The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ERIC SHIBLEY, Defendant.	NO. CR20-174JCC **GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE (Dkt. #89)**

The government files this response in opposition to Defendant Eric Shibley's Motion in Limine to exclude certain evidence from trial. Dkt. # 89. Defendant moves to exclude the following evidence:

- Any details of the case for which he was on probation that reference "domestic violence", "DV", a "victim's panel", or any "violence/aggression treatment agency";
- The summary restriction of defendant's medical license and his unauthorized writing of prescriptions for controlled substances;
- Defendant's prior civil litigation and bankruptcy; and
- Any use of information acquired during defendant's competency evaluation.

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I. BACKGROUND

On October 15, 2020, defendant was indicted by a grand jury with 15 counts of wire fraud, bank fraud, and money laundering related to a scheme to submit false and fraudulent applications for Paycheck Protection Program (PPP) loans and Economic Injury Disaster Loans (EIDL). Dkt. #31. Defendant's scheme involved the submission of false and fraudulent information and documentation about entities that he controlled to participating lenders and the SBA, including false statements about his employees and payroll. Further, in his PPP applications, defendant falsely affirmed that he was not on probation, when in fact he was on probation for violating a no-contact order from Skagit County.

Question 5 of the PPP application asks:

> Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, **or on probation or parole?**

(Emphasis added). Applicants are asked to check a box "Yes" or "No." Above Question 5, the application states "If questions (5) or (6) are answered 'Yes,' the loan will not be approved."

On all of his PPP applications, defendant answered "No" to Question 5, despite the fact that he was on probation at the time for violating a no-contact order. As part of his probation, defendant was required to attend a 52-week domestic violence perpetrators' program. Defendant did not start regularly attending the courses until January 2020, but he was attending classes weekly at the time he was applying for COVID-19 relief loans. Defendant also met with his probation officer on January 23, 2020, who reminded defendant that he was on probation until December 2020.

II. ARGUMENT

A. Legal Standard

In his motion *in limine*, defendant appears to argue that certain evidence should be excluded pursuant to Federal Rules of Evidence 404 and 403. Rule 404(b) precludes

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using crimes, wrongs, or other acts to prove that commission of the charged crime conforms to the defendant's character. Fed. R. Evid. 404(b)(1). The limitations of Rule 404(b) do not apply if the evidence is "inextricably intertwined" with the crime with which a defendant is charged. *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012 (9th Cir. 1995). Generally, to qualify as inextricably intertwined, the evidence must "constitute[] a part of the transaction that serves as the basis for the criminal charge." *Id.* at 1012-1013. Evidence can be inextricably intertwined for two reasons: (1) "because it . . . [serves] a part of the transaction that serves as the basis for the criminal charge" and (2) "when it was necessary to do so in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime; it is obviously necessary in certain cases for the government to explain either the circumstances under which particular evidence was obtained or the events surrounding the commission of the crime."

If not inextricably intertwined, Rule 404(b) precludes using crimes, wrongs, or other acts to prove that commission of the charged crime conforms to the defendant's character. Fed. R. Evid. 404(b)(1). But other-acts evidence may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). "Rule 404(b) has thus long been characterized as a rule of inclusion—not exclusion." *United States v. Bailey*, 696 F.3d 794, 806 (9th Cir. 2012) (*citing United States v. Cherer*, 513 F.3d 1150, 1157 (9th Cir.2008)) (internal quotation marks omitted). The other act evidence need not constitute a crime, *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), and may have occurred after the crime charged, *United States v. Ayers*, 924 F.2d 1468, 1473 (9th Cir. 1991).

The Ninth Circuit has adopted a four-part test to determine the admissibility of evidence under Rule 404(b): (1) the evidence of the other crime must tend to prove a material issue in the case; (2) the other crime must be similar to the offense charged; (3) proof of the other crime must be based on sufficient evidence; and (4) the commission of

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the other crime must not be too remote in time. *Vizcarra-Martinez*, 66 F.3d at 1013. In addition to satisfying the four-part test, evidence of other crimes must also satisfy the balancing test under Fed. R. Evid. 403 – that is, its probative value must not be substantially outweighed by the danger of unfair prejudice. *United States v. Montgomery*, 150 F.3d 983, 1000-01 (9th Cir.), *cert. denied*, 525 U.S. 989 (1998).

B. The Anacortes Municipal Court Case

The government submits that evidence about defendant's prior conviction and the terms of his probation are key evidence in its case.[1] In his motion, defendant does not appear to challenge the introduction of his prior conviction for violating a no contact order as improper under Rule 404(b), but rather that the nature of the conviction should be excluded as unfairly prejudicial under Rule 403. The evidence is admissible under Rule 404(b) because it is "inextricably intertwined" with the charged offense: defendant made multiple false statements about his probation status to lenders and the SBA in order to receive PPP loans.

The evidence should also not be excluded pursuant to Rule 403. Evidence about the nature of the conviction has high probative value in this case. The government must prove that defendant knowingly made false statements on his loan applications about his

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[1] Defendant filed a Witness List on November 5, 2021 including James Burnell, his attorney in the Anacortes Municipal Court case at issue. (Dkt. No. 99.) In response to a government question about this inclusion, defense counsel represented that defendant would not be calling Mr. Burnell as a witness. Should defendant raise an advice-of-counsel defense and / or make and involvement-of-counsel argument at trial, it will effect a waiver of the attorney-client privilege as to all materials relevant to an advice-of-counsel defense and / or involvement-of-counsel argument. The government would also be entitled to discovery as to all documents or materials relevant to the assertion of such a defense or argument. Thus, the government requests notice as soon as possible if defendant intends to raise an advice-of-counsel defense or make an involvement-of-counsel argument at trial. *See United States v. Crowder,* 325 F. Supp. 3d 131, 138 (D.D.C. 2018) ("Defendants decision on whether to assert the advice-of-counsel defense may impact the scope of discovery otherwise permitted or ordered, and thus risks unnecessary interruption and delay if asserted at trial .... [and] because an advice-of-counsel defense is complex it may raise issues requiring additional briefing before trial.").

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probation status. Defendant appears to contend that he did not know that he was on probation when he filled out the loan applications.[2] In order to prove that defendant knew that he was on probation, the government will elicit testimony from his probation officer about the requirements of his probationary term. These terms included the requirement that he pay fines and costs, a requirement that he attend a Domestic Violence Victims Panel, that he attend a 52-week domestic violence perpetrators' treatment program, and no contact with victims named in the underlying no-contact order. n order to prove that defendant knew he was on probation, the government will introduce that the defendant was still under active supervision and abiding by the terms of the judgment, including attending domestic violence training, at the time he applied for the loans.

The government also notes that it will be introducing evidence of an undercover call with a federal agent at trial, where he is asked about his probation status. On the call, defendant gives details about the circumstances that led to the conviction. On the call, defendant repeatedly states that the case was resolved, and he was not on probation anymore to the undercover agent. Again, this evidence is relevant to show that defendant made false statements: when confronted about being on probation for the specific case at issue, he continues to falsely state that he is not.

The government believes that the full details of defendant's probation term and judgment, including that he was attending domestic violence treatment classes, are

[2] Alternatively, the government would stipulate that defendant was on probation at the time of the offense and that he knew that he was on probation at the time of the offense. This would not preclude defendant from arguing, as he does in his brief, that he read Question 5 of the application incorrectly or did not think the question called for him to answer affirmatively. If this stipulation were entered, the government would not seek to introduce evidence about the conviction or the terms of defendant's probation. The situation would be akin to *Old Chief v. United States*, 519 U.S. 172, 186 (1997), where the Court determined that the admission of a defendant's prior conviction was improper in a felon in possession prosecution where the defendant's offered stipulation was "not merely relevant but seemingly conclusive evidence of the element." In *Old Chief*, the only difference between the stipulation and the government's evidence was the inclusion of the name of the prior conviction.

