IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE	)	
	)	
	)	**C.R. No. 05031801**
vs.	)	**Case No. 0503015897**
	)	
SHANNON THOMPSON,	)	
	)	
Defendant.	)	

Submitted August 12, 2005
Decided September 16, 2005

Carole E.L. Davis, Esquire, Deputy Attorney General.
Edward C. Gill, Esquire, counsel for Defendant.

DECISION AND ORDER ON STATE'S MOTION *IN LIMINE*

Trial by jury is scheduled in the above-captioned matter on September 20, 2005. A hearing was held on August 12, 2005 on the State's motion *in limine*. After hearing oral arguments, and reviewing the parties' pre- and post-hearing submissions, the Court denies the State's motion, based upon the following findings and determinations.

BACKGROUND

On March 23, 2005, Shannon Thompson (hereinafter, "Defendant"), was charged with one violation of 11 *Del. C.* § 1301(1)(b), Disorderly Conduct, and one violation of 11 *Del. C.* § 1335(a)(1), Violation of Privacy. The charges stem from an incident that allegedly occurred at the "Brew Ha Ha" café in Rehoboth

Beach, Delaware on March 19, 2005. The State alleges that the Defendant was present in the men's room at that establishment and that, while a fifteen-year-old female was in the women's room, the Defendant climbed up into the area above the ceiling tiles in the men's room so that he could hear and see into the women's room.

On June 7, 2005, the State filed the present motion *in limine* with the Court. The State seeks permission to admit certain evidence relating to one of the Defendant's 1989 convictions. The Defendant pled guilty to kidnapping in the second degree as a result of being charged with sexually assaulting an eighteen-year-old female in the women's room at a McDonald's restaurant in Georgetown, Delaware in 1988. The Defendant was not apprehended at the crime scene, but was arrested subsequent to police investigation. The State claimed in the 1989 criminal proceeding that the defendant had entered the space above the ceiling from the men's room and descended into the women's room through the ceiling area above the women's room to attack the victim. The State requests that this Court find that certain evidence of this prior crime it wishes to offer is admissible for the purposes of proving *modus operandi* and intent under D.R.E. 404(b).

DISCUSSION

The State seeks to admit evidence of the circumstances surrounding the prior incident to establish that the Defendant has a *modus operandi* and also to rebut any evidence that the Defendant may introduce, which would tend to show that the Defendant had an innocent purpose for being in the area above the ceiling.

Clearly, the *allegations* of the defendant's criminal behavior that led to his 1989 guilty plea to kidnapping in the second degree are strikingly similar to the allegations in the present case. The State claims that in both incidents, the defendant gained access to an occupied public women's restroom by climbing through the ceiling of an adjacent men's restroom. Admissible evidence of the defendant twice engaging in identical entry behavior obviously would be material to establishing the defendant's identity, intent, and *modus operandi*. However, the defendant was not convicted of any of the crimes charged in connection with the 1988 incident as a result of a trial. Defendant was originally charged with sexual assault and kidnapping in the first degree; however, he entered a guilty plea to kidnapping in the second degree to resolve the charges against him without a trial, and therefore no evidence ever was admitted in the prior proceedings.

The evidence of the 1988 incident that the State now wishes to offer in the present proceeding is the following: A certified record of the defendant's 1989 guilty plea and conviction, and the testimony of two retired Delaware State Police officers who investigated the 1988 incident, one officially and one unofficially. After the Court's hearing of the motion, the State submitted late a transcript of the defendant's plea colloquy and sentencing that it also wishes to admit in the present proceeding. The State indicates it has no intention of offering the eyewitness testimony of the victim of the 1989 crime.

The State proffers that it does not seek to introduce evidence relating to the actual assault that occurred in 1988. Instead, the State limits its offer to show that the prior incident is so in keeping with the current alleged incident that it negates any defense that the Defendant lacked the requisite intent or that the

Defendant had an innocent purpose for engaging in his actions during the current incident.

The Proffered Evidence

At the motion hearing, the State introduced the documentary and testimonial evidence of the 1988 incident it seeks to present to the jury in the present case. The documentary evidence consists of the Superior Court docket of the prior proceedings, the Information filed by the State in that proceeding, the Guilty Plea Agreement executed by the Defendant in 1989, and the resulting Superior Court sentencing Order. None of these documents contain any direct evidence of, or even any reference to, the precise acts or behavior by the defendant the State seeks to prove; namely, the entry of an occupied women's restroom through the common ceiling from an adjoining men's room. On the Guilty Plea form, the defendant agrees to plead guilty to kidnapping second degree, but the form does not contain any signed admission of the attendant facts surrounding the pled crime. Although it was submitted well after the Court's stated deadline, the Court likewise has reviewed the transcript of the Superior Court's 1989 plea colloquy with the defendant. The transcript also contains no statements or admissions by the defendant as to how he committed the 1988 kidnapping second degree, and no reference to a ceiling entry of a women's room other than a statement by the then-Deputy Attorney General referring to the incident. The defendant merely admitted he was guilty of kidnapping in the second degree, in response to that ultimate question by the presiding judge.

