

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN**

**PEOPLE OF THE VIRGIN ISLANDS,**

Plaintiff,

v.

**JOSIAH HODGE,**

Defendant.

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Case No.: ST-13-CR-458

**MEMORANDUM OPINION**

**THIS MATTER** is before the Court on Defendant's Supplemental Motion In *Limine* To Preclude Any 404(b) or Prior Bad Acts Evidence, filed May 13, 2017 (the "Supplemental Motion to Preclude"). Plaintiff opposed the motion on May 22, 2017 (the "Opposition"). For the reasons set forth herein, Defendant's Supplemental Motion to Preclude will be granted.

**Relevant Background**

On or about August 24, 2013, in St. Thomas, Virgin Islands, Gregory LeBlanc was shot to death apparently during an attempted robbery. Following an investigation, Defendant Josiah Hodge ("Hodge") and two other defendants were arrested pursuant to a warrant issued on September 30, 2013. On October 15, 2013, Plaintiff People of the Virgin Islands (the "People") filed an Information charging

Defendant Hodge, Marley Saunders and Marco Michael Colon with multiple counts relating to the death of Mr. LeBlanc.<sup>1</sup>

The charges pending against Hodge include first and second degree murder, unlicensed use of a firearm, assault and attempted robbery. Info. (Oct. 15, 2013). On January 11, 2016, Hodge filed Defendant's Motion in *Limine* to Preclude Any Prior Bad Act Evidence Pertaining to Defendant Josiah Hodge (the "Motion in *Limine*"), noting that as of the date of filing, the People had not provided notice of their intent to introduce any such evidence and had not disclosed any alleged prior bad acts to the defense.<sup>2,3</sup> Two months later, on March 15, 2016, the People filed their Notice of Intent to Use 404(b) Evidence (the "Notice of Intent") at Hodge's trial in order to show motive, intent, plan, identity and lack of accident.<sup>4</sup> Per the Activity Report filed as an attachment to the Notice of Intent (the "Activity Report"), the People intend to call Nathaniel Washington ("Washington") to testify as to a series of prior crimes and bad acts in which he allegedly participated with Hodge. Further, the Activity Report suggests that the People intend to introduce information about Hodge's two prior co-defendants in this matter, as well as information obtained from Face Book pages. Hodge now asks the Court to preclude the People from introducing all the alleged

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<sup>1</sup> On September 10, 2015, Marley Saunders entered a guilty plea to two of the counts in the Information. On July 8, 2016, this Court granted People's Motion to Sever Defendant Josiah Hodge from Marco Colon, leaving Hodge as the sole defendant in the instant matter, although Marco Colon later pled guilty to two counts in the Information.

<sup>2</sup> The People were served with a Demand for Production on December 10, 2013, requesting disclosure of any such 404(b) evidence, but they did not respond to the request.

<sup>3</sup> At that time of the filing of Defendant's motion in *limine*, jury selection and trial were scheduled for March 14, 2016, but was continued and is now scheduled for May 26, 2018.

<sup>4</sup> In their Opposition, the People give no explanation for the delay in their filing and in fact reference the Notice of Intent in a manner that suggests that they are unaware of the filing of the Motion in *Limine*. Opp. 3.

prior bad act and 404(b) evidence at trial as (i) the Notice of Intent was filed after Hodge had already moved to preclude such evidence, (ii) the bulk of the 404(b) evidence included in the Activity Report relates to alleged acts and crimes committed by persons other than Hodge, and (iii) the remaining 404(b) evidence of alleged prior crimes and bad acts is being offered for an improper purpose and would be highly prejudicial.

### Legal Standard

V.I. R. Evid. 404(b) states as follows:

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is 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.

(2) Permitted Uses; Notice in a Criminal Case. Evidence of a crime, wrong, or other act may be admissible for other purposes, such as addressing issues, if actually contested in the case, concerning motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident — provided that the probative value of such proof, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.<sup>5,6</sup>

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<sup>5</sup> The parties briefed this matter pursuant to 404(b) of the Federal Rules of Evidence. However, the Virgin Islands Supreme Court, on January 18, 2017, adopted the Virgin Islands Rules of Evidence, effective as of March 31, 2017. *In re Adoption of Virgin Islands Rules of Evidence*, No. 2017-002, 2017 V.I. Supreme LEXIS 21, (V.I. Apr. 3, 2017). Therefore, the Court will analyze this matter under Rule 404(b) of the V.I. Rules of Evidence.

<sup>6</sup> Rule 404(b) V.I. R. of Evidence is slightly different to Rule 404(b) F.R.E. However, the difference is not critical to this analysis.

