Original

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES	:	**Case No.: 2011-CF1-15683**
v.	:	**Trial Date: March 25, 2013**
ALBRECHT MUTH	:	**Judge Russell F. Canan**

MOTION TO EXCLUDE EVIDENCE OF UNCHARGED MISCONDUCT

Albrecht Muth, by and through undersigned counsel, respectfully requests that the Court deny the government's Motion *In Limine* to Admit Evidence of Other Crimes by the Defendant and that any such evidence be excluded from trial. A hearing is requested on this motion.

In support of this Motion, counsel states the following:

1. Mr. Muth is charged by indictment with First Degree Murder with Aggravating Circumstances, in violation of D.C. Code §§ 22-2101, 22-2104.01(b)(4)(10).

2. Trial in this matter is scheduled for March 25, 2013.

3. On March 1, 2013, the government submitted a Motion *In Limine* to Admit Evidence of Other Crimes by the Defendant.

4. Mr. Muth objects to the admission of such uncharged misconduct as discussed below.

ARGUMENT

"It is a principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed

the crime charged." *Drew v. United States*, 331 F.2d 85, 89 (D.C. Cir. 1964). However, such evidence of other crimes may be admissible for other purposes, such as to prove motive, intent, absence of mistake or accident, a common scheme or plan, or identity. *See Frye v. United States*, 926 A.2d 1085, 1092 (D.C. 2005). Even if the evidence falls into one of the enumerated categories, there are other hurdles that it must overcome before being admissible. First, the evidence must be related to a genuine and material issue in the case. *Thompson v. United States*, 546 A.2d 414, 422-23 (D.C. 1988). Additionally, the evidence of other crimes must be relevant and probative as to the government's proffered exception. *Daniels v. United States*, 613 A.2d 342, 348 (D.C. 1992). Second, the court must determine whether the evidence of other uncharged misconduct rises to the level of "clear and convincing evidence." *See Daniels*, 613 A.2d at 346-47 (providing brief history of use of "clear and convincing" evidence by the Court of Appeals). Third, the evidence must be excluded "if the danger of unfair prejudice substantially outweighs its probative value." *Johnson v. United States*, 683 A.2d 1087, 1101 (D.C. 1996) (*en banc*).

Here, the government seeks to admit certain prior uncharged misconduct under the following exceptions: "(1) motive evidence; (2) proof of intent, absence of mistake or accident and identity; and (3) consciousness of guilt." Gov't Mot. 2. Citing numerous *Drew* exceptions has been called the "shotgun approach" and "its use by courts has been criticized as being analytically imprecise." *Thompson*, 613 A.2d at 420 (internal citations omitted). Therefore, the court should analyze each of the government's proposed exceptions carefully. Furthermore, the government does not cite, nor is the defense aware of, any authority to support the proposition that consciousness of guilt is a recognized *Drew* exception. The court should thus reject admission of the proffered evidence under a consciousness of guilt exception. Finally, the

enumerated exceptions are not genuine and material issue in the case, the evidence does not rise to the level of clear and convincing evidence, and the probative value is substantially outweighed by its prejudicial effects.

I. MOTIVE

"'In marital homicide cases any fact or circumstance relating to ill-feeling; ill-treatment; jealousy; prior assaults; personal violence; threats, or any similar conduct or attitude by the husband toward the wife are relevant to show motive and malice in such crimes.'" *Gezmu v. United States*, 375 A.2d 520, 522 (D.C. 1977), *quoting Romero v. People*, 170 Colo. 234, 460 P.2d 784, 788 (Colo. 1969).

The admissibility inquiry regarding purported motive evidence does not, however, end there. The court must still determine whether the evidence of other crimes is relevant and probative as to the government's proffered exception of motive. *Daniels*, 613 A.2d at 348. Next, the court must decide whether the evidence of other uncharged misconduct rises to the level of "clear and convincing evidence." *See id.* at 346-47. Finally, the evidence must be excluded "if the danger of unfair prejudice substantially outweighs its probative value." *Johnson v. United States*, 683 A.2d 1087, 1101 (D.C. 1996) (*en banc*).

