UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN (Green Bay)

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 19-CR-00151-WCG-NJ-11

STEPHANIE M. ORTIZ,

Defendant.

DEFENDANT'S REQUEST FOR NOTICE OF CRIMES, WRONGS OR OTHER ACTS EVIDENCE PURSUANT TO FED. R. EVID. 404(b)(2)

The defendant Stephanie M. Ortiz, by attorney Thomas G. Wilmouth, pursuant to Fed. R. Evid. 404(b)(2)(A), makes request of the government for 30 days notice in advance of May 29, 2020 final pretrial conference of the general nature of any evidence of other crimes, wrongs, or acts of Ms. Ortiz that the government intends to introduce at trial in it's case-in-chief, for impeachment, or for possible rebuttal, and that is not set forth in the indictment.

I. Request and not Motion.

Motions for disclosure under Rule 404(b) are improper. *United States v. Mathis,* 2010 WL 1507881, *1 (E.D. Wis. Apr. 14, 2010) ["As this court has repeatedly said in the past, 'motion' for disclosure under Rule 404(b) are improper."); *United States v. Kaffo,* 2009 WL 5197826, *2 (E.D. Wis. Dec. 22, 2009)

["[N]o motion is required."). Rule 404(b) requires only that the defendant request the information.

II. Admissibility.

Fed R. Evid. 404(b)(1) states that "[e]vidence 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)(2) allows such evidence when it is used for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The Seventh Circuit recently abandoned its long-standing four (4) factor test to determine the admissibility of 404(b) character evidence. In *United States v. Gomez,* 763 F.3d 845, 853, (7th Cir. 2014), the Court held that Rule 404(b) is clear enough as drafted, without using an independent multi-factor test. "[T]he rule allows the use of other-act evidence only when its admission is supported by some propensity-free chain of reasoning." *Id.* at 856. The Seventh Circuit reiterated the *Gomez* holding recently, stating that "... to overcome an objection to Rule 404(b) other act evidence, the 'proponent of the evidence must first establish that the other act is relevant to a specific purpose other than the person's character or propensity to behave in a certain way. " ' *United States v. Mabie,* 862 F.3d 624, 632 (7th Cir. 2017), *quoting Gomez,* 763 F.3d at 860.

Count Two of the superseding indictment, the only count in which Ms. Ortiz is named, charges her with conducting a financial transaction with her co-defendant

brother Ruben Ortiz, Jr., namely the purchase of a motor vehicle on or about January 14, 2019, designed in whole or in part to conceal the nature, location, source, ownership and control of the proceeds of a form of unlawful activity, namely a conspiracy to distribute controlled substances, contrary to 18 U.S.C. § § 1956(a)(1)(B)(i) and 2. [R. 13: 3]. While some evidence of the existence of the referenced drug conspiracy is admissible in the trial of Ms. Ortiz, she has not been charged with participation in that conspiracy.

Especially in drug cases, other-act evidence is too often admitted almost automatically, without consideration of the "legitimacy of the purpose for which the evidence is to be used and the need for it." *United States v. Miller,* 673 F.3d 688, 692 (7th Cir. 2012); *see also United States v. Jones,* 455 F.3d 800, 812 (7th Cir. 2006) (Easterbrook, J., concurring) ("Allowing a prosecutor routinely to introduce drug convictions in the case-in-chief without demonstrating relevance to some concrete dispute between the litigants creates needless risk that a conviction will rest on the forbidden propensity inference.").

No known alleged prior crimes, wrongs or acts of Ms. Ortiz are inextricably intertwined with the charged crime, making them extrinsic prior acts requiring notice. *United States v. Vega,* 188 F.3d 1150, 1154, n. 3 (9th Cir. 1999) (citing cases). The Seventh Circuit has cast doubt on the usefulness of the inextricable intertwinement doctrine, holding that if evidence is not direct evidence of the crime itself, it is usually propensity evidence simply disguised as inextricable

intertwinement evidence, and is therefore improper, at least if not admitted under the constraints of Rule 404(b). *United States v. Gorman,* 613 F.3d 711, 718 (7th Cir. 2010). The Court must determine whether evidence is admissible either under Rule 404(b) or as direct evidence of the charged offense. *United States v. Ingram,* 2018 WL 5619450, * 3 (S.D. Indiana 2018).

If and when the proponent makes [a proper 404(b)] showing, the district court must then 'assess whether the probative value of the other-act evidence is substantially outweighed by the risk of unfair prejudice and may exclude the evidence under Rule 403 if the risk is too great.' " *Mabie,* 862 F.3d at 633, *quoting Gomez,* 763 F.3d at 860. Like Rule 404(b), Rule 403 is a rule of exclusion; it provides for the exclusion of relevant evidence that is unfairly prejudicial to the defendant. *United States v. Earls,* 704 F.3d 466, 471 (7th Cir. 2012); *United States v. Miller,* 688 F.3d 322, 327-28 (7th Cir. 2012).

