

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

EDWARD M. GILLIARD

:
:
:
:
:
:
:
:
:
:
:
:

CRIMINAL ACTION

NO. 04-355

MEMORANDUM AND ORDER

ORDER

AND NOW, this 25th day of May, 2005, upon consideration of the Government's Motion in Limine to Admit Evidence of Defendant Edward Gilliard's Prior Robberies with His Co-Conspirators (Document No. 74, filed May 2, 2005), Response of Defendant to Government's Motion in Limine to Admit Evidence of Defendant Edward Gilliard's Prior Robberies with His Co-Conspirators (Document No. 76, filed May 16, 2005), and the Government's Reply to Defendant's Response to Motion in Limine to Admit Evidence of Defendant's Prior Robberies with His Co-Conspirators (Document No. 81, filed May 19, 2005), **IT IS ORDERED** that, on the present state of the record, the Government's Motion in Limine to Admit Evidence of Defendant Edward Gilliard's Prior Robberies with His Co-Conspirators (Document No. 74) is **DENIED**.

IT IS FURTHER ORDERED that the government is granted leave to seek reconsideration of this Order during the trial if warranted by the circumstances.

MEMORANDUM

Defendant Edward M. Gilliard was charged in a four-count Superseding Indictment in

connection with the robbery of Craig Electric, a business located in Philadelphia, Pennsylvania. Specifically, the Superseding Indictment charges defendant with conspiring to interfere with interstate commerce by robbery and conspiring to commit carjacking, in violation of 18 U.S.C. § 371 (Count I); carjacking a motor vehicle, and aiding and abetting carjacking, in violation of 18 U.S.C. §§ 2119 and 2 (Count II); interfering with, and aiding and abetting the interference with, interstate commerce by robbery, in violation 18 U.S.C. §§ 1951 and 2 (Count III); and knowingly using and carrying a firearm, and aiding and abetting using and carrying a firearm, during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Count IV).

II. DISCUSSION

The government seeks to introduce evidence of prior robberies committed by defendant and his co-conspirators, John Harris, Harold Stanley and Ernest Juriel. Harris, Stanley, and Juriel are cooperating with the government and are expected to testify about the prior robberies at trial.

In general, all relevant evidence is admissible. Fed. R. Evid. 402. However, evidence of “extrinsic acts” or “other acts” that is intended to show a defendant’s propensity to commit crimes or to adversely reflect upon defendant’s character is prohibited. Government of Virgin Islands v. Harris, 938 F.2d 401, 419 (3d Cir. 1991).

Federal Rule of Evidence 404(b) permits evidence of extrinsic acts under certain circumstances. The Rule provides in pertinent part:

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

Fed. R. Evid. 404(b). Therefore, Rule 404(b) “prohibits the introduction of evidence of extrinsic

acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge." Huddleston v. United States, 485 U.S. 681, 685 (1988). The Rule does not apply to evidence of acts which are "intrinsic" to the offense charged. United States v. Cross, 308 F.3d 308, 320 (3d Cir. 2002).

The Third Circuit has grappled with the distinction between "intrinsic" and "extrinsic" evidence. See id; see also United States v. Gibbs, 190 F.3d 188, 217-18 (3d Cir. 1999). While most circuit courts view evidence as intrinsic if it is "inextricably intertwined" with the charged offense, the Third Circuit has explicitly expressed no view on whether "other acts" that are "inextricably intertwined" with the events underlying the charge are "intrinsic" to the offense charged and thus exempt from Rule 404(b). Cross, 308 F.3d at 320. Instead, the Third Circuit has held that "acts are intrinsic when they directly prove the charged conspiracy." Id.

In this case, the government argues that Rule 404(b) does not apply because evidence of defendant's prior robberies is "intertwined with the charged conspiracy . . . because it directly proves the unlawful nature of the co-conspirator relationship between Gilliard, Harris, Stanley, and Juriel." (Gov. Motion at 6-7).

The Court rejects the government's argument and concludes that the prior robberies are not intrinsic to the conspiracy because defendant's prior robberies do not "directly prove" the charged conspiracy. While the conduct of defendant and his co-conspirators "may be evidence tending to explain the circumstances of the relationship between the alleged conspirators," it does not directly prove the conduct charged in the Superseding Indictment. United States v. Butch, 48 F. Supp. 2d 453, 458 (D.N.J. 1999) *aff'd* 256 F.3d 171 (3d Cir. 2001); Cross, 308 F.3d at 320. Because the Court concludes that the prior robberies are extrinsic to the conduct charged in the

Superceding Indictment, the Court must consider whether the evidence is admissible under Rule 404(b).

The government contends that the proffered evidence is admissible under Federal Rule of Evidence 404(b) because it “will help prove Gilliard’s knowledge and intent – and the absence of any mistake or accident – in committing the charged offenses.” (Gov. Motion at 2). Moreover, the government argues that the evidence of defendant’s prior robberies is necessary because it counters the central argument that will be advanced by defendant at trial – that defendant had no idea that a robbery was taking place while he was outside Craig Electric and had nothing to do with it. (Id. at 2).