Here, many of the proffered misconduct incidents are not relevant and probative of any motive for Mr. Muth. For example, the incident alleged in paragraph six of the government's motion does not identify the "old lady." Therefore, there is no evidence that it is relevant or probative of any purported motive Mr. Muth may have had toward the decedent. Similarly, the alleged request by Mr. Muth to void the prenuptial agreement is not probative or relevant to motive. Furthermore, as an example, the decedent's requests to get a divorce are not probative

or relevant to any motive, as there is no indication that Mr. Muth was even aware of these supposed requests.

Similarly, with the exception of the 1992 conviction, the evidence does not rise to the level of clear and convincing. Mr. Muth disputes the facts asserted in the government's motion. In case number 1992-M-10001, the decedent was the only witness to the alleged misconduct. The decedent opted to assert her marital privilege and the case was dismissed. The incident involving D.D., where Mr. Muth allegedly told D.D. that he wanted to push the decedent down in the desert and leave her for dead, leaves much to the imagination. Such a statement, without more, equally leads to a conclusion that it was an offhand remark or even spoken in jest. In the 2006 incident, the decedent was again the only witness to the alleged incident and again asserted marital privilege, resulting in the case being dismissed. In the drug dealer incident, the decedent is not identified as the subject of the alleged threats. In fact, the witness to that alleged incident claims that Mr. Muth was talking about his step-mother. For the witness described in paragraph seven of the government's motion, that witness did not witness any alleged incidents, other than Mr. Muth allegedly asking to get the prenuptial agreement voided and acting rudely toward the complainant. Furthermore, the complainant told the witness information that was untrue. Finally, there is no indication that Mr. Muth was aware of any of the purported interactions between the decedent and the witness in paragraph seven, such that it would create a motive for Mr. Muth. These incidents do not rise to the level of clear and convincing evidence of motive.

Finally, the evidence must be excluded because the danger of unfair prejudice substantially outweighs its probative value. Here, the risk is too high that the jury would view this evidence as propensity to commit the charged offense.

II. INTENT

The Court of Appeals has recognized that "the intent exception has the capacity to emasculate the other crimes rule." *Thompson*, 546 A.2d at 420. The Court has cautioned that it may be difficult or impossible for a jury to distinguish between "the intent to do an act and the predisposition to do it." *Id.* In *Thompson* the Court recognized four crucial issues with the intent exception:

> (1) whether, and to what degree, intent as an issue can be distinguished from predisposition to commit the crime; (2) whether intent is a genuine, material and important issue, rather than merely a formal one; (3) whether the trial judge made his decision whether or not to admit the evidence at an appropriate time, when information as to all pertinent factors was available; and (4) whether the trial judge's instructions to the jury could and did resolve any issue of prejudice.

Id.

First, the court must assess whether intent is distinguishable from predisposition. In this case, it is not. Intent is an element of nearly every crime, but allowing "admission of evidence a similar crime simply to prove the intent element of the offense on trial" would swallow the *Drew* rule. *Id.* None of the proffered evidence would be probative for the jury without the jury first having to make an inference of predisposition on the part of Mr. Muth.

Second, the court must consider "whether intent is a genuine, material and important issue, rather than merely a formal on." *Id.* Although specific intent is an element of the charged offense, that does not resolve the question of whether intent is at issue in the trial. Where a defendant denies participation in the charged offense, "intent is ordinarily not a material issue for

purposes of admitting other crimes evidence." *Id.* at 422, *citing United States v. Powell*, 587 F.2d 443, 448 (9th Cir. 1978). Whether intent is a material issue is not determined merely by the statutory definition of the offense, but rather by the facts of the case and the nature of the defense. *Id.*, *citing United States v. Silva*, 580 F.2d 144, 148 (5th Cir. 1978); *see also Campbell v. United States*, 450 A.2d 428, 431 (D.C. 1982) (holding that the state of mind exceptions - intent, motive and absence of mistake – are not material where the defendant denied having committed the charged act of threats to do bodily harm). Here, the government asserts that Mr. Muth is "certainly claiming that he is not the perpetrator." Gov't Mot. 11. Thus, by the government's own admission, intent is not a genuine, material and important issue in this case.

