

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

UNITED STATES OF AMERICA

v.

LACEY GRAVES

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CRIMINAL ACTION

NO. 06-95-01

ORDER & MEMORANDUM

ORDER

AND NOW, this 12th day of July, 2006, upon consideration of the Defendant's Motion In Limine To Exclude Evidence of Prior Convictions (Document No. 33, filed June 9, 2006), and the Government's Response to Defendant's Pre-Trial Motions (Document No. 40, filed June 19, 2006), following oral argument on the Motion on June 21, 2006, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that the Defendant's Motion In Limine To Exclude Evidence of Prior Convictions (Document No. 33, filed June 9, 2006) is **GRANTED**.

MEMORANDUM

On March 7, 2006, a grand jury indicted Lacey Graves charging armed bank robbery in violation of 18 U.S.C. § 2113(d) (Count One); and, using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) (Count Two). Pursuant to Federal Rules of Evidence 609(a)(1) and 609(a)(2), Graves filed a Motion In Limine To Exclude Evidence of Prior Convictions. For the reasons set forth below, this motion is granted.

I. PRIOR CONVICTIONS

Graves's prior convictions and sentences are as follows:

1. July 14, 1980: burglary, sentenced to one to five years imprisonment;
2. October 24, 1981: robbery, conspiracy and theft, sentenced to four to five or four to ten years imprisonment¹;
3. March 5, 1982: burglary and conspiracy, sentenced to one to five years imprisonment;
4. April 21, 1993: armed bank robbery, sentenced to 96 months imprisonment with five years supervised release.

In its Response to Defendant's Pre-Trial Motions, the Government stated that it did not intend to use the 1980, 1981, or 1982 convictions "due to their age and the fact that Graves is no longer under parole or other supervision as a result of them." Gov't Response at 4. However, in the event that Graves testifies at trial or calls character witnesses on his behalf, the Government stated it will seek to use the 1993 conviction at trial pursuant to Federal Rules of Evidence 609(a)(1) and 609(a)(2). Id.

II. 1993 CONVICTION NOT ADMISSIBLE PURSUANT TO F.R.E. 609(a)(1)

A. Legal Standard

The admissibility of a prior conviction for impeachment purposes is governed by Federal Rule of Evidence 609. Rule 609(a)(1) provides, in relevant part, as follows:

For the purpose of attacking the credibility of a witness, . . . evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

Fed. R. Evid. 609(a)(1).

In determining whether the probative value of admitting evidence that an accused has been convicted of a prior crime outweighs its prejudicial effect, the Court must consider the

¹ According to Graves, he was sentenced to four to five years imprisonment. According to the Government, Graves was sentenced to four to ten years imprisonment. The difference is immaterial to the Court's decision on the pending Motion.

following four factors:

- (1) The nature of the prior crime;
- (2) The age of the prior conviction;
- (3) The importance of the defendant's testimony; and
- (4) The importance of the defendant's credibility.

United States v. Johnson, 388 F.3d 96, 103-04 (3d Cir. 2004) (McKee, J., concurring);

Government of the Virgin Islands v. Bedford, 671 F.2d 758, 761 n.4 (3d Cir. 1982). The

Government bears the burden of showing that the probative value of the evidence outweighs its prejudicial effect and is thus admissible. Bedford, 671 F.2d at 761; United States v. Tomczyk, 2005 WL 1397509, at *1 (E.D. Pa. June 9, 2005).

B. Analysis

The Court will examine Graves's 1993 conviction for armed robbery in light of each of the four factors.

1. Nature of the Prior Crime

The 1993 conviction was for armed bank robbery. Graves is currently charged with armed bank robbery. The striking similarity between these crimes increases the risk of unfair prejudice.

In United States v. Sanders, 964 F.2d 295 (4th Cir. 1992), the Court of Appeals explained the risk as follows:

Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged. The generally accepted view, therefore, is that evidence of similar offenses for impeachment purposes under Rule 609 should be admitted sparingly if at all.

Id. at 297-98; see also United States v. Seamster, 568 F.2d 188, 191 (10th Cir. 1978). Thus, this factor weighs strongly against admitting the 1993 conviction.

2. *The Age of the Prior Crime*

The 1993 conviction occurred over ten years ago. After serving 96 months imprisonment, Graves was released from confinement in 2001. Because ten years has not elapsed since Graves's release from confinement, this factor weighs in favor of admitting the 1993 conviction. See Federal Rule of Evidence 609(b) ("Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date . . .") (emphasis added).

3. *The Importance of Graves's Testimony*

If a defendant's testimony is important to his defense, this factor weighs against admitting a prior conviction. 4 Weinstein's Federal Evidence § 609.05[3][e]. "If, on the other hand, the defense can establish the subject matter of the defendant's testimony by other means, the defendant's testimony is less necessary, so a prior conviction is more likely to be admitted." Id.; see also United States v. Causey, 9 F.3d 1341, 1344 (7th Cir. 1993) (upholding admission of a prior conviction because other witnesses reiterated defendant's testimony).

