IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY N. GRAHAM, Defendant Below- Appellant, v. STATE OF DELAWARE Plaintiff Below, Appellee.	§ § § § § § § § § § § § §	 No. 43, 2007 Court Below: Superior Court of the State of Delaware in and for New Castle County ID # 0605008032 ID # 0603021096

Submitted: July 23, 2007
Decided: August 21, 2007

Before **STEELE**, Chief Justice, **BERGER**, and **RIDGELY**, Justices.

O R D E R

This 21st day of August 2007, upon consideration of the briefs of the parties, it appears to the Court that:

(1) Appellant Corey N. Graham appeals his Superior Court convictions of Burglary Second Degree, Felony Theft, and Misdemeanor Theft. Graham makes three arguments on appeal, all of which relate to the admissibility of evidence. First, he contends that the Superior Court erred when it admitted irrelevant and unfairly prejudicial evidence of cocaine use on the night of the alleged burglary. Second, Graham contends that the Superior Court's evidentiary ruling was not supported by the facts. Finally, he argues that the Superior Court recognized that

the evidence was unfairly prejudicial when it suggested that a limiting instruction would draw further attention to the prejudicial evidence. We find no merit to this appeal. Accordingly, we affirm.

(2) At approximately 2:00 a.m. on March 13, 2006, Detective Christopher Popp of the Delaware State Police Governor's Task Force saw a suspicious vehicle parked in the rear lot of the Rodeway Inn. Detective Popp testified that he "observed a [Chevrolet] Blazer parked back there and clearly occupied, a male seated in the driver's seat and female in the rear passenger's seat." As Detective Popp approached the vehicle, the male, later identified as Graham, fled across the parking lot and over a barbwire fence.

(3) The police traced the vehicle's registration to Georgia Wood who resided in a nearby neighborhood. Police knocked on the front door but received no response. They then proceeded to look around the house and found an open side window. The police announced their presence, entered the home through the window, and met Wood when she came out of her bedroom.

(4) Wood informed police that her Blazer was in her driveway when she went to bed around midnight and that she did not give anyone permission to use her car. She also discovered at that time that her purse containing "about $120 worth of cash . . . [and] gift cards and gift certificates" was missing.

(5) On March 25, 2006, New Castle County Police Detective Seth Polk investigated Graham about his whereabouts on the evening of March 13. Graham admitted that the Blazer was stolen, but told Detective Polk that "his people" gave it to him that evening. Graham was indicted on April 17, 2006 for Burglary Second Degree, Felony Theft and Misdemeanor Theft.

(6) Before trial, the State informed the trial judge and defense counsel that it intended to call Violet Burkel to testify at trial. The prosecutor explained that Burkel would testify that "[Graham] picked them up, he wanted to have them buy crack, and they had smoked some crack, and there was another female who left to get more crack when the police officers came up." The trial judge ruled the evidence admissible over defense counsel's objection.[1] Because she did not have the *Getz* case available at that time, she told the parties that she would later elaborate on her ruling for completeness of the record. Later in the trial, after Burkel testified, the trial judge explained the basis for her prior ruling pursuant to *Getz*.[2] Graham's girlfriend, Stacey Reed, testified at trial that Graham was with

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[1] The trial judge concluded, "I will allow that evidence in. I don't think that – and I'm going to resume on the 404(b) factors and *Getz* factors on the record when we get to court."

[2] During trial, the trial judge noted,

> With respect to, I just wanted to make sure I don't forget to clean up, make the record complete. In the event – I still don't recall, but I'll take Mr. Downs' word for the fact that there was some evidence that Mr. Graham was smoking crack cocaine, or had smoked it, or someone said that he had smoked it, I guess you could consider that a prior bad act. It's not necessarily evidence of a crime, but

her on March 13, 2006 until about 1:40 a.m. At that time, Graham left the house with a friend. A Superior Court jury found Graham guilty of all charges and Graham was sentenced to one year imprisonment followed by probation.

