

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

THE UNITED STATES OF AMERICA,	:	
	:	
vs.	:	CRIM. NO. 06-95-01
	:	
LACEY GRAVES,	:	
	:	
Defendant.	:	

DuBOIS, J.

JULY 13, 2007

ORDER & MEMORANDUM

ORDER

AND NOW, this 13th day of July 2007, upon consideration of Defendant’s Motion *In Limine* to Exclude Testimony of Government’s Witness and Memorandum of Law in Support Thereof (Document No. 108, filed July 5, 2007); the Government’s Motion to Impound (submitted to the Court on July 11, 2007, but not docketed); and the Government’s Response to Defendant’s Motion *In Limine* (submitted to the Court on July 11, 2007, but not docketed), for the reasons set forth below, **IT IS ORDERED** as follows:

1. Defendant’s Motion *In Limine* to Exclude Testimony of Government’s Witness and Memorandum of Law in Support Thereof is **GRANTED**.
2. The Government’s Motion to Impound is **GRANTED**.
3. Defendant’s Motion *In Limine* to Exclude Testimony of Government’s Witness and Memorandum of Law in Support Thereof, the Government’s Motion to Impound, and the Government’s Response to Defendant’s Motion *In Limine* shall be **FILED UNDER SEAL**.

MEMORANDUM

Defendant, Lacey Graves, is charged in an indictment with one count of armed bank robbery, in violation of 18 U.S.C. § 2113(d), and one count of using a firearm during the commission of a violent felony, in violation of 18 U.S.C. § 924(c). The charges arise out of an armed bank robbery of a Univest Bank branch in Warminster, Pennsylvania, on January 18, 2006. Currently before the Court is Defendant's Motion *In Limine* to Exclude Testimony of Government's Witness and Memorandum of Law in Support Thereof ("Motion to Exclude"). The admissibility of the government's proffered witness testimony turns upon whether its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under Federal Rules of Evidence 403. For the reasons set forth below, defendant's Motion to Exclude is granted.

I. BACKGROUND

The background of this case is set forth in detail in United States v. Graves, 465 F. Supp. 2d 450, 452 (E.D. Pa. 2006). Accordingly, the Court recites only those facts necessary to explain its ruling.

Graves allegedly entered a Univest Bank branch in Warminster, Pennsylvania on January 18, 2006, displayed a handgun, vaulted over the teller counter, and stole \$6,421 in cash. Id. at 452. According to the Government, the Assistant Manager of the branch noticed the robber approaching the bank on the outside sidewalk prior to the robbery. Id. The robber was allegedly carrying an umbrella that he moved to shield his face from the Assistant Manager. Id. According to the Government, the Assistant Manager then watched the surveillance monitors as the robber entered and robbed the bank. Id. Later, the Assistant Manager identified Graves as the robber from a photo array. Id.

Trial in this case commenced on March 5, 2007. On March 9, 2007, “the Jury having deliberated for one (1) and a half (½) days in the trial of this case which began on March 5, 2007, and each Juror having stated that there was no probability that they could reach a unanimous verdict within a reasonable time and that they were hopelessly deadlocked, by agreement of the parties,” the Court declared a mistrial. Order of March 9, 2007.

In late April 2007, the government informed defense counsel that it intended to call a new witness at Graves’s retrial. The new witness, a state prisoner currently incarcerated at FCI Sandstone, was Graves’s cell mate at the Federal Detention Center (“FDC”) in Philadelphia sometime in early 2007.¹ Order of May 22, 2007; Def.’s Mot. at 2.

According to the witness, Graves made incriminating statements while they were housed together at the FDC. The FBI Special Agents in this case, Kenneth G. Vincent and Andrew B. Lash, interviewed the witness on April 16, 2007. A large portion of the interview report describes prior crimes the witness claims that Graves admitted committing.² The interview

¹ According to the witness, they became cell mates on February 9, 2007. Ex. A to Def.’s Mot. at 1.

