

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITES STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

**DEFENDANT’S RESPONSE TO NOTICE OF RULE 404(b) EVIDENCE,
MOTION IN LIMINE, AND REQUEST FOR EVIDENTIARY HEARING**

The Defendant Eric Dean Sheppard, by and through his undersigned counsel, submits his Response in Opposition to the Government’s Notice of Intent to Use Rule 404(b) Evidence (“Notice”), motion in limine,¹ and request for evidentiary hearing.

As explained below, this is not the typical Rule 404(b) notice because, unlike most cases, the Government here cannot back up its Notice with proof. Upon information and belief, the one witness who can supposedly testify to the matters in the Notice denies knowledge of them.

I. The Government’s 404(b) Notice.

The Government seeks to introduce the testimony of J.G., who used to work for Mr. Sheppard’s companies, under the guise of Rule 404(b). [D.E. 77 at 2]. According to the Notice, the Government seeks to prove, through J.G.’s testimony, that Mr. Sheppard forged J.G.’s signature on visa documents where one of Mr. Sheppard’s companies, HM Management and

¹ On September 28, 2023, the Court granted Defendant additional time to brief his Motion in Limine No. 6 regarding the Rule 404(b). [D.E. 111 at 9]. Therefore, while this brief is a response to the Government’s 404(b) Notice, it is also styled as a motion in limine, consistent with Defendant’s timely filed motion from September 15, 2023, at [D.E. 84].

Development, LLC (“HMMD”), was the “applicant/sponsor” for a non-immigrant visa application on behalf of an individual who had performed work for HMMD. *Id.* The Notice states that Mr. Sheppard forged and used J.G.’s signature on two documents: A Government form that was to be filed by HMMD with the U.S. Department of Homeland Security, and a letter from HMMD to the U.S. Embassy in Mexico (together, the “Visa Documents”).² *Id.* Mr. Sheppard allegedly forged and used J.G.’s name on the Visa Documents without J.G.’s knowledge. *Id.* Finally, the Notice asserts that the Visa Documents contain false representations, but the Government does not identify any such false representations or indicate how it will prove any alleged false representations in the Visa Documents. *Id.*

The Government claims it intends to use this evidence under Rule 404(b) for the purpose of proving intent, opportunity, preparation, plan, knowledge, absence of mistake, and lack of accident. *Id.* Notably, the evidence is *not* offered to prove identity, *i.e.*, to prove that since Defendant allegedly forged a signature in the past, he must be the person who forged signatures at issue in the Aggravated Identity Theft charges, although, in reality, that is how the jury will see the evidence to the extreme prejudice of Defendant.

II. The Government Misrepresents the Facts

On September 13, 2023, the Government emailed defense counsel a “disclosure” advising, in pertinent part, that J.G. “learned in 2019 that Mr. Sheppard had forged his signature on visa application documents that were submitted to a law firm . . .”

² The Government also seeks to introduce facially privileged documents, including a letter from Mr. Sheppard, the owner of HMMD, to HMMD’s attorney at a law firm which HMMD used for multiple representations, not just visa issues. This and other communications on their face appear privileged. Upon receipt, defense counsel immediately put the Government on notice, demanding all facially privileged material be destroyed. The Government refused, stating, with no apparent support, that the representation was over at the time one of the facially privileged documents was written and, on that assertion, none of the documents can be privileged.

Upon receipt of this “disclosure,” defense counsel objected to its form and completeness because it was written as an email from the prosecutor and cannot be used (as a 302 or other statements could) to impeach the witness and because it formed the basis for the Notice. Eventually, the Government produced 302s for J.G., but there was *no mention* in the 302s of J.G. alleging that Mr. Sheppard forged his name on the Visa Documents. Indeed, the portion of J.G.’s 302 relating to the Visa Documents states:

Furthermore, [J.G.] explained that sometime during 2018 Eric Sheppard provided a Notice of Entry of Appearance as Attorney or Accredited Representative (DHS Form G-28) for a TN-2 (temporary work visa) . . . [J.G.] was listed as the “Petitioner.” [J.G.]’s signature was on the application.

. . .

