three hours before smoke was seen because the fire was set in an exterior alcove against a glass door and also because of the fire retardant nature of

the building materials. No security device was in place at the time of the fire.

At this time, Defendant was living in his brother's home in Smyrna, Delaware. He worked at Allen's chicken processing plant in Harbeson, Delaware, which he reached by riding his bicycle. The distance between these two points is approximately 43 miles, which the State asserts Defendant could easily have traveled in two or three hours. The State also argues that Defendant could have readily reached the locations of all three fires on his way to work and that it was easier to set the fires in the dark of night than in the daytime. On the day of these three fires, that is, April 13, 2009, Defendant clocked into work at 4:59, and his bicycle was in the parking lot at Allen's.

On April 24, 2009, two more fires were set in unoccupied homes in Milton. At approximately 3:50, a fire was reported in a house located at 104 Heritage Boulevard in the Heritage Creek Development in Milton. The origin of the fire was an exterior door on an open deck. Common combustibles had been ignited using an incendiary device, and there was no evidence of an accelerant having been used. A piece of partially burned newspaper was found at the bottom of the pile of burned debris. The State asserts that this is an important fact because several bags of unsold newspapers were found during a subsequent search of Defendant's rented room in Milton. However, the State did not establish that any

of the papers found in Defendant's room were used in starting the fire.

Another fire in the same development was discovered during the investigation of the Heritage Boulevard fire. An unoccupied house at 113 Arch Street had been set on fire in the kitchen using cardboard boxes that had apparently been inflamed by the use of an incendiary device. On this day, April 24, 2009, Defendant clocked into work at Allen's at 4:15 a.m.

Defendant was eventually charged with setting the five fires that were set on April 13 and April 24, 2009. These are the pending charges. To assist in proving Defendant's guilt on these charges, the State seeks to admit evidence of other bad acts as far back as 1994 and recently as 2008.

The Parties' Contentions

The State has moved to admit evidence of other arsons which Defendant either was convicted of setting or of which he was charged with setting. The State argues that Defendant has been setting fires for 14 years and that his *modus operandi* has remained consistent, thus showing his identity on the current charges. The State asserts that with the passage of time, Defendant has taken greater risks by setting larger fires. The State contends that the earliest fires were set in large trash cans or dumpsters, and later fires were set in vehicles or next to buildings. The factors which remain constant are the use of common combustibles

set aflame by an incendiary device. The State argues that the evidence of fires from 1994, 1995, 2000, and one uncharged incident in 2008, viewed in conjunction with evidence of the charged 2009 offenses will help show a pattern of fire-setting and will therefore help prove his identity as the perpetrator of the charged offenses.

Defendant argues that the consistent factors, that is, the use of common combustibles ignited by an incendiary device, are so general as to have no evidentiary value and that they constitute the easiest, most universal means of setting a fire. Defendant also argues that the unfair prejudice arising from the evidence of prior fires will outweigh any probative value of the evidence.

Discussion

Evidence of other crimes or bad acts is generally inadmissible to prove the commission of the offense charged.[3] This rule prevents the State from proving a charged offense by presenting evidence of other crimes on the theory that the defendant acted in conformity with his prior bad acts.[4] That is, the State cannot

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[3] *Getz v. State*, 538 A.2d 726, 730 (Del. 1988).

[4] The State is also precluded from presenting profile evidence, that is, evidence which attempts to link the general characteristics of an arsonist to specific characteristics of the defendant. Such evidence is highly prejudicial and is not relevant to the question of whether Defendant committed the crimes charged. *State v. Floray*, 715 A.2d 855, 859-60 (Del. Super. Ct. 1997)(citing *Pennell v. State*, 602 A.2d 48 (Del. 1991).

use another offense to establish that the defendant had a propensity to commit the charged offense.[5] D.R.E. 404(b) sets forth the general rule and its exceptions:

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

Five guidelines to be considered by trial judges in assessing the admissibility of evidence under Rule 404(b) are set forth in *Getz v. State*: (1) the evidence must be material to an issue in the case; (2) the evidence 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 evidence of other acts must be proved by plain, clear and conclusive evidence; (4) the other acts cannot be too remote in time; it has been said that evidence is remote only when there is "no visible, plain, or necessary connection" between the evidence and the charges currently before the court.[6] and (5) the court needs to balance the probative value of such evidence against its potential for prejudice under D.R.E. 403. If the evidence is admitted, the judge must instruct the jury

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[5] *DeShields v. State*, 706 A.2d at 506.