² The Court sets forth an abbreviated portion of this part of the report:

GRAVES spoke of doing “capes” which is what he called robberies including bank robberies and home invasion robberies. GRAVES said he had been doing robberies since the 1970’s. GRAVES specifically said that he had done eleven bank robberies and three armored car robberies. GRAVES used a gun in these robberies and he always has a gun accessible to him because he does “capers.”

* * *

[Graves’s] friend got his daughter to deal drugs for him. Graves would pick up drugs for his friend and deliver them to his friend’s daughter. One time, GRAVES, his friend, his friend’s daughter, and his friend’s daughter’s friend ate at a restaurant. GRAVES knew that the FBI was watching them and taking photographs.

report also details Graves's alleged interactions with and animus towards FBI Special Agent Kenneth G. Vincent.³

The government seeks to elicit testimony from the new witness regarding a purported "home invasion robbery" detailed in the interview report. According to the new witness,

GRAVES did a home invasion robbery where it was raining and he was carrying an umbrella as he approached the house. He saw a lady in a car who looked at him and saw him. He moved his umbrella so she wouldn't be able to see him and he wasn't sure if she had gotten a good look at him. GRAVES went into the house and robbed them of drugs and money. A lady inside of the house shot at him. After he left, people ran to the house and he believes it was the police watching the house, but he was able to escape. GRAVES had his girlfriend LESLIE watching the house from his car which was parked in front of the house. LESLIE did get out of the car. LESLIE cleared the scene for GRAVES to make sure that it was okay. LESLIE did drive away, but he believes that she was parked too close, because the police got the tag, but mixed up one of the numbers. The car was a Rodeo. GRAVES believes that the only person who could identify him was the lady who made eye contact with him and he doesn't think she would be able to recognize him. GRAVES was wearing black sunglasses and he had a bandana handkerchief that he covered his face with. HE was wearing a black spring jacket and black pants. He was also wearing his just purchased New Balance sneakers. GRAVES cleaned the sneakers after the robbery and put them back in the box. He left them at LESLIE's house and the police later got the sneakers from the house. He had a gun which was his own gun.

* * *

GRAVES said that he had a chance to kill the lady during the robbery and he should have so that she would not have been able to testify. GRAVES concluded that the lady is

Ex. A to Def.'s Mot. at 1-2.

³ The Court sets forth an abbreviated portion of this part of the report:

GRAVES talked about KEN a number of times. Graves views KEN as his nemesis. KEN took \$40 of quarters from GRAVE [*sic*] when GRAVES was charged with a previous crime. After GRAVES got out for that previous crime, he didn't get his quarters back, but he tried to find KEN to get his quarters back. This case is the second time that KEN is after GRAVES. GRAVES said, "I got to kill the dude, cause he will put a body in my trunk just to get me."

Ex. A to Def.'s Mot. at 2-3.

KEN's girlfriend because she referred to him as "KEN" on the stand. The attorney had to clarify who she was referring to. The lady's familiarity with KEN indicated her romantic relationship with KEN.

GRAVES went to trial on this case once and the jury was split eight to four in his favor. GRAVES believes that KEN or someone else talked to the jury to cause the four of them to vote for a guilty verdict.

Ex. A to Def.'s Mot. At 2-3.

On July 5, 2007, defendant filed the instant motion seeking to preclude the new witness' testimony at the retrial under Federal Rules of Evidence 403 and 404(b).

II. LEGAL STANDARD

Evidence must be relevant to be admissible at trial. Fed. R. Evid. 402. Under Federal Rule of Evidence 402, relevant evidence is "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." "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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

"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." Fed. R. Evid. 404(b).

The credibility of a witness ordinarily pertains only to the weight that the jury should give the evidence, and not to its admissibility. On Lee v. United States, 343 U.S. 747, 757 (1952).