## Discussion

Hodge claims that the 404(b) prior bad acts evidence the People seek to introduce at trial is not relevant to the crimes charged in this matter. Further, Hodge claims that the potential probative value of the proposed evidence is outweighed by the potential for unfair prejudice that would result.

### I. The Notice Requirement Has Now Been Met

Hodge asserts that the People should be precluded from introducing the proposed 404(b) evidence because the Notice of Intent was filed two months *after* Hodge had moved to preclude such evidence.

V.I. R. Evid. 404(b)(2)(A) requires that the People provide “reasonable notice” of the nature of any crimes, wrongs or other acts evidence they intend to use at trial; V.I. R. Evid. 404(b)(2)(B) requires that such notice be given to the defendant before the trial, or during trial if the court allows. Here, the People were served with a Demand for Discovery in December 10, 2013 (the “Demand”), requesting disclosure of any prior or subsequent crime, wrong or other act evidence pertaining to Hodge. Mot. in *Limine* Ex. A. It is unclear why the People did not respond to this request. After waiting over a year with no response, Hodge filed the Motion in *Limine* to preclude the use of such evidence. Although the People ought to have responded to the Demand in a timely manner, the notice requirements in 404(b) have now been met through the subsequently-filed Notice of Intent.

## **II. The Evidence Regarding Prior Co-Defendants is Irrelevant.**

Hodge claims that the bulk of the evidence the People seek to use relates to alleged prior bad acts and crimes committed by Hodge's former codefendants and other persons. At the time that the People submitted the Notice of Intent, all three defendants were still attached to this matter and thus the People likely filed a blanket Notice and Activity Report. But Hodge is now the only Defendant. Therefore, the evidence related to the former codefendants is irrelevant and will not be allowed at trial.

## **III. The 404(b) Evidence the People Seek to Have Admitted is Being Offered for an Improper Purpose and Would Be Unfairly Prejudicial to Hodge.**

The People assert that the evidence in the Activity Report is being offered to show Hodge's motive, intent, plan, identity, and lack of accident and should therefore be admissible at trial under 404(b).

"[Rule 404(b)] reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is." *United States v. Caldwell*, 760 F.3d 267, 276, 2014 U.S. App. LEXIS 14174.<sup>7</sup> "Rule 404(b) is a rule of general exclusion, and carries with it 'no presumption of admissibility.'" *Id.* (quoting

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<sup>7</sup> The Court notes that *U.S. v. Caldwell* was interpreting the Federal Rules of Evidence and the Virgin Islands now has its own Rules of Evidence. Therefore, *U.S. v. Caldwell* is not binding. However, as Fed. R. Evid. 404(b) and V.I. R. Evid. 404(b) are very similar, we find this decision persuasive.

Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, at 731 (4th ed. 2013)).<sup>8</sup> “The ‘permitted uses’ of prior act evidence set forth in Rule 404(b)(2) are treated like exceptions to this rule of exclusion.” *Id.*

In *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988), the United States Supreme Court laid out four requirements to consider in evaluating whether evidence is properly admitted under Rule 404(b). Namely, (1) the evidence must be offered for a proper purpose, (2) the evidence must be relevant under the standards of Rule 402, (3) its probative value must not be substantially outweighed by its potential for unfair prejudice pursuant to Rule 403, and (4) where requested the court must instruct the jury to consider the evidence only for its limited admissible purpose.

*Tyson v. People of the Virgin Islands*, 59 V.I. 391, 423, 2013 V.I. Supreme LEXIS 38.<sup>9</sup>

The People propose putting Washington on the stand to testify to a series of crimes that he and Hodge allegedly committed together, including burglary, robbery and carjacking. The People also propose for Washington to testify as to Hodge’s alleged gang affiliation and plan to offer a Face Book page supposedly associated with Hodge as evidence of the purported gang involvement.

Evaluating the proposed 404(b) evidence while using *Huddleston* and *Tyson* as guides, the Court will first examine (i) whether the evidence is being offered for a proper purpose, and (ii) whether the evidence is relevant. At least one court has held that “[t]he first two considerations of the four-part analysis are met where the proffered evidence is ‘probative of a material issue other than character.’” *Id.* (quoting

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<sup>8</sup> See n. 7, above.

<sup>9</sup> See n. 7, above.