[6] *State v. Ashley*, 1998 WL 731568 (Del. Super.)(citing *Lloyd v. State*, 1991 WL 247734 (Del.))

about the reason the evidence was admitted.[7]

In *DeShields v. State*,[8] the Delaware Supreme Court listed nine factors for a trial judge to consider in applying the balancing test of D.R.E. 403, the fifth *Getz* factor. The judge should consider (1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent's need for the evidence; (5) the availability of less prejudicial proof; (6) the extent of the prejudice associated with the evidence; (7) the similarity between the charged offense and the prior activity; (8) the effectiveness of limiting instructions; and (9) whether the prior act evidence would significantly prolong the trial.[9] In addition, if other crime evidence is admitted during the State's case-in-chief to prove the charged offense, it must have "independent logical relevance," and the jury should be carefully instructed regarding the limited purpose for which it can be considered.

Uncharged Conduct

The State seeks to introduce evidence of only one fire for which Defendant was not charged. On September 1, 2008, an empty house owned by Mr. and Mrs.

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[7] *Getz v. State*, at 734.

[8] *DeShields v. State,* at 506.

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

Wall on Reynolds Pond Road outside Milton, Delaware, was set on fire. The house was under construction, with a wood frame, walls, and wiring but no drywall. A woman leaving her job saw a plume of smoke and went to the house. She saw fire coming out of it and called the authorities, who arrived at approximately 7:30 a.m. Although the cause was determined to be arson, no evidence of the arsonist was found and no arrest was ever made. The electrical wiring was ruled out as a cause. There were no treads or boot or foot prints leading toward or away from the fire. Defendant was considered to be a suspect as were several other people. The State argues that evidence of this fire should be admitted because this house was set on fire again in April 2009 after it was rebuilt. The defense opposes its admittance as irrelevant to identity and unduly prejudicial because the jury could easily use it to infer that Defendant had a propensity for setting fires.

To meet the first prong of *Getz*, the evidence must be material to an issue or fact in dispute in the case. The State argues that this incident is material to prove identity because of Defendant's *modus operandi*, which is to use combustible materials found at the site and to ignite them without the use of an accelerant, and that he often did so at a construction site. While it is true that the issue of identity is a material issue in the case, it does not follow that evidence of any similar crime

is admissible to show identity. For identity to be established, the pattern and characteristics of the uncharged misconduct and the charged offense must be so unusual and distinctive as to be like a signature.[10] It also meets the second prong of *Getz*, which is that the evidence must meet a purpose sanctioned under Rule 404(b). However, the third *Getz* factor is that the acts must be proved by plain, clear and conclusive evidence. The Court has previously found that this standard of proof is tantamount to a clear and convincing standard.[11] Such evidence has been defined as that evidence which, when weighed against the evidence in opposition, will produce in the mind of the trier of fact, a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion.[12]

The evidence pertaining to the 2008 fire at the Wall house is scant, and there is nothing specific to tie Defendant to this fire. The fact that Defendant was considered a person of interest or even a suspect does not meet the clear and convincing standard. The fire occurred in 2008, which is not too remote in time. The final requirement is the balancing of the probative value of the evidence

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[10] *People v. Erving*, 63 Cal.App.4th 652, 660 (Cal. Ct. App. 1998)(citing 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803.).

[11] *State v. Williams*, 2001 WL 1403032 (Del. Super.).

