

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: May 21, 2020]

STATE OF RHODE ISLAND

:

vs.

:

No. P1-2017-0542 A&B

:

JAYQUAN GARLINGTON and

:

BRUCE MOTEN

:

DECISION ON MOTION IN LIMINE

VOGEL, J. Co-defendants Jayquan Garlington (Garlington) and Bruce Moten (Moten) were indicted for the 2007 murder of Darren Reagans and for conspiring with each other and with the late Kasean Benton (Benton) to commit that murder. Garlington, under his rap name “Yung Jake,” has performed several rap songs and music videos and has uploaded the same on the Internet. The issue before the Court relates to one of his rap songs, “Ain’t Da Same.” The State discloses that it seeks to offer lyrics from that song as evidence at trial. The State also plans to present testimony from two witnesses who would be expected to interpret the song lyrics for the jury, a Providence Police Department detective assigned to the Gang and Violent Crime Task Force and a lay witness who has had gang affiliations, Jon Thomas. The police detective, Matthew McGloin, would testify both based on his personal knowledge and also as an expert in gang violence. In particular, the State contends that one line in the song, “*In 07 I was smokin on D*” is an admission by the singer (Garlington) that in 2007, he killed Darren Reagans. Defendants move *in limine* to preclude the

State from presenting this evidence at trial.¹ For the reasons set forth herein, the Court denies the motions *in limine* subject to certain conditions set forth herein.

Background

In the opening lyrics ² of the rap song, *Ain't Da Same*, Yung Jake is heard rapping:

“Ni**as know what the fuck it is
It’s Yung
Y life ni**a
Bitch
A lot of ni**as talking about your boy, Yung, fuck them ni**as
Some lie, some ni**as just mad, oh you mad ni**a, you really about to be mad now
ni**a, lets get it
What you ni**as know about me
About me, about me
I said what you ni**as know about me
About me, about me
I said what you ni**as know about me
About me, about me
I ... I’m a real ni**a
I ... I ... I ... I drill ni**as
In 07 I was smokin on D³
Them ni**as bounced back and they smoked Kasean
R.I.P.
They thought it was a game while we was on the scheme
We lurking
2012 Devon on lean

¹ The Court bifurcates and reserves decision on the issue of whether to sever the trials of the two defendants and will decide that motion in a subsequent ruling after providing the parties an opportunity to brief the issue further.

² The rap song has a total of 76 lines. The State seeks to offer lines 2 and 14-20. The Court includes the first 20 lines in this decision to illustrate that the proffered lyrics are contiguous and not the result of “cherry picking” scattered references to gang violence and taken out of context. *See United States v. Bey*, CRIMINAL ACTION NO. CR 16-290, 2017 WL 1547006, at *5 (E.D. Pa. Apr. 28, 2017).

³ The Court recognizes that defendant contends that the recording of the rap song differs from the transcript prepared by the State in that the words “smokin on D” should have been transcribed as “coughin in D.” Having listened to the recording, this trial justice finds that a reasonable juror could agree with the State’s version of the song. Additionally, when initially transcribed, the word “drill” was written as “drown.” For purposes of this decision, the Court will consider the song to say “smokin” and “drill.” However, if the evidence is presented to the jury, they will be instructed to make their own determination of the words based on the recording itself and the trial justice will take the necessary steps to avoid suggesting to the jury what Garlington actually said with respect to any disputed word.

Now Dougie got smoked by the cops. . . .” See Tr. (prepared by State) of “Ain’t Da Same” by Yung Jake and Blue, at lines 1-20.

The State’s theory of the case includes an allegation that the defendants and their deceased co-conspirator, Benton were members of a gang, YNIC, and that Darren Reagans was a member of a rival gang, Comstock. Benton himself was shot and killed on July 12, 2009 by a member of Comstock, Donald Young. See *State v. Young*, 78 A.3d 787, 790 (R.I. 2013). The facts set forth in the Supreme Court opinion in the *Young* case give some context to the issues before the Court in this matter. As set forth in that opinion, YNIC, is an acronym for “Young Ni* *ers in Charge.” Comstock members come from Comstock Avenue in Providence. *Id.* at 790. Apparently, as of the date of Benton’s murder, there was an ongoing violent feud between the two gangs. *Id.*

The above quoted lyrics mention “Kasean,” “Devon” and “Dougie.” It appears that “Kasean” refers to Kasean Benton, “Devon” to Devon Young and “Dougie” to Douglas Cooper. Consistent with the song lyrics, all three met violent deaths. In addition to the aforementioned killing of Benton, Donald Young’s brother and fellow Comstock member, Devon, was shot and killed in 2012. Grand Jury Tr. 8-15, March 1, 2017. In 2014, police officers shot Cooper after the officers intervened in a shootout involving the rival gang members. *Id.* at 16-17.

The State contends that the subject lyrics are tantamount to a statement by defendant that he killed Darren Reagans. Other than singing the words “In 07 I was smokin on D,” Garlington provides no other reference to the killing of “D.” He gives no details as to how he committed the crime, where he committed it and whether or not he acted alone.

The State seeks to present two witnesses to offer lay opinions (or in the case of Detective Matthew McGloin, a combination of lay and expert opinions) as to the meaning of the song lyrics and in particular, the meaning of the words “smokin on D.” Both proposed witnesses appeared before the Grand Jury.

Matthew McGloin, a detective with the Providence Police Department, testified as to his extensive background in the field of gang activity in general and violent gang activity in the City of Providence in particular. He described his experience, training and familiarity with local gangs. Detective McGloin identified two rival gangs, YNIC and Comstock, and explained that part of his responsibilities included interacting with gang members and monitoring social media and YouTube postings created by members of those gangs and of other local gangs who have allegiances to either YNIC or Comstock. *Id.* at 2, 3, 5. He recounted a violent chronology of events leading to the deaths of the aforementioned individuals. He identified the defendant's voice in *Ain't Da Same* and testified that his performing pseudonym was "Yung Jake." *Id.* at 14, 15. He also provided the full names of those persons who Garlington had described in the lyrics of the song by their gang monikers, including "D," who he identified as Darren Reagans. *Id.* at 15-17.

The detective then interpreted the lyrics, and in particular, the line "in 07, I was smokin on D" to mean that defendant was saying that he had killed Darren Reagans in 2007. *Id.* at 16. He also described the statement as a "huge sign of disrespect" and provided an "alternate meaning." He testified that:

"when a rival gang member is killed, members from the opp--, the opposing faction will take to social media, Facebook, songs, what-have-you, and name their blunts⁴, their marijuana, cigarettes, after the rival who had died. So it's a huge sign of disrespect, like, "I'm smoking on Dee." Like he said." *Id.* at 16.

Counsel for the State then led him back to the interpretation he was seeking and said:

"Mr. Healy: "Smoking means to kill, though, right?"

"Witness: Yes.

⁴ "A blunt is a hollowed out cigar filled with marijuana." See *State v. Quinlan*, 921 A.2d 96, 103 n.4 (R.I. 2007).

“Mr. Healy: Okay.

“Mr. Baum: Is he saying, in ‘07 I killed Dee?

“Witness: Yes.” *Id.* at 16:10-14.

The witness never again deviated from his interpretation of the words as meaning that defendant killed Reagans. He responded to a question from a grand juror:

“Juror: As an expert, is this credible evidence to you that points to Jayquan being the murderer?

“Witness: I mean as far as the song?

“Juror: All I have is the song.

“Witness: It’s, it’s a very good piece of evidence.

“Mr. Baum: And again, what, this is a witness weighing on the piece of evidence. I would just caution the Grand Jury, if I may, asking it this way, is this a significant piece of evidence to you as an investigator . . .

“Witness: Yes.

“Mr. Baum: . . . as to whether or not he is responsible?

“Witness: Yes. In the totality of everything, yes, this piece of evidence, to me, as a gang investigator, is significant to this case, yes.” *Id.* at 21, 22.

Presumably, the State would argue that the detective’s alternative interpretation did not destroy the admissibility of his opinion that defendant used “smokin” to mean he had killed “D.” The witness testified that he based that opinion on the “the totality of everything” which may have included the use by defendant of the word “smoked” when referencing the killings of Kasean Benton and Douglas Cooper. The Court finds that with a sufficient foundation, the so-called “alternate meaning” given by Detective McGloin to the line in question may go to the weight of

his testimony, not to its admissibility. However, the Court will not permit either witness to offer testimony that constitutes vouching or otherwise invades the province of the jury.

The State's other witness before the Grand Jury, Jon Thomas, testified pursuant to a cooperation agreement with the Attorney General. Grand Jury Tr. 69, Feb. 27, 2017.

He testified that he had been affiliated with YNIC and was familiar with gang members and the rivalry between YNIC and Comstock. He testified that the pertinent phrase translated to "In '07, I killed Dee." *Id.* at 72. He also stated that the word "drill" in the line "I drill ni**as" means "shoot." *Id.* at 71.

Rules of Evidence

The Rhode Island Rules of Evidence provide in pertinent part that:

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." R.I. R. Evid. 401.

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the constitution of Rhode Island, by act of congress, by the general laws of Rhode Island, by these rules, or by other rules applicable in the courts of this state. Evidence which is not relevant is not admissible." R.I. R. Evid. 402.

The lyrics constitute an oral out-of-court statement of a party opponent. Although the State seeks to offer the lyrics for the truth of the matter asserted, the lyrics are not hearsay under Rule 801(d)(2) which provides in pertinent part:

"(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

"(2) Statement by Party-Opponent. The statement is offered against a party and is (A) the party's own statement, ..." R.I. R. Evid. 801.

It is clear that the Rules of Evidence do not specifically preclude the admissibility of the rap lyrics in this case. An admission of guilt by a party accused of a crime certainly has the

tendency to make the existence of the ultimate fact in the case more probable than it would be without the evidence.

Additionally, the proffered evidence may be admissible under Rule 404(b) as evidence of motive or intent.

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .” R.I. R. Evid. 404(b).

Although “[c]onviction of crime never requires proof of motive . . . motive is an item of circumstantial evidence that the jury may weigh in light of other facts and circumstances in evidence.” *State v. Caruolo*, 524 A.2d 575, 584 (R.I. 1987); *State v. Clay*, 79 A.3d 832, 840 (R.I. 2013).

Even if the proffered evidence is relevant and would be admissible under Rule 801(d) or Rule 404(b), the Court still might exclude evidence not otherwise precluded by other rules of evidence or constitutional or statutory authority. Rule 403 provides that:

“[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

Under Rule 403, the trial judge serves as a gatekeeper when asked to exclude relevant evidence as being unduly prejudicial. The Court may exclude challenged evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. R.I. R. Evid. 403.

In this case, the State argues that the probative value of the lyrics is high. Certainly, if the evidence is admitted along with testimony describing its meaning, the jury may consider the rap

song to include an admission of guilt on the part of Garlington as well as providing proof of motive for killing Reagans. Generally, an admission of guilt would be so highly probative that it would be unlikely that the scales would tip substantially in favor of exclusion. However, if the pertinent lyrics are equally or more likely susceptible to a different interpretation, then the Court might find that the risk of unfair prejudice or confusion substantially outweighs their probative value. In order to decide the subject motions, the Court must perform a fact-driven balancing test, weighing the proffered evidence in favor of the probative value of the evidence against the risks of unfair prejudice and confusion that would be created by its admission under Rule 403.

First Amendment

Even if the rap lyrics are relevant and admissible under the rules of evidence, the Court must disallow the evidence if its admission violates either the Constitution of the United States or the State of Rhode Island. Under the Constitution of the United States,

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

“Freedom of speech is a fundamental personal right and liberty which is protected from impairment by the States under the fourteenth amendment due process clause.” *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925); U.S. CONST. amend. XIV.

“Under the Constitution of the State of Rhode Island, ‘[n]o law abridging the freedom of speech shall be enacted.’” R.I. CONST. art. I, § 21.

It is clear that the constitutional protections set forth in both the United States and State constitutions extend to rap music which has been defined as a “style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment.” *Campbell v. Acuff–Rose Music, Inc.*, 510 U.S. 569, 572 n.1 (1994) (quoting The Norton/Grove Concise Encyclopedia of Music 613 (1988)). “Rap is no longer an underground phenomenon and is a mainstream music genre.” *United States v. Stuckey*, 253 F. App’x 468, 484 (6th Cir. 2007). Rap lyrics can be both violent and inflammatory. *People v. Wallace*, 873 N.Y.S.2d 403, 404 (N.Y. App. Div. 2009). “Gangsta rap” is a variation of the genre which addresses gang culture, conflict, and poverty. See *Holmes v. State*, 306 P.3d 415, 423 (2013); *Bell v. Itawamba County School Board*, 774 F.3d 280, 301-02 (5th Cir. 2014), *reh’g en banc*, 799 F.3d 379 (5th Cir. 2015).

However, it is well established that the First Amendment does not prohibit the evidentiary use of protected speech, subject to the applicable rules of evidence. Rap lyrics, like other protected speech, may be used by the prosecution to establish the elements of a crime or to prove motive or intent. Evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

However, the First Amendment does “bar the admission of evidence relating to a “defendant’s abstract beliefs . . . when those beliefs have no bearing on the issue being tried.” *Dawson v. Delaware*, 503 U.S. 159, 168 (1992). Likewise, the Constitution prohibits evidence offered to punish a defendant for the offensiveness or content of his or her speech. Rap lyrics will only be admitted if probative of independent criminal conduct. See *United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015); *United States v. Mills*, 367 F. Supp. 3d 664, 671 (E.D. Mich. 2019).

Analysis

The admissibility of defendant-authored rap lyrics has been addressed by state and federal courts across the country, but this is an issue of first impression in Rhode Island. Courts in other jurisdictions have focused on the nexus between the lyrics and the crime charged. If the nexus is high, the courts have admitted the evidence. *United States v. Foster*, 939 F.2d 445, 455-56 (7th Cir. 1991); *State v. Koskovich*, 776 A.2d 144, 166 (N.J. 2001); *Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004); *United States v. Graham*, 293 F. Supp. 3d 732, 737 (E.D. Mich. 2017); *United States v. Carpenter*, 372 F. Supp. 3d 74, 77 (E.D.N.Y. 2019); *Stuckey*, 253 F. App'x at 483.

Absent a connection between the commission of the offense and the rap lyrics, courts have excluded the proffered evidence as unduly prejudicial. *Commonwealth v. Gray*, 978 N.E.2d 543, 561-62 (2012) *Bey, supra*; *State v. Skinner*, 95 A.3d 236, 241-42 (N.J. 2014).

The determination of a nexus may be more complicated where the prosecution seeks to offer the evidence purely under Rule 404(b)⁵, rather than as an admission of the offense charged. In *Skinner*, the prosecution offered violent, profane rap lyrics written by defendant prior to the charged offense of attempted murder. Those violent-laden verses had no factual connection tying the defendant to the underlying incident. The prosecution claimed that they demonstrated his “motive and intent” in connection with the offense because the lyrics expressed a street culture of violence and retribution consistent with the prosecution’s theory of defendant’s role in the crime.

⁵ Federal Rules of Evidence, like the Rhode Island Rules of Evidence, bar evidence of any other wrongs or acts to prove a person’s character in order to show that he or she acted in conformity with such character on the date in question. However, evidence of wrongs or acts for other limited purposes, including proof of motive, plan, knowledge, absence of mistake or accident may be admissible.

The New Jersey Supreme Court held that such evidence was highly prejudicial and had little or no probative value as to a motive or intent for committing the charged offense. *Skinner*, 95 A.2d at 238-39.

In *Bey, supra*, the defendant was accused of being a felon in possession of a firearm. Neither his intent, motive nor state of mind were in issue in the case. The Court excluded evidence of an undated violent rap music video referencing the use of a firearm as lacking a non-propensity purpose.

However, evidence of defendant-authored rap lyrics may be admitted when the prosecutor offers them under Rule 404(b) where the evidence is pertinent to the issue in dispute. *See Foster, supra*. When Foster was arrested carrying luggage containing narcotics, he disclaimed ownership of the bag and denied knowledge of the contents. His rap lyrics contained drug code words and were admissible under Rule 404(b) on the only issue in dispute, whether he knew that he was carrying controlled substances.

In *Gray, supra*, the Court reversed defendant's murder conviction because the trial court had erroneously admitted a rap video that showed his gang allegiance. Like the State's theory in this case, the prosecution in *Gray* contended that the killing was part of an ongoing feud between two rival gangs. Purportedly, defendant mistakenly believed the victim to be a member of the rival gang when he shot and killed him. The trial justice allowed a rap video into evidence in rebuttal. By that point, a police detective already had testified to the violent gang rivalry and defendant had offered to stipulate to his gang membership in lieu of the video being presented to the jury. On the facts of that case, the Supreme Judicial Court found that the video was only minimally probative but highly prejudicial even if defendant's gang membership was relevant to provide a reason for an otherwise inexplicable killing. Unlike the *Gray* case, the rap

video in the instant matter has probative value beyond identifying Garlington as a loyal member of YNIC. The lyrics are relevant to the charged offense. Courts have used this distinction as a litmus test in determining whether to admit defendant-authored rap lyrics at trial.

In *Stuckey, supra*, the Sixth Circuit Court found that the rap lyrics were relevant to the crime and properly admitted into evidence. In *Stuckey*, defendant was convicted of committing a murder to prevent the victim from providing incriminating information to federal authorities. In rap lyrics written by defendant, he expressed negative views of so-called “snitches” and described shooting government witnesses, wrapping their bodies in plastic and dumping them on the road, which is what happened to the murder victim. The Court ruled that lyrics were admissible as relevant to the charged offense, that they went to knowledge, preparation, plan, and arguably modus operandi, and were not substantially more prejudicial than probative.

The reference to the shooting death of “Dougie” in the rap song “Ain’t Da Same” gives rise to a reasonable inference that song was written and recorded on or after the date Douglas Cooper was killed in 2014, long after the death of Reagans. The State contends that the lyrics not only constitute an admission by defendant of his participation and guilt in the killing of Darren Reagans, they also establish motive, knowledge of, and purpose for the murder.

Although defendant offered no details as to the manner in which he committed the crime and referenced the killing only in one line in the song, he mentioned each of the other three killings in single lines as well. He did not speak in the first person when referring to the killing of another Comstock gang member, Devon Young. The evidence would appear admissible under both Rule 801(d) and under Rule 404(b). Admitting the evidence does not violate the federal or state constitutions. It is not merely evidence of gang violence but of a specific violent rivalry between two gangs, Reagans belonging to one and Garlington to the other. When considering the nexus

between the rap lyrics and the crime charged, the Court finds a clear nexus. In that regard, this case is distinguishable from *Bey, supra*; *Gray, supra*; and, from *Skinner, supra* and more closely aligned with *Stuckey, supra*. When balancing the probative value of the proffered evidence against the risk of undue prejudice, the Court finds that the defendants have failed to demonstrate that the probative value is substantially outweighed by the risk of undue prejudice or confusion of the issues.

Conclusion

For the foregoing reasons, the Court denies the motions *in limine* subject to the following conditions: The Court will permit further hearing at the time of trial on whether to limit the testimony of Detective McGloin and Jon Thomas to ensure that they do not invade the province of the jury; also, if the State seeks to offer portions of the rap song beyond those addressed in this Decision, the Court will consider a request to limit the admissibility of the lyrics to those referenced herein; and at the time of trial, the Court will entertain any request for a limiting instruction.

Counsel shall submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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COURT: Providence County Superior Court

DATE DECISION FILED: May 21, 2020

JUSTICE/MAGISTRATE: Vogel, J.

ATTORNEYS:

For Plaintiff: Timothy G. Healy, Esq.

For Defendant: James T. McCormick, Esq.