*United States v. Cross*, 308 F.3d 308, 320-21 (3d Cir. 2002)). “[T]he probative value of proposed evidence should meet at least two distinct requirements: ‘(1) [t]he evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action.’” *Morton v. People of the Virgin Islands*, 59 V.I. 660, 667, 2013 Supreme LEXIS 55 (quoting *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981) (citations omitted)). Here, the People’s proposed evidence is offered to prove that Josiah Hodge shot and killed Gregory LeBlanc. But, the proposed evidence does not connect Hodge with Mr. LeBlanc. Most of the alleged crimes involve burglary or robbery, none involve murder. The Court notes that Mr. LeBlanc’s murder may have been a robbery gone bad, but none of the proposed evidence shows a pattern of behavior that could serve to identify Hodge as LeBlanc’s shooter in some way.

The FaceBook page evidence also lacks connectivity to Mr. LeBlanc’s murder. It purportedly shows gang affiliation, but it is not probative of whether Hodge murdered Mr. LeBlanc. Instead, the Court finds the People’s proposed 404(b) FaceBook evidence would likely only establish character and a pattern of behavior, both of which are prohibited by 404(b). “Generally, if evidence of other bad acts or previous criminal activity is offered only to prove that a defendant has a propensity to commit crime, it must be excluded.” *Morton*, 59 V.I. 660, 666.

As propensity is not a proper purpose under 404(b), the evidence fails the first two prongs of the *Huddleston* test.

The Court also finds that if the proposed evidence were allowed at trial it would be highly and unfairly prejudicial. This is especially true of the Face Book evidence and gang-related testimony. "The Court . . . recognizes that evidence identifying a defendant as a member of a gang may be highly prejudicial." *People of the Virgin Islands v. Elmes*, 55 V.I. 342, 346 (V.I. Super. Ct. Aug. 30, 2011). As the evidence has no probative value and there is a high danger of unfair prejudice under Rule 403, the unfair prejudice outweighs the probative value. Consequently, the evidence also fails under the third *Huddleston* factor.

### Conclusion

The People have given proper notice of their intent to use 404(b) prior bad acts evidence, by filing the Notice of Intent.

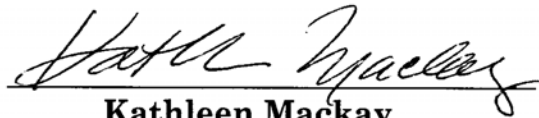
The proposed 404(b) prior bad acts evidence relating to Defendant Hodge's two prior co-defendants in this matter is irrelevant and is not admissible at trial.

The proposed 404(b) prior bad acts evidence relating to alleged prior crimes and bad acts committed by Defendant Hodge is being offered for an improper purpose and would be unfairly prejudicial. None of the prior bad acts connect Hodge to Mr. LeBlanc's murder; the prior bad acts do not show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Therefore, Defendant's Supplemental Motion in *Limine* To Preclude any 404(b) or Prior Bad Acts Evidence is granted. However, nothing herein shall be construed as prohibiting the People from introducing such evidence for impeachment purposes.

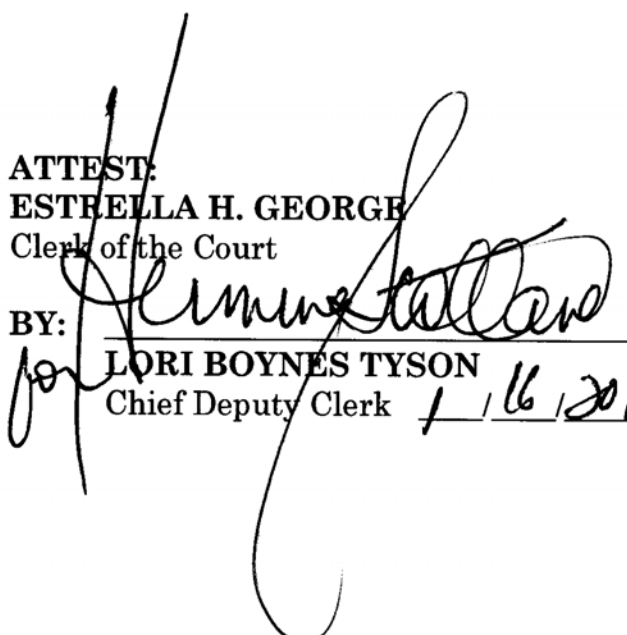
An Order consistent with this Memorandum Opinion will be entered.

DATED: January 16, 2018

  
**Kathleen Mackay**  
Judge of the Superior Court  
of the Virgin Islands

ATTEST:  
**ESTRELLA H. GEORGE**  
Clerk of the Court

BY:

  
**LORI BOYNES TYSON**

Chief Deputy Clerk

1 / 16 / 2018