[12] *Edward and Dixie H. v. DCPS*, 539 A.2d 1050 (Del. 1985).

against its prejudice under DRE 403. Here, too, this evidence fails to make the grade. *DeShields* calls for an assessment of the adequacy of the proof, which is weak, and also inquires into the proponent's need for the evidence. Because of the lack of clear and convincing evidence, the Court finds that evidence of the 2008 fire at the Wall house is not admissible at Defendant's trial. The State's motion to admit this evidence is **DENIED.**

Prior Bad Acts Not Related to Arson

In 1994, Defendant was arrested for calling 911 and making repeated false reports of heart attacks. Under *Getz*, this fact does not tend to prove a fact disputed in the instant case, and the Court's inquiry ends there. The State has not shown how the evidence of the false heart attack reports helps to establish Defendant's identity in the instant charges or any other purpose sanctioned by DRE 404(b). It is therefore not admissible in Defendant's trial for arson and related charges. In 2000, Defendant pled guilty to one count of Terroristic Threatening for making false bomb threats. Evidence of this conduct does not tend to prove a disputed fact in relation to the current charges and is not admissible under either *Getz* or DRE 404(b). The State's motion to admit evidence of these bad acts is **DENIED.**

Defendant's prior arson-related charges and convictions

On March 2, 1995, Defendant pled guilty to three charges of Reckless Burning for fires he set in Dover during May and June 1994. The fires were set at the Shore Stop convenience store, the Shop-N-Kart store and the Blue Coat Inn. The State entered a *nolle prosequi* on three charges of Reckless Burning arising from a second fire at the Blue Coat Inn, a fire at the Roma II restaurant, and a second fire at the Shop-N-Kart store. All six fires were within a two-mile radius of Defendant's residence at the Whatcoat Apartments in Dover. The fires were started in large trash cans that the arsonist moved close to a building. The arsonist used common combustibles, that is, paper, cardboard, sticks or other garbage found at the scene. The materials were ignited by an incendiary device such as matches or a lighter. All the fires were started between 10:30 p.m. and 2:30 a.m. The fires occurred between May 6, 1994, and September 17, 1994. Defendant admitted to the Dover Police that he set these fires. He stated that he used open flames to start the fires and that watching something go up in flames relieved his anger or tension.

In March through May 2000, another series of suspicious fires occurred in Dover. A task force consisting of members from the State Fire Marshall's Office, the Dover Fire Marshall's Office, and Bureau of Alcohol, Tobacco and Firearms

was assembled in order to catch the perpetrator(s) and put and end to the fires. The State has presented evidence that Defendant was implicated in numerous 2000 fires, as explained below.

At trial on December 22, 2000, a jury found Defendant guilty of the following three charges: one count of Attempted Arson Second Degree for a fire set in a trash can pushed up against the back of Mary Ann's Cutting Corner on May 20, 2000; one count of Arson Third Degree and one count of Arson Second Degree for a fire in the seat of a car next to Precision Tune auto repair shop on May 19, 2000, where drums marked "flammable" were moved near the vehicle. This fire was set at approximately 3:30 a.m. Members of the task force had seen Defendant riding a bike around the area of these fires on both nights. On May 20, at approximately 12:30, he was seen crouching near the trash containers at Mary Ann's Cutting Corner. He left the scene on his bike and was arrested minutes later. Defendant confessed to setting these fires using common combustibles and an incendiary device. He was sentenced to serve seven years at Level 5 to be followed by Level 4 work release and probation.

The State argues that evidence of all these fires is admissible primarily to prove Defendant's identity by showing evidence of his *modus operandi*.