Third, the court must consider the proper timing for a decision whether to admit the proffered evidence. Because prior bad acts evidence should only be admitted once intent becomes a material issue in the case, the court is required to wait to until it has sufficient information whether intent is a material issue. *Thompson*, 546 A.2d at 423. Similarly, the court needs sufficient information to "assess both probative value and prejudicial effect," including the government's need for the evidence and the defense. *Id.*

Notwithstanding the third element of the *Thompson* factors, this Court should deny the government's request that the prior bad acts be admissible under the intent exception. To make use of the proffered evidence, the jury would have to make an inference of predisposition on the part of Mr. Muth. More importantly, intent, by the government's own admission, is not a genuine, material or important issue in this case.

III. IDENTITY

Evidence of uncharged misconduct is admissible under the identity exception "'if the evidence shows that the defendant has committed crimes so nearly identical in method that it is

likely the present offense has been committed by him.'" *Campbell v. United States*, 450 A.2d 428, 431 (D.C. 1982), *quoting Bridges v. United States*, 381 A.2d 1073, 1075 (D.C. App. 1977). To be admissible, the prior conduct and the charge offense must contain a "concurrence of unusual and distinctive facts . . . which shows with a reasonable probability that the same person committed the previous acts also committed this crime. . . ." *Campbell*, 450 A.2d at 431. The incidents which the government seeks to introduce do not contain such a concurrence of unusual and distinctive facts to make them admissible in this case under the identity exception.

Importantly, the Court of Appeals has cautioned against use of hearsay statements to prove prior conduct under the identity exception. *Green v. United States*, 580 A.2d 1325, 1328 (D.C. 1990); *see also Clark v. United States*, 412 A.2d 21, 28 (D.C. 1988) (reversing murder conviction where only evidence of prior bad acts under identity exception were through hearsay of decedent). Much of the government's proffered evidence here is strictly through hearsay statements and those acts should be excluded.

IV. TIMING OF THE ALLEGED MISCONDUCT

The court should also be mindful of the lapse in time between the alleged uncharged misconduct and the charged conduct in this case. Although the Court of Appeals has admitted prior misconduct when ten or more years have passed before the charged conduct,[1] the Court of Appeals has also cautioned that incidents closer in time are "far more revealing with regard to the motivation of the principals on the day of the crime." *Green*, 580 A.2d at 1328, n.3. Much of the alleged conduct that the government seeks to introduce occurred over twenty years ago. Therefore, the court should preclude the admissibility of misconduct so old as to render it unrevealing as to the charged conduct.

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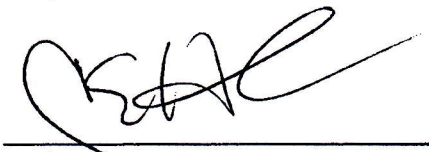
[1] *See e.g., Garibay v. United States*, 634 A.2d 946, 948 n.5.

V. HEARSAY

The court must also consider the admissibility of hearsay statements in determining whether the government can establish clear and convincing evidence of the uncharged misconduct. For many of the proffered incidents, the only sources are out of court statements of the decedent. Hearsay statements of the deceased complainant that only offer evidence of her state of mind are prejudicial and inadmissible if the defendant is claiming that the offense was committed by another perpetrator. *See Clark v. United States*, 412 A.2d 21, 25 (D.C. 1980); *Clark v. United States*, 593 A.2d 186, 192 (D.C. 1991). Notably, here the decedent state of mind is not at issue.

WHEREFORE, for the reasons set forth in this Motion, reasons presented at a hearing on this Motion, or for any other reasons that may appear to the Court, Mr. Muth respectfully requests that the Court deny the government's motion and exclude all proffered evidence of uncharged misconduct.

Respectfully submitted this 15th day of March 2013,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing has been dispatched for hand-delivery upon the Office of the United States Attorney, 555 Fourth Street, N.W., Washington, D.C., 20530, Attention: Glenn Kirschner and Erin Lyons, Esq., this 15th day of March 2015.

Craig E. Hickein