

IN THE SUPERIOR COURT THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CASE NO. ST-11-CR-35
	)	
v.	)	
	)	
TREVORNE R. LAKE,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION

This matter came on for hearing on the People's Motion to Admit Evidence Pursuant to Federal Rule of Criminal Procedure 404(b) on September 8, 2011. After hearing argument from both counsel, the Court took the Motion under advisement.

The People wish to present evidence that cartridge casings collected from the scene of the homicide in this case matched those found at the scene of a previous incident in which Defendant has purportedly admitted firing a weapon, albeit in self defense. Defendant has been charged criminally in the previous incident, which occurred approximately six months before this homicide, and he is awaiting trial on that matter as well. The People also intend to elicit evidence that the weapon Defendant admitted firing in the previous incident was a 9mm Smith and Wesson Springfield firearm and that casings collecting in this case could only have been fired from 39 types of firearms, 38 of which are manufactured by Smith and Wesson. The People's proffered basis for presenting the evidence is to prove the identity of the Defendant as the perpetrator of this homicide.

Evidence of other crimes, wrongs, or acts is not admissible to prove a character trait of the Defendant nor to prove that he had a disposition or propensity to commit crimes.¹ But, Rule 404(b) specifically permits the introduction of such evidence when relevant for the purpose of proving

¹ Federal Rule of Evidence 404(b); *Government of the Virgin Islands v. Oliver*, 5 V.I. 568 (3rd Cir. 1966).

several recognized exceptions, including identity.² In considering Rule 404(b) evidence, the Court must first determine whether the evidence is relevant for a purpose other than to show propensity or disposition to commit an offense and then determine if the probative value of the evidence is substantially outweighed by the risk that its admission will result in unfair prejudice to the accused.³

Citing *Government of the Virgin Islands v. Pinney*⁴, Defendant asserts that the Court should only permit the introduction of this evidence if it demonstrates a unique signature or *modus operandi* on the part of the accused. In *Pinney*, the Third Circuit reversed the defendant's conviction of aggravated rape of a thirteen year old because the trial court had permitted the introduction of evidence that the accused had previously raped the victim's sister when she was six. The court noted that, while a jury could rationally infer from evidence that the accused had committed a prior offense "in an unusual and distinctive manner and evidence that a second crime was committed in the same unusual and distinctive manner that the defendant committed the second crime"⁵, the facts before the trial court revealed that "the manner in which the two alleged crimes were committed here was neither sufficiently detailed nor significantly unusual to permit any inference that the perpetrator of the second assault was the same perpetrator of the first."⁶ The court went on to say, "The pattern and characteristics must be so unusual and distinctive as to be like a signature."⁷

But, Defendant fails to recognize that the evidence in *Pinney* was proffered in an effort to prove identity through a common scheme or plan on the theory that the two incidents were

² *Rivera v. Government of the Virgin Islands*, 10 V.I. 39 (3rd Cir. 1973) (evidence of other crimes may be received if relevant for any purpose other than to show a mere disposition or propensity to commit the crime).

³ *Government of the Virgin Islands v. Felix*, 15 V.I. 490 (3rd Cir. 1978).

⁴ 27 V.I. 412 (3rd Cir. 1992)

⁵ *Pinney*, *supra*, at 420.

⁶ *Id.*

⁷ *Id.*, at 421.

“sufficiently similar to earmark them as the handiwork of the same actor”⁸. Here the People do not assert that the evidence demonstrates a unique manner of committing two similar offenses. The People propose to use the other acts evidence to identify Defendant as the perpetrator by demonstrating that Defendant was previously in possession of the firearm used in this offense. Physical items linking the accused to the crime charged that were employed in the commission of another crime are admissible to show the identity of the accused as the perpetrator.⁹

The Court recognizes that the proffered evidence is not conclusive on the issue of identity. Proof that a person possessed a firearm six months prior to a shooting does not definitively show that the same person used the firearm during a subsequent shooting. And, the Court is aware that the People are not able to introduce the firearm itself, merely casings from both events. But, “conclusiveness” has never been the standard for admission of Rule 404(b) evidence. The Court may admit evidence of other crimes, wrongs, or acts if it is relevant and logically tends to establish or refute a material fact at issue.¹⁰ The Court finds that the evidence proffered by the People, if properly limited, is probative regarding a material issue in this case, the identity of the accused, and that the admission of the evidence for that purpose is a permissible use of 404(b) evidence.