In June 2001, Defendant pled guilty to one count of felony Terroristic Threatening stemming from the bomb threats he made in 2000. As explained above, the evidence of this guilty plea is not admissible at Defendant's impending arson trial. As part of the plea agreement, the State entered a *nolle prosequi* on each of seven charges related to fires set in the Dover area between March 25, 2000, and May 11, 2000. The State seeks to introduce evidence of the Defendant's involvement in the following fires: Arson Second Degree in relation to a fire started in a dump truck at Pizzeria Uno on May 11, 2000; Arson Second Degree for a trash can that was placed between two cars and set on fire at Avenue Imports on May 6, 2000; Arson Third Degree and Arson Second Degree for two vehicle fires set near Ray's Auto Repair, where a black male wearing camouflage pants was seen walking away from the scene, on May 6, 2000; Arson Second Degree for a fire set in the cab of a dump truck at the Silver Mill Apartments, which was under construction, and where bicycle tracks were found leading from the road to the truck; Arson Second Degree for a tractor-trailer-cab set on fire nearby at Dover Leasing on March 25, 2000, where a black male was observed towards the front of the vehicle minutes before the fire was noticed; and Arson Second Degree for a fire set in the cab of a dump truck at the Blue Coat Inn, which was under construction, on March 25, 2000. The Blue Coat Inn is located around

the corner from Dover Leasing, both of which experienced fires on March 25, 2000.

Thus, the State argues that there was an escalation in the types of fires set in March through May 2000, all of which involved vehicles. Defendant was charged with setting night-time fires in various types of vehicles, a marked change from the dumpsters he had previously used. He continued to use common combustibles such as paper, wood and other trash to start the flames. The State points out that Defendant set fires at the Blue Coat Inn twice in 1994 and returned there again in 2000. The State also notes that all the fires which Defendant set in Dover in 2000 were within a five-mile radius of each other, and Defendant resided within that same area. Since at least 1994, Defendant's primary mode of transportation was a bicycle.

In this case, the identity of the arsonist who set fires in Milton in 2009 is the ultimate fact in contention. When evidence of other crimes is used to prove identity, a much greater degree of similarity between the charged crime and the uncharged conduct or prior crimes is required than when such evidence is used to prove a state of mind.[13] In cases in which the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense by evidence he had

[13] *United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977).

committed uncharged offenses, admissibility 'depends upon proof that the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity.[14] Even when the defendant was convicted of the prior conduct, the State must still show a greater degree of similarity if the prior acts are being used to prove identity as opposed to motive or intent. That being said, the Court examines cases in which prior acts evidence has been admitted and others in which it has been excluded for purposes of proving identity.

In *People v. Clay*,[15] an appellate court reversed a trial court's finding that evidence of another crime was admissible under the modus operandi, or method of working, exception to the general principle disallowing evidence of other crimes. The evidence of the charged crime showed that three black men entered a currency exchange and killed a deliveryman in the course of robbing him. At trial, the prosecutor introduced evidence of a somewhat similar crime that had occurred in a currency exchange five months prior to the charged offense. The appellate court observed that the crimes had notable differences. In the prior crime, the three offenders entered the exchange after the deliveryman had completed the delivery, whereas in the charged offense, the deliveryman was shot as he entered the

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[14]*People v. Gray*, 118 P.3d 496, 520 (Cal. 2006), *cert. denied*, 127 S.Ct. 38 (2006).

[15]811 N.E.2d 276 (Ill. App. Ct. 2004).

exchange. In the prior crime, the offenders announced a stickup, while in the charged offense, the offenders said nothing. In the first robbery, the two lookouts stayed in the exchange, while in the second robbery, all but the shooter left the exchange before the robbery. There was no evidence that the same guns or cars were used in both robberies.

In remanding for a new trial without the evidence of the prior robbery, the appellate court stated that while there were similarities between the two crimes, they did not "earmark" the two robberies as the work of the same individuals.[16] The court took note of the fact that the use of guns and cars is common in crimes of this sort, and that lookouts an getaway cars are also common. In the case at bar, Defendant has made the same argument regarding the use of common combustibles and incendiary devices to start fires; that is, this is the easiest and most common way to start a fire. The Court finds that this argument has merit.