III. DISCUSSION

The government and defendant dispute only the admissibility of the witness' testimony pertaining to the home invasion robbery; the government concedes that the remaining subject

matter described in the interview report is inadmissible.⁴

According to the government, testimony regarding the home invasion robbery is relevant because it constitutes a confession by Graves to the armed bank robbery charged in the indictment. Resp. at 6. Defendant disagrees with this characterization and argues that the probative value of the witness's testimony regarding the home invasion robbery is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Defendant also addresses in the motion the witness' questionable credibility.

Whether or not the witness is credible does not bear upon whether his testimony is admissible. On Lee v. United States, 343 U.S. 747, 757 (1952). However, the Court concludes that the probative value of the new witness is substantially outweighed by the danger of unfair prejudice and confusion of the issues. Fed. R. Evid. 403.

Many aspects of the witness' description of the home invasion robbery match the facts of this case. In particular, the robber's New Balance sneakers, the robber's attire, the robber's use of an umbrella, and the actions of Leslie [Neal] were all focal points of Graves's first trial.

On the other hand, the witness' description of the home invasion robbery departs from the facts of this case in several crucial respects. Beyond the fact that he describes a "home invasion

⁴ As the government correctly explains,

Graves also seeks to limit [the witness'] testimony to prevent him from informing the jury that Graves discussed crimes he committed other than the robbery which is the subject of this indictment, pursuant to Fed. R. Evid. 404(b). The government concurs that such testimony is not admissible as 404(b) evidence and will not elicit it during direct examination. Nor will the government elicit testimony regarding Graves's animus toward case agent Ken Vincent due to its lack of probative value.

Resp. at 3 n.4.

robbery” rather than a bank robbery, the witness asserts that Graves stated that: (1) “a lady in a car” observed him as he approached the house; (2) a “lady in the house shot at him;” (3) that he robbed the house of “drugs and money;” and (4) after he left, “people ran to the house,” but he managed to escape. Quite simply, no such details are presented in this case – there is no evidence that defendant was observed by a woman in a car, that anyone shot at him, that he stole drugs, or that people ran to the bank but he managed to escape.

The Court is particularly concerned about admitting evidence suggesting that Graves is involved with drugs, let alone the armed robbery of drugs, which has nothing to do with this case and could unfairly prejudice the jury. See Chladek v. Milligan, 1998 WL 748324, *5 (E.D. Pa. Oct. 23, 1998) (noting “the Court is unpersuaded at this time by the . . . argument that the probative value of evidence of . . . Chladek’s drug use outweighs any possible prejudice to the jury.”). Moreover, evidence that “a lady in a car” observed Graves and that a “lady in the house shot at” Graves is likely to confuse the jury on the crucial issue in this case: whether the Assistant Manager of the Uninvest Bank accurately identified Graves as the robber from a photo array. See generally United States v. Graves, 465 F. Supp. 2d 450 (E.D. Pa. 2006).

The Court also notes that the government plans to “elicit testimony that Graves told [the witness] that he regretted not taking the opportunity to kill the identifying witness in the case” Resp. at 3 n. 4. The portion of the interview report that bears on this issue states as follows:

GRAVES said that he had a chance to kill the lady during the robbery and he should have so that she would not have been able to testify. GRAVES concluded that the lady is KEN’s girlfriend because she referred to him as “KEN” on the stand. The attorney had to clarify who she was referring to. The lady’s familiarity with KEN indicated her romantic relationship with KEN.

Ex. A. to Def.'s Mot. at 2. This testimony cannot be elicited without references to Graves's purported animus towards FBI Special Agent Kenneth G. Vincent, which the Government concedes is inadmissible in this case.

Finally, the Court determines that it would be improper to parse the evidence of the home invasion robbery so as to exclude the prejudicial and confusing aspects of the witness' testimony; doing so would likely affect the way in which the jury perceives his credibility.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion *In Limine* to Exclude Testimony of Government's Witness and Memorandum of Law in Support Thereof is granted.

BY THE COURT:

/s/ JAN E. DUBOIS, J.

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