[J.G.] was shocked to hear of this and advised he did not request or complete the DHS Form-28 and he did not authorize the use of his name. [J.G.] explained he did not sign or complete any documents concerning the DHS Form-28.

Glaringly absent from the 302 is any indication that J.G. believes or claims Mr. Sheppard forged J.G.’s name on the Visa Documents. Had J.G. made such a claim, it would have been in the 302.

Based on information and belief, defense counsel asserts and represents that J.G. will *not* testify that he believes or claims that Mr. Sheppard forged his name on the Visa Documents. J.G.’s testimony is contrary to the disclosure and the Notice. Moreover, the Government has not provided any information about Mr. Sheppard allegedly misrepresenting facts in the Visa Documents. Thus, both the disclosure and the Notice are completely inaccurate, and worse still, they are misleading.

III. The Evidence Should be Excluded Under Rules 404(b) and 403.

Evidence of other crimes, wrongs, or acts are not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. Fed. R. Evid. 404. This type of evidence may be admissible if it is used for another purpose, “such

as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *Id.* Specifically, for evidence of other crimes or acts to be admissible under Rule 404(b): (1) it must be relevant to an issue other than the defendant's character; (2) there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question; and (3) the probative value of the evidence cannot be substantially outweighed by undue prejudice, and the evidence must satisfy Rule 403. *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007). Further, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

In assessing probative value and unfair prejudice, courts also consider “prosecutorial need” and the “overall similarity of the charged and extrinsic offenses”. *United States v. Williams*, 21-CR-20137, 2021 WL 3883700, at *3 (S.D. Fla. Aug. 31, 2021) (Bloom, J.).

A. The Government Has Not Shown and Cannot Show that the Prior Act is Admissible for a Legitimate Purpose.

As discussed above, based on information known to the defense, J.G. does *not* believe or claim that Mr. Sheppard forged his name on the Visa Documents which allegedly contain as-yet-unidentified false representations, contrary to the disclosure and the Notice.³ [D.E. 77 at 3]. This is dispositive of the issue, where the Government’s stated purpose for the 404(b) evidence is to show intent and state of mind based on the submission of supposedly forged and false Visa Documents to defraud the Government. Obviously, the Government’s argument fails because the only witness, J.G., lacks personal knowledge to back up the accusations. Nor has the Government

³ The Government never identifies, describes, or explains any alleged false representations in the Visa Documents or how the Government will seek to prove them.

even identified, much less provided evidence of, any false statement made by Sheppard in the Visa Documents.

B. The Government Cannot Show that it Can Prove the Prior Act by a Preponderance of the Evidence.

The Government fails to meet this minimal requirement. First, on the Government's accusation that Mr. Sheppard forged J.G.'s signature on the Visa Documents, its key and only witness, J.G., denies even making that claim, much less having personal knowledge. Second, on the Government's accusation that Mr. Sheppard caused the Visa Documents to contain misrepresentations, the Government has not identified any misrepresentation on the Visa Documents or indicated that it can prove any misrepresentation or Mr. Sheppard's involvement or culpability.

The Government states in its Notice that Mr. Sheppard subsequently made an "implied admission" of wrongdoing by sending a facially privileged letter to HMMD's counsel. [D.E. 77 at 4]. *Nothing in the letter states that Mr. Sheppard forged J.G.'s name or made misrepresentations on the Visa Documents.* The Government is playing fast and loose.

The Government cites to *United States v. Barrington*, 648 F.3d 1178 (11th Cir. 2011) for the proposition that "the uncorroborated testimony of the co-defendant was sufficient for the jury to find that the defendant committed the extrinsic act[.]" [D.E. 77 at 4]. Yet, the court in *Barrington* makes clear that the uncorroborated testimony of the co-defendant was sufficient to satisfy Rule 403 "since he had *personal knowledge* of [Defendant's] conduct." *Barrington*, 648 F.3d at 1187 (emphasis added). Unlike in *Barrington*, the Government has no witness with personal knowledge to back up their Rule 404(b) accusations.

C. *Assuming Arguendo the Government can Prove the Prior Acts in the Notice (Which it Cannot), the Probative Value Would Be Substantially Outweighed by the Danger of Unfair Prejudice.*

In assessing whether the probative value of the prior acts is substantially outweighed by the danger of unfair prejudice, courts look to prosecutorial need and the similarity of charged and extrinsic offenses. *United States v. Williams*, 2021 WL 3883700, at *3. Here, the Government did not demonstrate that either factor was met, and therefore the evidence should be excluded.

i. The Potential Prior Act is Not Sufficiently Similar to the Charges and Thus Has No Real Probative Value.

Assuming *arguendo* the Notice is accurate (which it is not, based on defense counsel's information and belief), and J.G. will testify that he believes Mr. Sheppard forged his signature on the Visa Documents and that they contain as yet unidentified misrepresentations that J.G. can attribute to Mr. Sheppard, those potential prior acts were not part of an attempt or scheme to steal money.⁴ Critically, Mr. Sheppard is not defending against the Aggravated Identity Theft charges by arguing mistake or oversight, where 404(b) evidence on intent or state of mind would be relevant. *Mr. Sheppard denies signing any of the alleged forged signatures.*

Again, putting aside the lack of evidence supporting the Rule 404(b) Notice, the cases cited by the Government would be in inapposite, because the prior acts in those cases are almost

⁴ The prior act must be sufficiently similar to the charged offense to satisfy Rule 404(b) and 403. See *United States v. Liuzzo*, 608 F. Supp. 1234, 1236 (S.D. Fla. 1985) (excluding evidence of accepting bribes as not sufficiently similar under Rule 404(b) for charged offense of attempt to influence a grand jury witness, even though both could be construed to be similar intent in obstructing justice); see also *United States v. Backer*, 08-20200-CR, 2008 WL 2439741, at *1 (S.D. Fla. June 13, 2008) (excluding evidence of prior incident at amusement park that led to defendant's arrest for lewd and lascivious acts upon a minor in trial of assault of passenger on flight because conduct was not sufficiently similar: "[t]he victim in the California incident was a 14-year old minor whereas the victim in the instant case is an adult. Additionally, the victim in the California incident accused the defendant of touching her breasts and moving his hands down her waist. Here, the defendant allegedly touched the victim's arm and upper leg.").

identical to the charged offenses.⁵ Although the Government cites to one case which superficially seems similar, it is inapposite. In *Garcia*, the Court allowed testimony that defendant had previously signed another individual's name to a document, on a charge of making false statements on a loan application. See *United States v. Garcia*, 880 F.2d 1277 (11th Cir. 1989). Yet, the evidence was admitted for the purpose of proving the defendant's *ability* to forge, which is not at issue here. *Id.* The court admitted the evidence because that there was zero prejudice to the defendant since everyone agreed the prior act of forgery occurred and was a joke. *Id.* As we read *Garcia*, the affirmance of the trial court's admission of this evidence was based primarily on the fact that there was no possible prejudice, because everyone agreed the prior forgery was a joke.

Here, as described above, the prior acts in the Notice are not sufficiently similar. Even assuming *arguendo* that the Notice is accurate and the defense's information and belief about J.G.'s testimony is wrong, the alleged forgery on Visa Documents for the purpose of obtaining a visa for an employee is not sufficiently similar to alleged misrepresentations on loan documents during Covid to secure a loan.

⁵ In *Zapata*, a prior conviction of trafficking marijuana was introduced for the charged offense of conspiracy to distribute and possess with intent to distribute marijuana. *United States v. Zapata*, 139 F.3d 1355 (11th Cir. 1998). In *Edouard*, the defendant's prior cocaine smuggling activity was introduced for the charged offense of cocaine trafficking conspiracy. *United States v. Edouard*, 485 F.3d 1324 (11th Cir. 2007). In *Ellisor*, defendant's prior misconduct related to the promotion and sale of tickets for an illusory show in D.C. that never took place was admitted in mail fraud prosecution related to the defendant's promotion and sale of tickets for an illusory Christmas show, which also never took place. *United States v. Ellisor*, 522 F.3d 1255, 1268 (11th Cir. 2008) (noting the similarities between the incidents were "striking."). Similarly, in *Barrington*, defendant's prior scheme to change grades through grade change slips was introduced for charge of wire fraud related to scheme to change grades through keylogger software system. *United States v. Barrington*, 648 F.3d 1178 (11th Cir. 2011) (noting that the prior act was sufficiently similar to the charged scheme in its objectives, but also "explained the events immediately preceding the formation of the charged conspiracy and the reason the scheme evolved as it did.").

ii. The Government Has Not Shown its Need for the Evidence.