In analyzing the issue under the *modus operandi* exception, the Illinois court relied in part on the following observations, which are relevant to the State's argument regarding Rodriguez's pattern of setting fires:

> The *modus operandi* or 'method of working' exception refers to a pattern of criminal behavior so distinct that separate offenses are recognized as the work of the same person. Between the offense

[16] *Id.* at 284.

> offered to prove *modus operandi* and the offense charged, **there must be a clear connection which creates a logical inference that, if defendant committed the former offense, he also committed the latter. This inference arises when both crimes share peculiar and distinctive features not shared by most offenses of the same type and which, therefore, earmark the offenses as one person's handiwork**. The offenses need not be identical but must share features which, although common to similar crimes in general, are distinctive when considered together.[17] (Emphasis added.)

In the case at bar, the prior crimes which the State seeks to use as evidence of *modus operandi* do not share "peculiar and distinctive features not shared by most offenses of the same type." In fact, one of the State's witnesses stated that there was nothing distinctive about the fires that Defendant started.

Another notable case where a conviction was reversed because prior bad acts evidence was inappropriately admitted is *People v. Tate*.[18] The defendant was accused of shoplifting meat from a supermarket by putting it inside his coat. A police officer followed him out of the store and confronted him. The man threw the meat down and grabbed the officer's gun during a scuffle. Three months earlier, a man tried to shoplift meat from a supermarket also by placing it in his coat. When confronted by a security guard, he threw the meat down and grabbed

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[17] *Id*. at 282 (citing *People v. Berry*, 613 N.E.2d 1126 (Ill. App. Ct. 1991) (internal citations omitted).

[18] 429 N.E.2d 470 (Ill. 1981).

the guard's gun. The Illinois Supreme Court found as follows:

> [P]utting meat inside one's clothes is a standard shoplifting technique, as is grabbing for a gun during a struggle. . . . [T]here are no distinctive features to serve as a link between the two offenses, such as using similar weapons, dressing the same, acting with the same number of people, or even a distinctive method of committing this particular offense. **Although the similarities need not be unique only to the two offenses being compared, there must be present some distinctive features that are not common to most offenses of that type in order to demonstrate *modus operandi.***[19] (Emphasis added.)

In the case at bar, the State has not presented evidence of "distinctive features that are not common to most offenses of that type." This is Defendant's main argument, and the Court finds that in reviewing all the evidence, he is correct.

Cases where prior bad acts evidence was found to be admissible illustrate the types of evidence that can be used to prove identity by way of *modus operandi* evidence. In *Colley v. Sumner*,[20] the Ninth Circuit affirmed the admission of *modus operandi* evidence where in both incidents, the defendant took a woman out driving, assaulted the woman in the same general place within days of each other, started his assault by choking the victim and expressed distress and confusion during or after the act. The Court found the evidence of the prior act to

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[19] *Id.* at 470.

[20] 784 F.2d 984 (9th Cir. 1986).

be "especially probative of identity" because it showed a unique *modus operandi*.[21]

The Supreme Court of Kentucky in *Adcock v. Commonwealth* stated that "[i]n every case in which evidence of other crimes is sought to be introduced to establish a pattern or scheme, the real question is whether the method of the commission of the other crime or crimes is so similar and so unique as to indicate a reasonable probability that the crimes were committed by the same person."[22] In *Adcock*, the evidence showed that the defendant committed a similar crime within the previous six months in the same household and against the same victim, assaulting, beating and robbing her. The Ninth Circuit saw this evidence as constituting a signature and therefore found it to be admissible to show identity.[23]

In this case, the State argues that Defendant's conduct shows a pattern of fire setting, but has not shown that a unique manner or a signature means of doing so. In *People v. Erving*,[24] the trial court admitted evidence of 40 uncharged fires that occurred in neighborhoods where defendant had lived to prove identity and

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[21] *Id.* at 990.

[22] *Adcock v. Commonwealth*, 702 S.W.2d 440, 443 (Ky. 1986).