In making this determination, the Court finds the reasoning in *State of New Jersey v. Gillispie*¹¹ to be persuasive. Gillispie and two others were charged with murder and other offenses in the execution style shooting of a woman and her son during a robbery. The State introduced evidence that the defendants had participated in a robbery and shooting that took place twenty days earlier in a Bronx barbershop, as well as testimony that Gillispie had admitted committing the prior robbery with an accomplice and had stated that “probably the same gun was used”. An expert also

⁸ *Id.*, at 420.

⁹ See, for example, *United States v. Gelzer*, 50 F3d 1133, 1139-40 (2nd Cir. 1995) (“Evidence of the 1992 Atlanta robbery has substantial probative value: it links Robert Gelzer to the revolver used in the Lynbrook Post Office robbery by demonstrating that he had access to it.”)

¹⁰ *Pinney, supra.*

¹¹ ___ A.3d ___, 2011 WL 2224522 (N.J. June 9, 2011).

testified that he had examined five cartridge casings from the murder scene and compared them with two casings from the Bronx robbery and found the cartridges were all fired from the same weapon and that the same gun had been used in both offenses. The trial court found that the evidence was admissible because it satisfied a four pronged test established in *State v. Cofield*¹²: (1) the evidence of the other crime must be relevant to a material issue, (2) it must be similar in kind and reasonably close in time to the offense charged, (3) the evidence of the other crime must be clear and convincing, and (4) the probative value of the evidence must not be outweighed by its apparent prejudice. The *Gillispe* trial court found that the evidence was relevant to the issue of the identity of the accused as the perpetrator of the murders, that both crimes were robberies of drug dealers in which weapons were used occurring twenty days apart, that the expert's testimony made it "unquestionably clear and convincing" that the same gun was used in both offenses, and that the probative value was "extremely strong" because the evidence directly related to the material issue of identity, thus outweighing its potential for prejudice. At trial the State also presented a detailed description of the commission of the murder from an accomplice, as well as Gillispe's handwritten statement admitting to firing a gun at the earlier robbery.

The Appellate Division agreed that the other crimes evidence was admissible to prove identity, but reversed the convictions because the prejudicial effect of the evidence outweighed its probative value. On further appeal, the Supreme Court of New Jersey approved the finding that evidence that the accused used the same gun in a prior robbery and in a subsequent murder was admissible "other crimes" evidence. But, the Court went further and overturned the Appellate Division's reversal, ultimately determining that the error was harmless in light of the overwhelming evidence of the defendants' guilt.

¹² 127 N.J. 328, 605 A.2d 230 (N.J. 1990).

The decision of the Supreme Court of New Jersey was rendered under New Jersey law and was not specifically premised on Fed. R. E. 404(b). Instead, the court utilized Rule 404(b) of the New Jersey Rules of Evidence, which provides:

[E]vidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.¹³

That court also employed a somewhat different, but useful, analytical framework than suggested by instant counsel, relying on the aforementioned *Cofield* factors. Citing *State v. Darby*¹⁴, the New Jersey Supreme Court held that to satisfy the first *Cofield* prong, other crimes evidence must be “relevant to a material issue genuinely in dispute.” Implicitly addressing the issue raised by Lake’s counsel, the court indicated:

Despite prior rulings indicating that proof of identity is limited to testimony of the defendant’s participation in a similar or “signature” crime,...[citations omitted] N.J.R.E. 404(b) is not so narrow with respect to proof of identity. If a defendant can be connected to a weapon or disguise used in a prior criminal transaction, it can serve to identify him or tie him to a similar event. *State v. Porambo*, 226 N.J.Super. 416, 423-24, 544 A.2d 870 (App.Div. 1988) (admitting evidence of disguise observed at two separate crime scenes and subsequently found in defendant’s car); *State v. Hardaway*, 269 N.J.Super. 627, 630, 636 A.2d 128 (App.Div. 1994) (permitting introduction of gun found at subsequent crime scene because it proved defendant’s identity and presence, but reversing conviction because of details of events of unrelated crime).

The Appellate Division in this case stated that proof of a defendant’s use or possession of a weapon in one crime can be evidence of the identity of the person who used the same weapon in another crime....; see also *State v. Carswell*, 303 N.J. Super. 462, 697 A.2d 171 (App.Div. 1997) (permitting admission of evidence that defendant had carried a gun on other occasions in trial concerning whether defendant had threatened someone with a gun.)¹⁵

¹³ Of course, the similarity between N.J.R.E. 404(b) and Fed. R. E. 404(b) is apparent.

¹⁴ 174 N.J. 509, 809 A.2d 138 (N.J. 2002).

¹⁵ *Gillispe*, *supra*, 2011 WL 2224522 at *14.

The court then noted that it had, subsequent to the cases cited by the Appellate Division, addressed the issue of identity in the context of a “signature” crime in *State v. Fortin*¹⁶. But the court continued:

Fortin must be understood in context and does not preclude admission of the gun to link the murder weapon to defendants in this case...

Where a signature crime is alleged, circumstantial evidence is key, and the unique common features among the crimes must be nearly identical. But that is not the case where, as here, an object can be linked directly to the defendant for purpose of identification. Therefore, “an object associating the defendant with the crime” is admissible to prove identity. *Weinstein on Evidence* ¶ 404 [15], ...n.6 (citing *United States v. Covelli*, 738 F.2d 847, 855-56 (7th Cir.), *cert. denied*, 469 U.S. 867...(1984) (prior possession of small caliber weapon admissible as probative of possession of murder weapon and ultimate identification of defendant); *United States v. Two Eagle*, 633 F.2d 93 (8th Cir. 1980) (observation of defendant in stolen car admissible as to identity of defendant who fled from crime scene in victim’s vehicle)). The fact that ballistics testing revealed that the gun used in the Bronx barbershop shooting was the same as the gun used in the Barnegat murders is highly relevant to the disputed material issue of identity given the evidence linking defendant to the Bronx barbershop shooting. Accordingly, because we are not dealing with a “signature crime,” we agree with the Appellate Division’s holding under the first prong.

The court has recently noted “that the second prong [of *Cofield*] may be eliminated where it serves no beneficial purpose.”[citations omitted]...The Appellate Division stated that since the other-crimes evidence here dealt with defendants’ connection with the gun and not the similarity of crimes, the second prong is irrelevant for the purposes of this case, and we agree.

The third prong of our *Cofield* test requires that the judge serve as gatekeeper to the admission of other-crime evidence.” [citation omitted] In other words, the trial court must determine that proof of the other-crimes evidence is established clearly and convincingly...Given the testimony of Detectives Barry and Mojica and Gillispe’s own statement, the trial judge did not abuse his discretion in admitting the evidence of the gun on this basis.