Should the district court elect to permit introduction of any Rule 404(b) evidence, proper limiting jury instructions need be prepared. *United States v. Ciesiolka,* 614 F.3d 347, 358 (7th Cir. 2010). Appropriate jury instructions may help to reduce the risk of unfair prejudice inherent in other act evidence. *United States v. Carter,* 695 F.3d 690, 702 (7th Cir. 2012); Fed. R. Evid. 403 Advisory Committee Note (1972) (explaining that the effectiveness of limiting instructions are a factor in weighing the danger of unfair prejudice). Rule 404(b) instructions are required to provide "concrete advice about what sort of inferences are proper or improper."

United States v. Lawson, 776 F.3d 519, 521 (7th Cir. 2015). The limiting instruction should be customized to the case rather than boilerplate. *Gomez*, 763 F.3d at 860 (7thCir. 2014).

iii. Nature of Notice.

The mere tender of discovery is not the required notice of intent to offer 404(b)(2) evidence at trial because this does not provide the defense with any notion of the government's basis for the purported admissibility of the evidence so as to allow for objection and proper use at trial. *United States v. Connor,* 583 F.3d 1011, 1024 (7th Cir. 2009) ["...the theory of admissibility may affect the government's use of the evidence"]; *United States v. Villegas,* 655 F.3d 662, 671(7th Cir. 2011) [404(b) evidence must respond to what is said to trigger admissibility]; *United States v. Jones,* 389 F.3d 753, 757 (7th Cir. 2004), *vacated on other grounds by* 545 U.S. 1125 (2005) ["[T]he government must affirmatively show why a particular prior conviction [admitted under Rule 404(b)] tends to show the more forward-looking fact of purpose, design, or volition to commit the new crime"].

The government is required to provide notice of the specific evidence it intends to introduce, and the defense contends the specific purpose, because the defense is concerned any such evidence is (1) not directed toward establishing a matter in issue other than what is prohibited, *i.e.* the defendant's propensity to commit the crime charged or other crimes, *see* Fed. R. Evid. 404(b)(1); (2) not similar enough to be relevant to a matter in issue; and (3) not evidence of probative

value that is not outweighed by the danger of unfair prejudice pursuant to Fed. R. Evid. 403. *United States v. Baker,* 655 F.3d 677, 681-82 (7th Cir. 2011).

iv. Time of Notice.

A defendant is entitled to the amount of notice reasonably necessary to prepare for trial. *United States v. Rusin,* 889 F.Supp. 1035, 1036 (N.D. Ill April 20,1995). With respect to time, the advisory note to Rule 404(b) states that "[o]ther than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case." *See* Rule 404 Advisory Committee Notes, 1991 Amendments. Notice "is intended to reduce surprise and promote early resolution on the issue of admissibility." *Id.* Without notice, 404(b) evidence is inadmissible. *Id.; United States v. Blount,* 502 F.3d 674, 677 (7th Cir. 2007); *United States v. Carrasco,* 381 F.3d 1237, 1241 (11th Cir. 2004) (per curiam) (reversing a defendant's conviction because the prosecution's failure to give "the required Rule 404(b) notice" before offering evidence of the defendant's prior drug deals "prejudiced [the defendant]'s ability to defend himself").

The defense desires to challenge the subject evidence sufficiently in advance of trial so that the Court may rule upon it's admissibility, and the defense may devote it's trial preparation time accordingly as to investigation and cross-examination. *Vega,* 188 F.3d at 1155. The government should not be able to lay in wait and spring the "other acts" evidence on the defendant in its rebuttal case. *Id.*

v. Basis for Relief.

Evidence that Ms. Ortiz was involved in drug trafficking or any other nefarious activity in concert with Ruben Ortiz, Jr. on any previous occasion(s) to January 14, 2019 has no probative value of the charged offense because any past drug trafficking conduct and or any other conduct does not tend to prove the elements of the charged offense of money laundering on that January 14, 2019 date. That evidence is unfairly prejudicial because it portrays Ms. Ortiz as a bad person and risks a conviction based on propensity.

Scheduled is a pretrial conference on May 29, 2020 and jury trial on June 15, 2020. The defense believes reasonable notice under Rule 404(b)(2)(A) is thirty (30) in advance of the pre-trial so that Ms. Ortiz may dedicate sufficient time to investigate the competency of the evidence and prepare for cross-examination of witnesses who will present such evidence. The defense may then address the propriety of the evidence at the final pretrial conference to be scheduled.

Dated at Green Bay, Wisconsin on February 27, 2020.

Respectfully submitted,

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