[23] *Id.*

[24] 63 Cal.App.4th 652 (Cal.Ct.App. 1998).

intent. *Erving* presents both similarities to and differences from the case at bar. A notable similarity is that Erving, like Rodriguez, started fires using an open flame device without accelerants, setting fire to materials that were present at the scene. An equally notable difference was that the fires were set either in her own home or within easy walking distance of it. The court stated that the common characteristics must be "so unusual and distinctive as to be like a signature,"[25] and found such a signature in the fact that each fire was set in close proximity of all the fires, some being set in her own home. In Rodriguez's case, the two factors that remained consistent throughout the relevant time period were the arsonist's use of common combustibles and incendiary devices such as matches or a lighter. The "stringent identity" standard requires "a mark whose distinctive nature tends to differentiate those offenses" from other arsons.[26] The Court finds no such distinctive mark in the facts of the case at bar.

In *State v. Bunda*, the Supreme Court of West Virginia affirmed the admission of a defendant's prior series of burglaries and arsons where the prior crimes as well as the currently charges series of arsons were committed in unoccupied summer homes in close proximity to one another. In addition, a car

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[25] *Id.* at 660.

[26] *Id.*

matching the description and registration number of Bunda's car was seen in the area and at the time of day of the first series of crimes. In light of these similarities, as well as the fact that the burglaries involved uncharged arsons, the court found that the evidence was relevant and that the potential prejudice did not outweigh the probative value.[27] In *State v. Sines*,[28] an Ohio appellate court affirmed the admissibility of evidence of the defendant's prior arson conviction because in that case as well as the current arson case, the fires were found to be intentionally set, the scene was a domestic one, and the smoke detectors had been disabled. The court found that the evidence was relevant and therefore admissible because of the common factors in both crimes.[29] In both these cases, the prosecution presented evidence of prior crimes that was admissible because of distinct similarities in each of the prior crimes as well as the current charges. In this case, the State has not presented evidence of distinctive similarities between Rodriguez's prior conduct and the current charges.

The Third Circuit has stated that "[w]hen evidence of prior bad acts is offered, the proponent must clearly articulate how that evidence fits into a chain of

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[27] *Id.* at 462-63.

[28] 2006 WL 1044445 (Ohio App. 5 Dist.).

[29] *Id.* at *4.

logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged."[30] As the Ninth Circuit has observed, the difference between the proper use of other acts evidence to prove identity and the improper use of such evidence to prove propensity is a subtle matter.[31] In *United States v. Luna*, the Ninth Circuit reversed the defendant's convictions for robbing two banks because evidence of similar bank robberies was improperly admitted to prove identity.[32] There were two charged robberies and two uncharged robberies. The government listed 13 similarities between the two sets of robberies, including the facts that at least one of the robbers always wore white surgical gloves, a white pillow case was used to take the money, one robber stayed in the lobby and was armed with a handgun, the second jumped the counter to take the money, the robbers wore long sleeve sweatshirts and sweatpants, one or more of them wore women's stockings on their face, they had Hispanic accents, they appeared to be between 20 and 30 years old, a car was usually found abandoned with engine running near the scene the robbers used extreme profanity to intimidate the people in the banks.

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[30] *United States v. Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994).

[31] *United States v. Luna*, 21 F.3d 874, 882 (9th Cir. 1994).

[32] *Id.*

Despite these and other similarities, the court found that within these alleged similarities many distinctions appeared. The court pointed out that there was contradictory testimony about what the robbers said, that in some of the robberies all the robbers went over the counter whereas in one robbery only one robber went over the counter, the gloves differed from one robbery to the next and the robbers used either nylon masks and/or ski masks and different types of bags were used to carry out the money.

In pinpointing these distinctions, the court concluded that the common features of the two sets of robberies were "largely generic"[33] and that the evidence of the uncharged acts was inadmissible.[34] The phrase "largely generic" also describes the conduct at issue in the case at bar. The fires were set in a common manner, using materials found at the scene and lit by a match or a lighter, usually at nighttime. These are no doubt generic factors found in many arson scenarios. Certain factors which the States asserts are distinctive are present at only certain locations, such as the bike tracks and the single boot print. The previous fires were all set within a five-mile radius of where Defendant lived in Dover. The State alleges that Defendant rode his bicycle approximately 43 miles to set the

[33] *Id.* at 881.

[34] The Court notes that the defendant subsequently pled guilty to charges brought against him regarding the other two robberies. *Id.* at 878.

currently charged fires, a distance which he no doubt traveled to get to work, but which differs from the five-mile radius of his prior convictions.

Like the *Luna* court, this Court finds that the similarities pointed out by the State do not suffice for admission as to the identity of the perpetrator of the instant crimes. The Court cannot conclude that the common characteristics of the numerous arsons in this case are "sufficiently distinctive to warrant an inference" that the person who committed the prior acts also committed the offenses at issue.[35]

It has been said that "if the characteristics of both the prior offense and the charged offense are not in any way distinctive, but are similar to numerous other crimes committed by persons other than the defendant, no inference of identity can arise."[36] In this case, the Court finds that the elements which were common to the current and prior arsons are not sufficiently distinctive to permit an inference of the same identity to be drawn.

Conclusion

The *Getz* standard for the admission of Rule 404(b) evidence is an inclusive one that allows the proponent to offer evidence of misconduct for any material

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[35] *Id*. at 881.

[36] *United States v. Luna*, 21 F.3d 874, 879 (9th Cir. 1994)(citing *United States v. Perkins*, 937 F.2d 1397, 1400 (9th Cir. 1991)).

purpose other than to show a mere propensity or disposition on the part of the defendant to commit the charged crime.[37] Such evidence is admissible when it has independent logical relevance to the crimes being tried. Evidence of similar criminal acts is admissible where the prior acts are so "unusual and distinctive that their relationship to the charged offenses may establish identity."[38] While identity is a purpose sanctioned by Rule 404(b), the State has not met the standard for showing that because Defendant committed arsons in 1994, 1995, 2000, and 2008, he must also be identified as the perpetrator of the 2009 arsons. This is a high standard, as shown by the cases discussed above, and it demands more than general acts accompanied by an assertion that the acts collectively show a pattern and therefore prove identity.[39]

Specifically, Defendant Rodriguez is known to have set numerous fires using common combustibles found at the scene and igniting them with a match or

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[37] *Torres v. State*, 979 A.2d 1087, 1099 (Del. 2009)(citing *Getz v. State*, 538 A.2d at 730).

[38] *Getz v. State*, 538 A.2d at 733.

[39] Admission of Defendant's prior arson-related activity in 1994, 1995, 2000, and 2008 would mean turning a blind eye to Rule 404(b). Such admission would create a likelihood that a jury would consider the evidence of Rodriguez's prior crimes as tending to show that he committed the 2009 crimes with which he is currently charged. And it would mean that any defendant with an extensive criminal record would be subject to similar suppositions from a jury, if the State successfully argued for admission of the prior bad acts evidence based on an escalating pattern of criminal activity. This runs counter the letter and the spirit of Delaware law as found in Rule 404(b), as well as *Getz v. State* and its progeny.

lighter. These are the only factors that occur in all the prior acts and current charges, and they do not constitute what may be called an earmark or signature that has independent logical relevance to the charged offenses. Having found that the State has not shown that the prior crimes are admissible for proving identity, the Court need not address the remaining *Getz* factors. The State has not met its burden of showing that admission of Defendant's prior arson-related conduct gives rise to an inference that he committed the charged offenses. The proffered evidence does not constitute a signature manner of fire-setting and instead would have an "undue tendency to suggest decision on an improper basis, [such as] an emotional one."[40] The analysis ends here, and the State's motion in limine is **DENIED.**

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary

[40] *Moorhead v. State*, 638 A.2d 52, 55 (Del. 1994).