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appropriately introduced in this case. This is particularly true in light of the fact that defendant is arguing that he did not know he was on probation.

Should the Court disagree, the government believes that the appropriate compromise is to remove any reference to "domestic violence", "DV", a "victim's panel", or any "violence/aggression treatment agency" on the judgment but allow the government to introduce evidence that defendant was attending classes and still subject to other terms of probation, including a no contact order, at the time he applied for the loans. The government is also not opposed to a limiting instruction to ensure that the jury evaluates the evidence of the defendant's probationary status appropriately.

C. Defendant's Medical Practice

In its case in chief, the government will introduce evidence that defendant's medical license was in "summary restriction" status as of January 2, 2020, meaning that he was no longer allowed to prescribe controlled substances.[3] As part of the charged scheme, defendant applied for fraudulent loans in the name of his medical practice. It is relevant to the case that defendant's medical practice was already suffering in January 2020, before the onset of the COVID-19 pandemic and before he applied for fraudulent loans. Because the business was one of the businesses defendant used to apply for fraudulent loans, the status of that business is "intrinsically intertwined" with the charged scheme to defraud. Evidence about defendant's medical practice, namely that it was not allowed to prescribe controlled substances, is also necessary to present a coherent and comprehensible story about what sort of business defendant was operating. In *United States v. Anderson*, 741 F.3d 938, 949–50 (9th Cir. 2013), the Ninth Circuit affirmed a district court's ruling to allow evidence of an uncharged act of copyright infringement that took place six months after the charged conduct because it was inextricably intertwined with the charged offense. The court held that the evidence of the uncharged

[3] The government does not intend to introduce evidence about why defendant's medical license was in summary restriction status in its case in chief.

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conduct "help[ed] explain [the defendant's] business operations" and thus was inextricably intertwined with the charged conduct.

Should the Court not believe that evidence about the summary restriction on defendant's license is inextricably intertwined with the charged conduct, it is also admissible under Rule 404(b). The fact that his license was suspended is relevant to show that his medical operation was not operating as represented in the loan applications, and also shows motive to seek out fraudulent loans.

The government has also uncovered evidence that defendant continued to prescribe controlled substances after his license was restricted in January 2020. He did this primarily by backdating the prescription date. The government does not plan to introduce evidence of this practice in its case in chief. However, the government does reserve the right to introduce this evidence should the defendant testify at trial or in its rebuttal case.

Currently, the government contemplates introducing evidence about his prescribing practice in two ways. First, defense counsel has provided the government with certain driver's licenses of individuals defendant may claim as his "employees." The government has found evidence that defendant was prescribing to certain of these individuals. The government should be permitted to introduce evidence that defendant's purported employees were patients that he was prescribing controlled substances to. This fact is relevant because it could suggest that defendant had their licenses because they were patients, not employees.

Second, the government would ask defendant about the fact that he continued to prescribe controlled substances after his license was suspended should he testify pursuant to Fed. R. Evid. 608(b)(1). Rule 608(b)(1) states:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of . . . the witness.

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The fact that defendant continued to prescribe controlled substances after his license was suspended is wholly probative of his character for truthfulness. Most of the prescriptions he wrote were backdated, meaning that they contained a false statement. The government should be permitted to ask defendant about this on cross-examination should he testify.

D. Defendant's Prior Civil Litigation and Bankruptcy

The government does not plan to introduce evidence related to defendant's prior civil litigation or bankruptcy in its case in chief. However, the government reserves the right to impeach the defendant with any prior inconsistent statements he made during any of his prior civil litigation or bankruptcy should he choose to testify.

E. Defendant's Competency Report

The government will not seek to use statements from defendant's court-ordered competency report in any manner at trial.

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III. CONCLUSION

The government respectfully requests that the Court deny in part defendant's Motion in Limine.

DATED this 8th day of November, 2021.

Respectfully submitted,

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