Graves argues that his testimony is crucial to his defense because he is the only witness who may provide certain significant information. Although the Court cannot anticipate what the substance of this testimony might be, the Court concludes that this factor weighs strongly against admitting the 1993 conviction.

4. *The Importance of Graves's Credibility*

Whether or not Graves's account of events is found credible will be crucial to his case should he decide to testify. When a defendant testifies, he places his credibility "directly at issue." United States v. Beros, 833 F.2d 455, 463-64 (3d Cir. 1987). Therefore, this factor weighs in favor of admitting the 1993 conviction.

C. Admissibility of Conviction Under Federal Rule of Evidence 609(a)(1)

Of the four factors to consider in admitting a conviction under Rule 609(a)(1), two weigh in favor of admission in this case, and two weigh strongly against. Faced with this balance, the Court concludes that the Government has not met its burden of showing that the probative value of the 1993 conviction outweighs its prejudicial effect. Bedford, 671 F.2d at 761; United States v. Tomczyk, 2005 WL 1397509, at *1 (E.D. Pa. June 9, 2005). Thus, Graves's 1993 conviction for armed bank robbery will not be admitted under Federal Rule of Evidence 609(a)(1).

III. 1993 CONVICTION NOT ADMISSIBLE PURSUANT TO F.R.E. 609(a)(2)

A. Legal Standard

Federal Rule of Evidence 609(a)(2) provides:

For the purpose of attacking the credibility of a witness, . . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

In Cree v. Hatcher, 969 F.2d 34 (3d Cir. 1992), cert. dismissed, 506 U.S. 1017 (1992), the Third Circuit narrowly interpreted Rule 609(a)(2), stating that it "does not measure the severity or reprehensibility of the crime but rather focuses on the witness's propensity for falsehood, deceit,

or deception.” Id. at 38. The Cree Court explained that “what matters is whether dishonesty or false statement is an element of the statutory offense.” Id. at 38.

B. Analysis

Graves argues that armed robbery is not a crimen falsi, since its statutory elements do not involve dishonesty or false statement, and thus the 1993 conviction is inadmissible under Federal Rule of Evidence 609(a)(2). In support of this argument, Graves points to a number of cases from the Court of Appeals for the Third Circuit which hold that robbery, theft, and petit larceny are not crimen falsi. See, e.g., Walker v. Horn, 385 F.3d 321, 334 n.27 (3d Cir. 2004) (“One can obviously commit a crime of theft without employing deceit (i.e. a pickpocket). Therefore, the theft that is required for robbery does not transform that crime of violence into a crimen falsi crime.”); United States v. Johnson, 388 F.3d 96, 99-100 (3d Cir. 2004) (government conceding, and the Court of Appeals agreeing, that the district court erred in allowing defendant’s theft conviction under 18 Pa. C.S.A. § 3921 to be used to impeach him at trial); Government of Virgin Islands v. Toto, 529 F.2d 278, 280-82 (3d Cir. 1976) (petit larceny not crimen falsi); Government of Virgin Islands v. Testamark, 528 F.2d 742, 743 (3d Cir. 1976) (same).

In response, the Government urges the Court to take a common law view of “crimes of dishonesty,” which it contends would make the 1993 conviction admissible. Gov’t Response at 12. The Government also argues that Graves has a specific motive to lie – he was on supervised release stemming from the 1993 conviction at the time of the instant offense and, if he is found guilty, he will face further punishment for violation of supervised release – and the jury should be informed of this motive. Finally, the Government contends that a limiting instruction to the

jury would cure any unfair prejudice.

C. Admissibility of Conviction Under Federal Rule of Evidence 609(a)(2)

The Court is unpersuaded by the Government's arguments. Armed robbery is not a crimen falsi, and Graves's prior conviction for that offense does not reflect "dishonesty or false statement" within the meaning of Federal Rule of Evidence 609(a)(2). This Court will not adopt the common law approach urged by the Government because the Court of Appeals has explicitly interpreted Federal Rule of Evidence 609 without reference to the common law. The Court also concludes that a limiting instruction, in all probability, would be insufficient to cure any unfair prejudice to the defendant. For these reasons, the 1993 conviction is inadmissible pursuant to Federal Rule of Evidence 609(a)(2).

IV. CONCLUSION

For the reasons set forth above, Graves's 1993 conviction for armed bank robbery is inadmissible under Federal Rules of Evidence 609(a)(1) and 609(a)(2). Thus, the Defendant's Motion In Limine To Exclude Evidence of Prior Convictions is granted.

BY THE COURT:

/s/ **JAN E. DUBOIS, J.**

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