Finally, the New Jersey Supreme Court observed that the difficult issue was the fourth prong, the balance between probative value and undue prejudice. The court reiterated that the other crimes evidence was relevant and probative to link the weapon used by Gillispe in the Bronx to the later murders, stating, “[T]he fact that the same gun was used in the Bronx shooting and Barnegat

¹⁶ 162 N.J. 517, 532, 745 A.2d 509 (N.J. 2000).

murders was admissible to prove identity under *Cofield*.¹⁷ The court then discussed the responsibility of the trial court to “sanitize” the other crimes evidence:

However, there is no excuse for admitting the unduly prejudicial evidence of the details of the barbershop robbery... The fact that the gun used in the Bronx shooting was the same gun used in the Barnegat murders, coupled with Gillispe’s admission to its possession while in custody in the Bronx, would have sufficed to prove identity without the details involving the actual shootings and the injury of Folks.¹⁸

In reversing the Appellate Division, the court made it clear that the other-crimes evidence was admissible, but that it was the trial court’s admission of the details of the other-crimes evidence – detailed testimony concerning how the barbershop robbery was planned and executed, particularly graphic testimony concerning the barbershop crime scene and the processing of a bullet that had literally fallen out of a victim, and a vivid written statement by Gillispe describing his actions during the barbershop robbery – that were unduly prejudicial and outweighed its probative value. However, after emphasizing the necessity of a firm and clear limiting instruction, the court ultimately remanded the case to the Appellate Division, holding that the error in admitting the details was harmless in light of the overwhelming evidence of the defendants’ guilt.

The Court finds that the other crimes evidence proffered by the People is relevant to the disputed material issue of identity; that, in the context of this case, to be admissible it is not necessary that the evidence be so unique as to present a “signature”; that Defendant’s admission to firing a 9mm Smith and Wesson handgun, together with the match of the cartridge casings from the two crime scenes, is clear and convincing evidence tending to establish the identity of the Defendant as the perpetrator of the offenses charged in this case; and that, if the other crimes evidence is appropriately limited and accompanied by firm and clear cautionary instructions to the jury, both at the time of its admission and at the close of the case, its probative value will not be outweighed by the risk of undue prejudice to the Defendant.

¹⁷ Gillispe, *supra*, 2011 WL 2224522 at *16.

¹⁸ *Id.*

The Court recognizes full well its responsibility to prevent the admission of unduly prejudicial evidence, whether under Rule 404(b) or some other provision. To that end, the Court has determined that the other crimes evidence the People may present shall be limited as follows:

(a) The testimony concerning the circumstances of the previous incident shall consist only of an indication that the Defendant has admitted in a statement to police that on a previous occasion, the specific date and specific location of which may be disclosed, he fired a 9mm Smith and Wesson handgun and that the Defendant has asserted that he did so in self defense;

(b) Mr. Cooper and/or other persons who collected and preserved the cartridge casings found at the scene of the prior occurrence may testify that a specific number and type of casings were collected and preserved;

(c) Mr. Cooper and/or other persons who collected and preserved the cartridge casings found at the scene of the Ja shooting may testify that a specific number and type of casings were collected and preserved, but may also describe other non-inflammatory evidence collected at the scene and any aspects of the crime scene relevant to the issues presented in this case;

(d) Mr. Cooper may testify that the casings collected in this case could only have been fired from 39 types of firearms, 38 of which are manufactured by Smith and Wesson; and

(e) Mr. Cooper may testify concerning the details of his comparison and analysis of the cartridge casings, as well as his conclusions that the casings from both scenes matched and were fired from the same firearm.

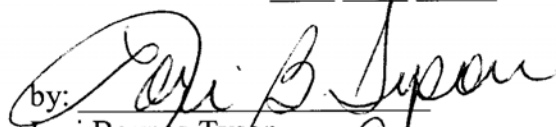
No mention shall be made by the People nor any prosecution witness of the fact that Defendant has been charged criminally in the previous incident, nor shall the People introduce the statement made by Defendant or any other details of the prior incident, without specific permission from the Court in advance.

Additionally, the Court will present carefully crafted limiting instructions to the jury.

An Order consistent with this Opinion is issued simultaneously herewith.

Dated: September 15, 2011.

ATTEST: Venetia H. Velazquez, Esq.
Clerk of the Court / /

by: 
Lori Boynes-Tyson
Court Clerk Supervisor 9/16/2011


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS