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Trial Tactics: Reverse Rule 404(b) Evidence: Parts I and II

Stephen A. Saltzburg
George Washington University Law School, SSALTZ@law.gwu.edu

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Reverse Rule 404(b) Evidence: Part I

Defendants have the same right to offer Rule 404(b) evidence as prosecutors, and they are not required to give pretrial notice under the Federal Rules of Evidence. When defendants offer this evidence, they attempt to prove that someone else is guilty of the crime attributed to them. This often is referred to as reverse Rule 404(b) evidence. Some defense evidence will be admitted—indeed the Confrontation Clause or Compulsory Process Clause may require admission in some cases—but not all defense evidence will be admitted. The issue is where to draw the line between admissible and inadmissible evidence. Two recent Rule 404(b) cases help to provide an answer. In the first case, the court held that the defendant had a constitutional right to explore another person’s possible guilt. In the second case, the court found that the evidence was irrelevant and appropriately excluded. This column analyzes the first case. The next column looks at the second.

United States v. Montelongo

In United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005), two defendants were convicted of possessing with intent to distribute more than 50 kilograms of marijuana; one was convicted of conspiracy to possess the marijuana. They complained on appeal that the trial judge erroneously excluded reverse Rule 404(b) evidence.

Victor Montelongo, Jr., picked up the tractor portion of a semitrailer truck from Gilbert Gomez, Jr. Montelongo and codriver Carmen McCalvin were scheduled to drive the loaded truck from New Mexico to Michigan. On the day of the trip, McCalvin’s husband, Ronald McCalvin, took his wife’s place because he did not want her driving with another man.

The trip started with Montelongo as the driver. After 30 minutes, Montelongo said he was tired and McCalvin took over while Montelongo slept in the sleeping compartment. When the truck arrived at a border patrol checkpoint, McCalvin blew cigarette smoke in the patrol officer’s face. Combined with the strong scent of orange air freshener, the officer concluded the two scents were attempts to mask the smell of narcotics. The officer asked McCalvin whether he had a codriver; McCalvin said he did and nervously hit the curtain behind which Montelongo was sleeping. Montelongo stuck his head out, but kept the rest of his body concealed. The officer requested and obtained permission from McCalvin to do a canine search. The dog alerted to the area underneath the mattress where Montelongo was sleeping. McCalvin responded, saying, “Oh my God. This isn’t happening to me.” Officers saw cellophane-wrapped bundles when they looked in a hole under the mattress and removed the mattress rack with a socket wrench that was in the cab. They found 25 bundles of marijuana contained in duffle bags, and arrested Montelongo and McCalvin.

Reverse Rule 404(b) evidence

Montelongo and McCalvin defended themselves using the theory that they did not know the marijuana was in the cab and that it belonged to Gomez. The defendants were aware that earlier two other truck drivers had been arrested under similar circumstances. These drivers had picked up a truck from Gomez in which police later found marijuana hidden in the sleeping compartment of the cab. These two drivers (Brown and Hernandez) did not claim, however, that they were unaware of the marijuana. They claimed that they found the 34 pounds of marijuana lying on the side of the road and hid it themselves in the sleeping compartment.

Fearing they would be convicted of participating in an extensive drug trafficking conspiracy, Montelongo and McCalvin moved before trial to exclude the evidence from the earlier incident. The trial judge granted the motion. But, by the time of trial, the defendants realized that they needed to use the other incident to bolster their claim that they had no knowledge of the marijuana and to point the finger at Gomez as the mastermind behind both incidents. Thus, after Gomez testified for the government that there was no marijuana in the cab when Montelongo picked it up, the defendants sought to cross-examine Gomez about the other incident in order to back their contention that Gomez was operating a drug ring of which the defendants were unaware.
The trial judge excluded the evidence and reasoned as follows:

I am not going to allow any questioning of Mr. Gomez relating to the prior incident. I think that this matter is covered by [Fed. R. Evid.] 404(b) and 608(b). And I don’t—each of which, relate to specific instances of conduct on the part of the person being questioned. The 404(b) relates to other crimes, wrongs, or acts committed by the person being questioned; 608 relates to the specific instances of the conduct of a witness—specific instances of the conduct of the witness, of Mr. Gomez, for the purpose of attacking or supporting his credibility.

And what particular instances would we be asking Mr. Gomez about? He wasn’t driving the truck. He wasn’t charged relating to possession in that instance. And what I’d be allowing you to do is put before the jury just enough to taint Mr. Gomez, when the law enforcement authorities didn’t find any wrongdoing on his part. Apparently, as I’ve reviewed the Discovery that was provided by the Government to the Defense, the truck was returned to him and—without any prosecution.

Applying, apparently, the trial judge concluded that the defense could not question Gomez about the other incident because he was not charged with or convicted of participation in that incident. Referring to the evidence the defense sought to elicit as “reverse 404(b) evidence,” the court of appeals concluded that its admissibility depends on a “straightforward balancing of the evidence’s probative value against considerations such as undue waste of time and confusion of the issues.” (Id., quoted in United States v. Stevens, 935 F.2d 1380, 1404-05 (3d Cir. 1991).)

The court of appeals agreed with Montelongo and McCalvin that the cross-examination of Gomez about the other incident was an attempt to elicit relevant evidence: “There are several similarities between the two crimes, and a jury could disbelieve the somewhat incredible story told by Mr. Brown and Mr. Hernandez—that they found thirty-four pounds of marijuana by the side of the road—concluding instead that Mr. Gomez himself had packed it in the semi-truck.” (420 F.3d at 1173.) The court explained that it did not matter that the drivers in the other incident did not tie the marijuana to Gomez: “Although Messrs. Brown and Hernandez maintained that they simply found the thirty-four pounds of marijuana by the side of the road, it would not be unreasonable to conclude that such similarities are not coincidental, which belies Mr. Gomez’s claim that he had no knowledge of the marijuana in this case.” (Id. at 1175.)

The court also found that the probative value of the evidence was not substantially outweighed by the risk of confusing the jury or wasting time: “The Defendants only sought to cross-examine one witness on this one discrete issue. Nor was there any real danger that the similarities between the two crimes would have ‘distracted the jurors’ attention from the real issues in the case.’ To the contrary, it would have highlighted the central issue at trial—namely, which man was responsible for the contraband.” (Id., quoted in United States v. Stevens, 935 F.2d at 1406.)

Having ruled that the evidence was admissible under Rule 404(b), the court found that Rule 608(b) was inapplicable. The defense did not attempt to cross-examine Gomez in order to attack his character for truthfulness, but attempted to prove that Gomez was guilty of the crime charged.

Constitutional error

The court did not limit its holding to the Rules of Evidence. It held that the trial judge’s refusal to permit the cross-examination of Gomez violated the defendants’ confrontation rights, notwithstanding the discretion afforded trial judges to place reasonable limits on cross-examination:

This error, we conclude, undermined the protections afforded by the Sixth Amendment’s Confrontation Clause. Of course, we certainly recognize that “trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” Delaware v. Van Arsdall, 475 U.S. 673, 679, 89 L. Ed. 2d 674, 106 S. Ct. 1431 (1986). Nonetheless, we underscore that a constitutional violation occurs when “the defendant is prohibited from engaging in ‘otherwise appropriate cross-examination’ ” that, as a result, precludes him from eliciting information from which jurors could draw vital inferences in his favor. Cf. United States v. Ellzey, 936 F.2d 492, 496 (10th Cir. 1991). Put another way, “a defendant’s right to confrontation may be vio-
lated if the trial court precludes an entire relevant area of cross-examination.” *Parker v. Scott*, 394 F.3d 1302, 1316 (10th Cir. 2005) (quotations and alterations omitted). We find this to be the case here.

**Prejudicial or harmless?**

The government argued that any error was harmless. It contended that there was substantial evidence of guilt. With respect to McCalvin, the government relied upon his blowing cigarette smoke in the patrol officer’s face and the strong smell of the air freshener. It also relied upon his nervous behavior and his outcry when the canine alerted to the marijuana. With respect to Montelongo, the government focused on his control over the truck, and his request that McCalvin drive as they approached the checkpoint. The government also relied upon his delay in exiting the cab of the truck after McCalvin consented to a canine search. With respect to both men, the government relied on the presence of a socket wrench in the truck that perfectly fit the mattress rack bolts. Most of this evidence was undisputed. The government also relied upon one disputed piece of evidence: whether Montelongo made a statement in a detention center that McCalvin did not know what was in the sleeping compartment.

The court of appeals was unpersuaded. In the end, it reasoned that “the prior incident could be viewed as compelling evidence that Mr. Gomez, and only Mr. Gomez, hid and knew about the marijuana in the truck driven by Mr. Montelongo and Mr. McCalvin.” (420 F.3d at 1176.) The court noted that the jury acquitted Montelongo of conspiracy while convicting McCalvin, and concluded that this was not a case of overwhelming evidence of guilt.

**Four possible theories**

There were three plausible explanations for the marijuana in the cab. First, it was possible that Montelongo and McCalvin put it there, as the government charged. Second, it was possible that Gomez hid it there without the knowledge of either defendant. Third, it was possible that Gomez hid it there and one or both defendants conspired with Gomez. The government contended at trial that the first explanation was correct and relied upon Gomez to prove it. The defendants contended that Gomez was solely responsible, and they were innocent. It is understandable why the government chose not to rely on the third theory. It would have required the government to call Gomez a liar, and he was a key witness without whom the government might not be able to prove guilt beyond a reasonable doubt. Thus, this was a case in which both sides contended it was all or nothing—i.e., either the defendants were lying or Gomez was lying.

**The important factors**

An examination of the court’s reasoning reveals that four factors led the court to conclude that it was not only error, but constitutional error, to prohibit the cross-examination of Gomez. First, and of great importance, “evidence of the prior incident tended to negate the Defendants’ guilt, and, as such, was directly—as opposed to merely “marginally”—relevant.” *(Id.)* Second, and also of great importance, the evidence tended to show the prior incident involved “nearly identical conduct,” and thus “was not merely coincidental,” and “could be viewed as compelling evidence.” *(Id.)* Third, the evidence “was neither cumulative nor repetitive.” *(Id.)* Fourth, “the Defendants had no improper motive in seeking it.” *(Id.)*

**Conclusion**

The case strongly suggests that reverse 404(b) evidence is most likely to be admitted, and perhaps even constitutionally required to be admitted, when a defendant has a plausible alternative explanation for criminal conduct and the evidence is essential to develop that explanation. The case for admissibility is strengthened with the defense theory is clear and understandable, and the evidence plainly fits the theory.

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Reverse Rule 404(b) Evidence, Part 2

The facts in *United States v. Seals*, 419 F.3d 600 (7th Cir. 2005), illustrate a case in which reverse Rule 404(b) evidence was deemed inadmissible. Edward Seals and Earnest D’Marco Johnson were each convicted of one count of aggravated bank robbery and of using a firearm in a crime of violence. The two defendants were alleged to have been part of a team of four masked, African-American men in camouflage fatigues who robbed the credit union in Cahokia, Illinois. The other two men, Jonah Paschal and Rasheed Townsend, were arrested, gave proffers admitting their involvement and explaining the planning and preparation for the robbery, and identified their fellow robbers as Johnson and Seals.

At trial, both cooperating witnesses testified as to how the robbery was planned and executed. Both witnesses also identified Seals and Johnson, whom they had known for several years. On the stand, Paschal detailed the planning, execution, and aftermath of the robbery. He also testified that, while he was being held in a cell at the courthouse, Seals threatened to kill him or his family if he testified. Three other inmates testified at trial that they overheard the threat, and all three identified Seals as the person who made it. Townsend’s testimony at trial supported Paschal’s version of the events.

In addition, Paschal’s cousin, who shared a house with him, testified that he told her that the four intended to rob a bank, and, when he returned to the house after the robbery, he showed her his share of the money. Two used car dealers testified that the defendants paid cash for cars in the weeks following the robbery. Finally, a barber who cut Johnson’s hair testified that Johnson passed him notes that outlined a false version of the events the day of the robbery and suggested that he “just keep it plain and simple and don’t remember too much.”

These notes were admitted into evidence, and a handwriting expert testified Johnson wrote them.

Reverse Rule 404(b) evidence

About a month before the trial, the district court ordered the government to produce police reports concerning a bank robbery in New Baden, Illinois, 31 miles from Cahokia that took place two weeks after the charged robbery. Seals’s counsel claimed that the defense needed the reports to determine whether a similar modus operandi existed between the two robberies. The New Baden bank was robbed by five African-American men wearing disguises—one wore a woman’s dress and another was dressed as a construction worker. The robbers, armed with handguns, directed a bank employee, at gunpoint, to hand over cash. The participants in the New Baden robbery were caught and convicted.

The government produced the reports, but moved in limine to exclude the evidence from trial. The district court granted the government’s motion, ruling that there was not enough similarity between the two robberies to make the New Baden evidence relevant and that it would confuse the jury. The district court reasoned as follows:

One of the prongs in the *Huddleston* (*Huddleston v. United States*, 485 U.S. 691 (1988)) case requires a similarity of the prior bad act such that it would be fair to use it in the instant case. It seems to me that that same logic applies in determining whether or not the defense can bring out a separate crime committed by separate individuals to allege that those individuals are the ones who committed the instant crime. *I am going to hold the defense to the same standard that I held the Government*, and that is there has to be enough similarity that the jury is not confused and that the evidence becomes relevant.

