

Evidence of other crimes, wrongs or acts is not admissible to prove the defendant's character in order to demonstrate that the defendant committed another crime.¹ Rule 404(b), however, permits jury consideration of “[e]vidence of other crimes, wrongs or acts...for purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.”

In *Getz v. State*,² the Delaware Supreme Court established the test for admissibility under Rule 404(b). The trial court must consider the following:

1. The evidence of other crimes must be material to an issue or ultimate fact in dispute 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 other crimes must be proved by “plain, clear and conclusive”³ evidence;
4. The other crimes must not be too remote in time;
5. The court must balance the probative value of the evidence against its unfairly prejudicial effect, as required by D.R.E. 403; and

¹Del. R. Evid. 404(b).

²538 A.2d 726 (Del. 1988).

³*Renzi v. State*, 320 A.2d 711, 712 (Del. 1974).

6. The jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.⁴

The State contends that the evidence will show that on September 26, 2003, three probation officers observed the Defendant driving a white Acura with tinted windows and rims and Pennsylvania tags. The officers ascertained that the Defendant already was in violation of his probation and did not have a valid driver's license. Additionally, the officers previously had received information that the Defendant may have committed an armed car jacking in Philadelphia, involving a white Acura with tinted windows and rims and Pennsylvania tags.⁵

The probation officers began to follow the Acura, while calling for assistance from the Wilmington Police. Apparently recognizing the uniformed officers, the Defendant began to speed away. After beginning to pursue the Acura, the officers determined that continued pursuit would be unsafe.

Later that day, two Wilmington Police officers observed an Acura meeting the same description and followed the vehicle. The vehicle began to weave in and out of traffic as if to elude the officers. After the officers activated lights and sirens in an attempt to pull over the Acura, the vehicle fled at a high rate of speed.

⁴*Getz*, 538 A.2d at 734.

⁵Preliminary Hearing, transcript at 11 - 12 (Ct. Common Pleas, Oct. 3, 2003)

The Acura crossed an intersection against a red light and hit another car broadside. The driver of the other car was killed.⁶

The Defendant was charged with Murder First Degree, Murder Second Degree, and Receiving Stolen Property. The indictment alleges that the Defendant: recklessly caused the death of the other driver in order to evade or prevent the lawful arrest of himself; recklessly and under circumstances manifesting a cruel, wicked and depraved indifference to human life caused the death of the other driver by traveling at a high rate of speed and running a red light; and intentionally received the Acura under circumstances amounting to theft.

Among other defenses, Defendant's counsel have indicated that they intend to challenge the State's evidence identifying the Defendant as the driver of the Acura at the time of the other's driver's death.

The parties' contentions must be evaluated in light of *Getz*. It is not disputed that the Defendant was on probation on September 26, 2003. Therefore, remoteness in time is not an issue.

The evidence that the Defendant was on probation at the time of the indicted offenses is material to whether or not the probation officers were able to correctly

⁶*Id.* at 12 - 14.

identify the Defendant. Even though the Defendant does not dispute that he was driving the Acura at the time the probation officers saw him, the State is entitled to present identification evidence. Additionally, the Acura driver's conduct in seeking to evade law enforcement officers is material to the driver's state of mind. The earlier identification, as well as the Defendant's state of mind in fleeing from the probation officers, are material to the issue of whether the earlier evasive conduct is consistent with the driver's conduct at the time of the fatal collision.

Evidence of flight supports the inference that a defendant fled because of a "consciousness of guilt and a desire to avoid an accusation."⁷ It is well-settled that evidence of flight from police is admissible.⁸ Any defendant conduct subsequent to commission of a crime that tends to show consciousness of guilt is relevant under Delaware Rule of Evidence 401.⁹

The probative value of the evidence of Defendant's probationary status outweighs any unfair prejudicial effect. The evidence is necessary to describe the sequence of events, beginning with how the officers were able to identify the Defendant. Further, the evidence is material to the issue of why the probation

⁷*Thomas v. State*, 467 A.2d 954, 958 (Del. 1983).

⁸*Ashley v. State*, 633 A.2d 368, *2 (Del. 1993).

⁹*Hunter v. State*, 788 A.2d 131, *1 (Del. 2001); *McKinney v. State*, 466 A.2d 356, 359 (Del. 1983).

officers attempted to pursue the Defendant after identifying him. This identification and subsequent pursuit is integral to the issue of why the Wilmington Police followed the Acura at a high speed and attempted to stop the car.

As required by *Getz*, the Court will instruct the jury pursuant to Delaware Rule of Evidence 105 as to the limited purpose of admission of the evidence of the Defendant's probationary status.

THEREFORE, the evidence that the Defendant was on probation at the time of the alleged offenses on September 26, 2003 is admissible under Delaware Rules of Evidence 401, 403 and 404(b), and satisfies the *Getz* analysis. Defendant's Motion to Preclude Evidence at Trial is hereby **DENIED**.

IT IS SO ORDERED.

The Honorable Mary M. Johnston