Finally, the Court has closely reviewed the testimonial evidence the State proffers in this motion. Both retired detectives Warrington and Richardson testified only as to their present recollections of what they observed in the

McDonald's restaurant when investigating the crime scene in 1988. One officer testified to the layout of the men's room, and about a smudge and a partial footprint on the wall that he interpreted as evidence of someone climbing up to the ceiling, and holes he observed in the ceiling tiles of the women's room. However, he could not recall the location of the foot smudge, or whether he observed any disturbed or damaged tiles in the men's room. Even after refreshing his recollection by review of the 1988 police report, the former detective remained unsure of much of his recollection after nearly seventeen years. The other officer testified regarding his crime scene observations of the condition of the ceiling bridging the McDonald's men's and women's restrooms. He said he went up a ladder for about 30 seconds to look into the drop ceiling. He did not see if there was a connection between the men's and women's room through the ceiling. He admitted that "my memory is very hazy" about the incident due to the passage of time.

D.R.E. 404(b) and Getz

Although D.R.E. 404(b) prohibits admission of evidence of a witness' prior crimes, wrongs or acts to prove action in conformity with a character trait, or that the defendant committed the offense charged, such evidence may be admissible for another appropriate purpose. Purposes that are sanctioned by the Rule include those raised by the State; namely, to show *modus operandi*, intent and an absence of mistake or accident.

The Court must consider six factors in determining whether evidence is admissible pursuant to 404(b). *Getz v. State*, 538 A.2d 726 (Del. 1987). First, the evidence must be material to an ultimate issue or fact in dispute. Second, the

evidence may only be admitted for a purpose that is sanctioned under the Rule. Third, the evidence must be proved by clear, plain and conclusive evidence. Fourth, the evidence may not be too remote in time from the charged offense. Fifth, the probative value of the evidence must substantially outweigh any prejudicial effect. Finally, if the Court finds that the evidence satisfies the aforementioned factors and the Court admits the evidence, it must also administer a limiting instruction. *Id*. at 734.

Generally, the evidence sought admitted by the State may be deemed to satisfy the first two *Getz* factors. The establishment of the similarity of the defendant's unique past pattern of execution of a similar crime with the pattern and method of the execution of the currently alleged crime (*modus operandi*) would be material to the identification of the defendant as the perpetrator of the current crime. Further, the State must prove defendant's criminal intent in its *prima facie* case. The State also reasonably anticipates that the Defendant will argue that his alleged actions were innocent and that he did not have the intent to commit the crime charged. Defendant's intent is clearly in dispute, and evidence of past similar actions by the defendant with admitted criminal intent is therefore material. *See Taylor v. State*, 777 A.2d 759, 764 (Del. 2001). Both *modus operandi* and intent are permissible purposes for the introduction of such evidence under D.R.E. 404(b). However, upon examination of the specific evidence sought to be introduced by the State, neither the evidence contained in the documents, nor the testimony offered by the former detectives, can be found to be material, because it is so devoid of factual information it is at best only tangentially relevant to the establishment of the fact that defendant committed his prior crime in the manner claimed by the State.

Clear, Plain and Conclusive Evidence

The parties spent most of their time in the hearing arguing this factor. Despite the volume of evidence submitted by the State, none of the court documents and transcript that reflect the conviction of the prior incident, nor the officers' testimony, set forth any facts necessary to place the Defendant at the prior crime scene. Nor does it establish clearly, plainly and conclusively that the Defendant at the prior crime scene entered the women's room through the ceiling via an adjoining men's room. These critical facts that supposedly were the prelude to, and the means of commission of the defendant's prior admitted crime are not clearly and plainly established by the evidence the State would like admitted. The State accurately argues that eye-witness testimony is deemed plain, clear and conclusive evidence. *See State v. Walls*, 541 A.2d 591, 593-594 (Del. Super. 1987). Although the investigating officers observed the crime scene, they were not eye-witnesses to the crime and they did not provide evidence that placed the Defendant at the original crime scene. As previously noted, the Court finds that the officers who investigated the original crime scene seventeen years ago understandably do not readily recall important elements of the scene. Their lack of recollection due to the passage of time further renders their evidence less clear, plain and conclusive. This case is scheduled to be heard by a jury. Without at least some evidentiary connection of the Defendant to the original crime scene, the evidence submitted would do nothing more than unnecessarily confuse the jury. The evidence thus fails this prong of the *Getz* examination.

Remoteness of Time

Even if the State was able to satisfy the previously-discussed *Getz* requirements, the defense contends that the prior incident is too remote in time.