(7) Graham first argues that the Superior Court erred because it admitted the evidence before it conducted a complete *Getz* analysis.[3] This Court reviews evidentiary rulings for an abuse of discretion.[4]

> it's bad acts. So under those circumstances, I need to just go through the Getz factors.
> I think it goes to motive and why he was where he was and what he was doing there. So I don't have a problem with the fact that it's introduced for a purposed sanction, like 404(b). I think it's material to an issue in dispute in the case, and that is what was going on that night and why he was there and what he was doing there.
> The evidence was plain, clear and conclusive because it came from an eyewitness who was with the defendant at the time. It's obviously not remote in time because it happened on the same night as this presumably occurred. And I think the probative value of the evidence is such that it is not unfairly prejudicial under Rule 403 of the rules of evidence.

[3] In *Getz v. State*, this Court set forth six factors for the trial judge to consider when deciding whether a defendant's prior bad acts should be admitted pursuant to D.R.E. 404(b). Those factors include:

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue; (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition; (3) The other crimes must be proved by the evidence which is "plain, clear, and conclusive"; (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.

538 A.2d 726 (Del. 1988).

[4] *Baumann v. State*, 891 A.2d 146, 149 (Del. 2005).

(8) It is a trial judge's function "to ensure that the rules of practice and evidence are applied to insure a fair trial."[5] The analysis required under *Getz* should precede the admission of any other crimes evidence. "If there is a timely objection, the objection should be on the record followed by a prompt, clear ruling on the objection."[6] If counsel making the objection does not produce the caselaw necessary to decide the issue, the trial judge has the authority to control the presentation of evidence[7] or recess the proceeding if necessary to conduct the required legal analysis. The trial judge's failure to do so here was rendered harmless error by her later application of the *Getz* factors, after the evidence was admitted. The trial judge found that each factor was satisfied and we find no abuse of discretion in her ruling.[8]

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[5] *State Highway Dept. v. Buzzuto,* 264 A.2d 347, 351 (Del. 1970).
[6] *Alexander v. Cahill*, 829 A.2d 117, 129 (Del. 2003).
[7] *See* D.R.E. 611.
[8] The trial judge gave the following ruling:

> I think that it goes to motive and why he was where he was and what he was doing there. So I don't have a problem with the fact that it's introduced for a purposed sanction, like 404(b). I think it's material to an issue in dispute in the case, and that is what was going on that night and why he was there and what he was doing there.
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> The evidence was plain, clear and conclusive because it came from an eyewitness who was with the defendant at the time. It's obviously not remote in time because it happened on the same night as this presumably occurred. And I think the probative value of the evidence is such that it is not unfairly prejudicial under Rule 403 of the rules of evidence
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> And if you would like, I will give you a limiting instruction.

(9) Graham next contends that the trial judge relied on incorrect facts when she made her ruling under D.R.E 404(b). Specifically, he argues that the ruling was flawed because the trial judge incorrectly noted that the evidence did not show that Graham was smoking crack cocaine and that the testimony concerned a bad act, not a crime.[9] This error was also harmless because the trial judge conducted the *Getz* analysis on the premise that the evidence showed that Graham was smoking crack cocaine.[10] We find no reversible error.

(10) Finally, Graham contends that the Superior Court's suggestion that a limiting instruction would draw further attention to the evidence that Graham was smoking crack cocaine indicates that the evidence was, in fact, unfairly prejudicial.[11] This argument lacks merit. The trial judge simply commented that she believed that a limiting instruction would draw attention to what she

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[9] *See* fn.2, *supra*. 16 *Del. C.* § 4753 classifies the possession, use or consumption of a narcotic drug without a valid prescription as a class A misdemeanor.

[10] The trial judge noted, "I still don't recall, but I'll take [the State's] word for the fact that there was some evidence that Mr. Graham was smoking crack cocaine, or had smoked it, or someone said that he had smoked it . . . ."

[11] The trial judge ruled:

> I think, from a defense perspective, I would prefer that it not be pointed out and not be highlighted, because I thought it was an extremely insignificant part of the evidence to such an extent that I don't even remember hearing her say that he was smoking crack cocaine. Once I do that, then you're right into me reminding the jury that this is a – even though I say he's not a bad person, I'm basically saying he is, which I think we all find that to be somewhat illogical sometimes when we have to give that instruction.
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> But this isn't like a long history of drug dealing, or anything of that nature, which would really necessitate that instruction. This is just simply what he was doing that night, which nobody was up to any good.

characterized as an "insignificant part of the evidence." It was defense counsel who ultimately requested that a limiting instruction not be given for his own tactical reasons.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/Henry duPont Ridgely
Justice