Conspicuously absent from the Government's Notice is a showing that it needs the evidence. *See United States v. Boston*, 249 Fed. Appx. 807, 808 (11th Cir. 2007) (Whether the probative value is substantially outweighed by unfair prejudice calls for a common sense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need); *United States v. Jones*, 847 Fed. Appx. 830, 835 (11th Cir. 2021) (same). The Notice completely fails to address this point, which favors the exclusion of such evidence. Further, the absence of this evidence also prevents any effort to assess the argument that the prior act is needed for the Government's case.

iii. The Evidence is Highly Prejudicial.

The prejudicial effect is substantially higher than its probative value, as demonstrated above. First and foremost, the Government's factual asserts in the Notice are inaccurate, which is why an evidentiary hearing is necessary pre-trial.

The inaccurate accusation that Mr. Sheppard forged J.G.'s signature on the Visa Documents and made misrepresentations to Government officials in the Visa Documents is highly inflammatory and would likely divert the jury's attention from the issues in the instant case as the defense would be forced to disprove these allegations, resulting in a confusing and wasteful mini-trial on uncharged conduct.

The defense submits that the Government has no admissible evidence to support the accusations in its Notice, and therefore the Government should not be permitted to refer to these accusations in its opening or in questioning witnesses. This is a total distraction to the charges at issue and will only serve to permit the Government to throw proverbial spaghetti against the wall.

These wholly untrue accusations will cause the jury to infer that if Mr. Sheppard forged before (or is simply accused of forging before), he forged here, which is the exact propensity inference the rules forbid. This demonstrates the efforts of the Government to pile on irrelevant bad character evidence. The Government seeks to overwhelm the jury with accusations and uncharged “bad” acts of the Defendant which are completely irrelevant, prejudicial, and strictly for the purpose of propensity—which is prohibited.⁶ Unlike *Garcia*, where everyone agreed that the prior act of forgery occurred and was a joke and thus had zero prejudicial effect on the defendant, the evidence here has a high risk of unfair prejudice and has no real probative value. 880 F.2d at 1277. As in *Liuzzo*, the evidence should be excluded as “[t]o allow the introduction of these alleged acts [] risks the sever[e] prejudice against the Defendant in order to allow the Government to argue a tenuous theory of intent.” 608 F. Supp. at 1236.

IV. Summary of the Government’s Conduct Regarding Purported 404(b) Evidence.

As discussed above, first, the Government sent a “disclosure” to defense counsel via email, rather than send a report that could be used to impeach the witness or provide other necessary information on this topic. Next, only after the defense pointed this out to the Government and requested the 302 or proper reports which can be challenged (rather than a personal email from the prosecutor), the Government produced a 302 for J.G. that glaringly does not contain any mention of Mr. Sheppard forging anything.

⁶ In the same vein that the Government seeks to call witnesses to try to prove that Mr. Sheppard did not fulfill his obligations to his workers, as discussed in the Motion in Limine briefing. [D.E. 84 at 6].

V. Request for Evidentiary Hearing

Respectfully, the Government's representations to the Court in its Notice regarding the expected testimony of J.G. are plain wrong. They must be examined closely. This is a relatively unique situation where, upon information and belief, it is defense counsel's representation to the Court that the 404(b) notice does not reflect the witness's anticipated testimony.

WHEREFORE, Defendant, Eric Dean Sheppard, respectfully requests that this Court exclude J.G.'s testimony and any purported evidence relating to said Visa Documents and for such other and further relief as may be just and proper. Moreover, Defendant respectfully requests a pre-trial evidentiary hearing to demonstrate to the Court that the Notice is factually inaccurate and does not correctly describe J.G.'s anticipated testimony.

Dated: October 2, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 2, 2023, the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

/s/ Jayne C. Weintraub
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