(419 F.3d at 606-07.)

The court of appeals agreed with the district court’s result, but not with its reasoning.

The standard for Reverse Rule 404(b) evidence

The court of appeals noted that, although both prosecutors and defendants may offer Rule 404(b) evidence and all such evidence is subject to Rule
Applying the standard

The court of appeals found that the defense evidence was irrelevant and therefore inadmissible. The court reasoned that the only similarities between the two robberies were “generic,” so that evidence of the other robbery did not support an inference that the robbers of the other bank committed the robbery attributed to the defendants. The court reasoned that “[m]any robbers disguise their identities, carry firearms, and use a stolen vehicle in their getaway.” (419 F.3d at 607.) It also found five specific differences between the two robberies. First, the number of robbers differed—five in New Baden and four in Cahokia. Second, although disguises were used in both robberies, they were not the same. Both robberies involved a man disguised as a woman, but in Cahokia the robber wore a blond wig and fatigues whereas in New Baden the robber wore a woman’s dress. Third, the guns used in the two robberies were different. Fourth, the robbers’ modus operandi was different in the two robberies. The Cahokia robbers vaulted over the teller counter to retrieve the money themselves, whereas the New Baden robbers waited on the customer side of the counter for bank employees to bring the money to them. Fifth, the similarities in time and place were not great; although the robberies occurred two weeks and 31 miles apart, “[t]hirty-one miles might not appear very far on a globe, but in practical terms these two robberies occurred in separate counties.” (Id.)

The factors

A comparison of this case with United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005), is instructive. The factors favoring admissibility in Montelongo were these: First, “evidence of the prior incident tended to negate the Defendants’ guilt, and, as such, was directly—as opposed to merely “marginally”—relevant.” Second, the evidence tended to show the prior incident involved “nearly identical conduct,” and thus “was not merely coincidental,” and “could be viewed as compelling evidence.” Third, the evidence “was neither cumulative nor repetitive.” Fourth, “the Defendants had no improper motive in seeking it.”

Applying these same factors to Seals, the case for admissibility is weak. The first two factors that were important in Montelongo are closely related in Seals. The New Baden incident only tended to negate the defendants’ guilt in the Cahokia robbery if it established that the New Baden robbers must have committed both crimes. The lack of similarity between the two robberies undermined the defense claim that there was a single modus operandi and thus there must have been only one group of robbers. The conduct was not nearly identical and could hardly be viewed as compelling. As for the third factor, although evidence of the New Baden incident would not have been cumulative or repetitive, it would have involved a substantial amount of trial time. After all, the five New Baden robbers were all convicted. Presumably, they would have had to be produced as witnesses along with the investigating officers and possibly other witnesses. This would have involved a trial within a trial. The burden this would have placed on the prosecution was sufficient to raise a question about the defendants’ motivation in seeking the evidence. Thus the fourth factor also cut against the defendants.

There are two other big differences between Montelongo and Seals. In Montelongo, the defense evidence, if believed, explained how the defendants might have been present in a truck containing marijuana without knowing the drug was present. In Seals, the reverse Rule 404(b) evidence could not explain the substantial evidence that existed tying the defendants to the crime charged. It might well be the case that, in doing Rule 403 balancing, a trial judge inevitably will look to see whether there is defense evidence tending to negate the prosecution’s evidence tying a defendant to a charged crime. If there is no such evidence, reverse Rule 404(b) evidence may appear to be less important.

Second, in Montelongo, the defendants and the truck owner denied knowing anything about the marijuana found in the owner’s truck. It was plausible that the owner was lying, just as it was plausible that the defendants were lying. The jury had to choose between the competing versions, and therefore evidence that might have tied the owner to other marijuana was particularly important. In Seals, the five men who committed the New Baden
robery were all convicted. So, there was almost no chance that the two cooperating witnesses in the Cahokia robbery, Paschal and Townsend, were involved in New Baden. If they were not involved in New Baden, then there was zero probability that the same group committed both robberies.

Although there are no bright lines in Rule 403 balancing, it seems reasonable to assume that reverse Rule 404(b) evidence will be more probative in cases like Montelongo when there are no government witnesses who participated in the alleged crime with a defendant than in cases like Seals where such witnesses exist and are cooperating with the government.

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