

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO. ST-10-CR-179
	)	
JODY A. PENN,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

The People of the Virgin Islands move¹ to admit evidence pursuant to Fed. R. Evid. 404(b). For the following reasons, the People's motion will be denied.

ANALYSIS

In this case, Defendant is charged with the shooting death of Dion Henry that occurred on April 8, 2010. In case number ST-10-CR-206, Defendant has been charged with two counts of attempted murder for shooting at two individuals with an assault rifle on April 6, 2010. The People move to admit evidence of the earlier shooting for its probative value in this case.

Under Fed. R. Evid. 404(b), evidence of other crimes is not admissible as character evidence but may be admitted for proof of motive, opportunity, knowledge, or identity, among other reasons. Fed. R. Evid. 404(b) is counterbalanced by Fed. R. Evid. 403, which excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by

considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

In addition, many courts will only admit 404(b) evidence if the criminal defendant has put at issue his motive, knowledge, or intent. See *State v. White*, 2010 WL 5463331, at *2 (Mo. App. Ct. 2010); *U.S. v. Bastanipour*, 41 F.3d 1178, 1183 (7th Cir. 1994) (where defendant “did not dispute that he had the requisite intent ... it is more likely than not that the prior bad act evidence will be used by the prosecution to create the improper inference ‘that a person who violates the law at one time has a bad character and therefore violated the law at a different time’”) (citations omitted); *U.S. v. Ruiz-Estrada*, 312 F.3d 398, 403 (8th Cir. 2002) (“Rule 404(b) evidence is admissible to show knowledge and intent when a defendant places his state of mind at issue”); *U.S. v. Jenkins*, 345 F.3d 928, 937 (6th Cir. 2003) (prior bad acts not admissible to prove knowledge unless defendant places his mental state at issue or knowledge is not inferable from proof of possession itself).

Defendant’s defense is that he was at home at the time Dion Henry was shot. Defendant has not asserted that he accidentally shot Henry without the requisite intent for murder or that he was unaware of the type of damage a high-powered assault rifle could inflict. Rather, defense counsel stated that the defense “can stipulate that [Defendant] knows that a gun is dangerous.” (Defendant’s opposition, at page 5). Furthermore, the People admit that “evidence of the earlier shooting is very prejudicial.” (People’s motion, at page 6). Because the probative value of the earlier shooting is substantially outweighed

¹ The People filed a motion on September 3, 2010, and Defendant filed an opposition on September 13, 2010.

by its prejudicial effect and because Defendant has not placed his state of mind at issue, evidence of the April 6, 2010, incident will not be admitted as part of the People's case in chief to demonstrate that Defendant knew of the damage caused by an assault rifle, intended to kill Henry, or intended to possess an unlicensed firearm.

Similarly, evidence of the April 6, 2010, incident will not be admitted to demonstrate that Defendant had the opportunity to shoot Henry based on the use of a similar weapon in the earlier shooting. An assault rifle with 7.62x39mm rounds, which match the cartridges found at the location where Henry was shot, was "found in the apartment where the defendant was seen shortly before his arrest." (People's motion, at page 4). Moreover, one witness has testified that she heard Defendant unloading guns in the apartment shortly before his arrest. These facts demonstrate that Defendant had access to, or an opportunity to use, an assault rifle. At this point in the proceedings, admitting into evidence the circumstances of the April 6, 2010, incident would result in needless presentation of cumulative evidence, and the prejudicial effect would outweigh its probative value. As a result, the People's motion will be denied. An Order consistent with this Opinion shall follow.

Dated: January 31, 2011

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

by:

Estrella George

Acting Chief Deputy Clerk


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

CERTIFIED A TRUE COPY

Date:

2/1/11
Venetia H. Velazquez, Esq.
Clerk of the Court

By:


Court Clerk

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

PEOPLE OF THE VIRGIN ISLANDS,

Plaintiff,

vs.

JODY A. PENN,

Defendant.

CASE NO. ST-10-CR-179

ORDER

UPON CONSIDERATION of the premises, it is hereby

ORDERED that the People of the Virgin Islands' September 3, 2010, motion to admit evidence pursuant to Federal Rule of Evidence 404(b) is DENIED; and it is

ORDERED that a copy of this Order shall be directed to counsel of record.

Dated: January 31, 2011

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

by: [Signature]
Estrella George
Acting Chief Deputy Clerk

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

CERTIFIED A TRUE COPY

Date: 2/1/11
Venetia H. Velazquez, Esq.
Clerk of the Court
By: [Signature]
Court Clerk