This factor is important because the relevance of the proffered evidence depends, at least in part, on how recently the Defendant engaged in the previous act. *See Allen v. State*, 644 A.2s 982, 988 (Del. 1994). The prior incident at issue was committed on October 31, 1988. The Defendant pled guilty and was convicted of a charge arising out of the incident on September 13, 1989. On June 25, 2002, the Defendant was released from prison. The current incident allegedly occurred on March 19, 2005.

Neither D.R.E. 404(b) nor *Getz* set forth a bright line rule to determine at what point in time a prior incident becomes too remote under the *Getz* test. However, courts generally apply a ten-year time limit, which is analogous to the time element provided in D.R.E. 609. *Allen* at 988; *State v. Siple*, 1996 WL 528396, *5 (Del. Super.). The State argues that that Court should find that the evidence is not too remote in time because even though the prior incident occurred seventeen years ago, the Defendant was released from confinement less than three years before the current incident.

Under D.R.E. 609, evidence of a conviction for impeachment purposes is only admissible if no more than ten years has elapsed since the later of the date of conviction or release from confinement for that conviction. Thus, in calculating the time limit for purposes of Rule 609, courts do not look to the date of the prior incident; rather, they look to the conviction date or the release date. The State would have the Court apply a similar analysis when applying the remoteness factor under a 404(b) analysis. Such calculation would be improper in light of Delaware case law, however.

The State cites two cases in support of its argument. First, it cites *State v. Siple*, *supra,* in which the court held that evidence of the defendant's prior crimes

where the incidents occurred over a three-year time span were not too remote under the *Getz* test. 1996 WL 528396 at *5. The State also relies on the Delaware Supreme Court's decision in *State v. Allen*. In *Allen*, the Court held that evidence of an act that occurred twelve years prior to the charged incident was inadmissible because it was too remote in time. 644 A.2d at 988. In *Allen*, the court looked to the amount of time that had passed between the date of the prior incident and the current incident. *Id*. The court did not look to the date of release, although there was an indication that the defendant served time which would have rendered the evidence admissible within the D.R.E. 609(b) time limit. *Id*. at FN. 5. Accordingly, this Court concludes that while it is appropriate to apply the ten-year limit contained in D.R.E. 609(b) when determining remoteness under the *Getz* test, Delaware case law has yet to adopt the precise analysis set forth in that Rule regarding extension of the time period by the length of intervening incarceration. This court declines to do so here, especially inasmuch as doing so in the present case would not cure the State's other deficiencies in meeting the *Getz* test.

The prior incident at issue occurred nearly seventeen years prior to the alleged incident now before the Court. It is too remote under this Court's interpretation of current Delaware law to satisfy this prong of the *Getz* analysis.

Balancing of Probative Value Against Prejudicial Effect

The State's failure to provide clear and conclusive evidence of the relevant circumstances of the prior incident significantly diminishes the fifth and final factor that the Court must apply under *Getz*. The Delaware Supreme Court has recognized nine additional considerations that courts should apply when

balancing probative value against prejudicial effect. *See Deshields v. State*, 706 A.2d 502, 506-507 (Del. 1997). The relevant considerations include the following:

> "(1) [T]he 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 inflammatory or prejudicial effect of the evidence; (7) the similarity of the prior wrong to the charged offense; (8) the effectiveness of limiting instructions; and (9) the extent to which prior act evidence would prolong the proceedings." *Id*. (citing, Graham C. Lilly, *An Introduction to the Law of Evidence*, § 5.15 at 177-78.

The probative force of the evidence, which the State seeks to admit, is significantly diminished by the understandable lapse in memory of the officers who investigated the prior incident seventeen years ago, and the lack of evidence linking the Defendant to the particular circumstances of the prior incident in both the proffered testimonial and documentary evidence. At the hearing the State provided significant evidence that defendant pled guilty to a kidnapping second degree that he committed in 1988. However, the state has offered virtually no evidence it wishes to admit at trial regarding the circumstances of that kidnapping, and it is precisely those circumstances that are needed to prove intent and *modus operandi* in the present case. Even if the Court was to find that the evidence was otherwise admissible under *Getz*, it has little probative value and does not significantly outweigh the danger of undue prejudice to the Defendant. Every consideration required under *Deshields*, other than the State's need for the evidence and the suggested similarity of the two events, clearly weighs against admission of the evidence in this case. The prejudicial effect of informing the jury of defendant's prior kidnapping conviction alone greatly outweighs the questionable probative value of the evidence offered by the State.

CONCLUSION

If a proponent cannot satisfy *all* of the *Getz* factors, the evidence is inadmissible under to D.R.E. 404(b). The Court finds that here, the State cannot satisfy *any* of the *Getz* factors, thus admission of the proffered evidence is not justified. The State's motion *in limine* is **DENIED.**

IT IS SO ORDERED, this ____ day of September, 2005.

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Kenneth S. Clark, Jr., Judge