The Supreme Court has set forth the following four requirements for admitting “other acts” evidence under Rule 404(b): (1) the evidence must be offered for a proper purpose under Rule 404(b); (2) the evidence must be relevant; (3) the probative value of the evidence must not be substantially outweighed by its prejudicial effect under Rule 403; and (4) the court must, upon request, instruct the jury to consider the evidence only for the limited purposes for which it is admitted. Huddleston v. United States, 485 U.S. 681, 691 (1988).

The Third Circuit has held that the requirement that the evidence be offered for a proper purpose under Rule 404(b) is not a difficult burden to overcome. See United States v. Morley, 199 F. 3d 129, 139-40 (3d Cir. 1999); see also Harris, 938 F.2d at 419 (“If offered for a proper purpose and for a material issue apart from character under Fed. R. Evid. 404(b), other-acts evidence is subject only to the typical limitations under Fed. R. Evid. 402 and 403.”). This interpretation is consistent with the drafter’s intention that the rule be construed as one of “inclusion” and not “exclusion.” United States v. Long, 574 F. 2d 761, 766 (3d Cir. 1978).

The Court concludes that the evidence of defendant's prior robberies is relevant to show defendant's intent, which is a proper purpose under Rule 404(b). Evidence that defendant participated in prior robberies with his co-conspirators could demonstrate that defendant was not an innocent bystander, present at Craig Electric by accident or mistake. Thus, the first requirement of the Rule is satisfied.

The second requirement under Rule 404(b) is that the evidence be relevant. Relevant evidence is defined as "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." Fed. R. Evid. 401. To establish that evidence is relevant, "[a]ll that is needed is *some* showing of proper relevance," the burden is not onerous. United States v. Sampson, 980 F.2d 883, 888 (3d Cir. 1992).

First, the government argues that the evidence of the prior robberies is relevant to prove that defendant did not have an innocent motive for being in front of Craig Electric on July 3, 2001. Second, the government contends that the proffered evidence is relevant to show the relationship between the parties and the co-conspirators' roles in the scheme charged in the Superseding Indictment. (Gov. Motion at 11). The Court agrees. The proffered evidence tends to show that defendant did not unwittingly participate in the robbery of Craig Electric and that he had a relationship with Harris, Stanley, and Juriel. See United States v. Butch, 256 F.3d 171 (3d Cir. 2001); United States v. Vega, 285 F.3d 256, 262 (3d Cir. 2002). Thus, the evidence is relevant and the second requirement under Huddleston is satisfied.

The third requirement is that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Huddleston, 485 U.S. at 691. Therefore, even

though the Court has concluded that the proffered evidence is relevant and admissible for a proper purpose, the evidence is not admissible unless it satisfies the requirements of Rule 403. Morley, 199 F.3d at 133. Rule 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .” Fed. R. Evid. 403.

“In making this determination, the trial judge must appraise the genuine need for the challenged evidence and balance that necessity against the risk that the information will influence the jury to convict on improper grounds.” United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988). The drafters of Rule 403 and 404(b) “intended that the trial judge be given a very substantial discretion in balancing probative value on the one hand and unfair prejudice on the other.” Long, 574 F.2d at 767. A trial court ruling under Rule 404(b) may only be reversed if it is “arbitrary or irrational.” In re Paoli R.R. Yard PCB Litig., 113 F. 3d 444, 453 (3d Cir. 1997).

The Court concludes that, on the present state of the record, the probative value of defendant’s prior robberies is substantially outweighed by the danger of unfair prejudice. Evidence that defendant committed numerous robberies, or even one robbery, in a case charging armed robbery might lead the jury to conclude that the defendant committed the offense charged. There is a danger that the jury could infer from the testimony of the prior robberies that defendant is a person of bad character deserving of punishment and convict defendant independent of the government’s proof regarding the robbery of Craig Electric. See Harris, 938 F.2d at 419. Even the most carefully crafted limiting instruction might not eliminate the prejudicial effect of the proffered evidence. Thus, the government’s Motion in Limine is denied and the government is precluded from presenting evidence of the prior robberies at trial.

III. CONCLUSION

For the foregoing reasons, the Government's Motion in Limine to Admit Evidence of Defendant Edward Gilliard's Prior Robberies with His Co-Conspirators is denied. That denial is without prejudice to the government's right to seek reconsideration of this Order if warranted by evidence and/or arguments presented at trial.

BY THE COURT:

JAN E. DUBOIS, J.

Furthermore, the government's need for the evidence is not so substantial so as to risk the improper use of the evidence. Although defendant may not be identifiable by victims or police because defendant remained outside the store and fled before the police arrived, the government intends to present the testimony of three of defendant's co-conspirators.