

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) Case No. 05-00344-01/02-CR-W-ODS
)
 GARY EYE and)
 STEVEN SANDSTROM,)
)
 Defendants.)

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTIONS IN LIMINE**

Pending are several motions in limine filed by Defendants. The motions are granted in part and denied in part. The parties are reminded that the rulings in this order are interlocutory. This observation is particularly important in this case because several of Defendant's arguments may have merit depending upon developments during trial, so Defendants are not precluded from re-asserting these issues if circumstances warrant.

Evidence prohibited by this Order may not be mentioned or discussed in the jury's presence. However, the Government is free to discuss the issue outside of the jury's hearing if counsel believes circumstances warrant reconsideration of the Court's interlocutory ruling.

1. Defendant Eye's motion to preclude evidence of any plea agreements with Government witnesses (Doc. # 227) is granted in part. At issue are witnesses who were involved in the crimes at issue in this case. The fact that such witnesses entered a written plea agreement is admissible, as are the details describing any benefits the witnesses could expect from pleading guilty. Obviously, the witness can testify about his or her actions. However, the plea agreement may contain information that should not be seen by the jury, such as details about the crime. While the witness can testify about those details, the factual basis for the plea as set forth in the written plea agreement should not be seen by the jury. In short, the witness can testify about the

plea agreement, but the plea agreement should not be displayed to the jury absent prior approval from the Court – and the granting of such approval will likely depend on the extent to which the Government has redacted the factual basis from the plea agreement.

2. Defendants' request¹ to bar Government witnesses from testifying as to the meaning of coded messages is granted. See United States v. Peoples, 250 F.3d 630, 639-43 (8th Cir. 2001). However, this does not preclude the Government from offering testimony from participants in the conversations from testifying about their understanding. It also does not prevent any other witness how somehow has personal knowledge about the meaning of the terms from testifying, but the Government should identify the witnesses in this category on or before April 4, 2008.

3. Defendants' request² to limit evidence about their views towards racial minorities is granted in part. No witness will be permitted to opine that either Defendant is a "racist." However, Defendants' motivations are an issue in this trial, so witnesses will be permitted to provide factual testimony, including testimony about Defendants' actions and statements, that reflect Defendants' views towards racial minorities.

4. Defendants' separate motions (Doc. # 263 & Doc. # 270) to limit evidence of their involvement in drugs, gangs, and other crimes is granted. The Government declares that it does not intend to introduce evidence of Defendants' involvement in gangs. The Government indicates it intends to introduce evidence of Defendants' drug use and uncharged criminal activity only in the time period surrounding the victim's death. However, evidence of Defendants' drug use "around" the time of the charged crimes presents a serious risk of unfair prejudice. See Fed. R. Evid. 403. The Government argues the temporal connection is sufficient to justify introduction of the evidence under Rule 404, but the rule is not so broad. "[B]ad acts that form the factual setting of the

¹The original motion (Doc. # 261) was filed by Eye. Defendant Sandstrom's motion to join in that motion (Doc. # 268) is granted.

²The original motion (Doc. # 262) was filed by Eye. Sandstrom's motion to join in that motion (Doc. # 269) is granted.

crime in issue . . . do not come within [Rule 404's] ambit at all. This is because such acts are not truly separate bad acts that show propensity, but are intrinsic evidence which is inextricably intertwined with the crime charged.” United States v. Heidebur, 122 F.3d 577, 579 (8th Cir. 1997) (internal quotations omitted). Close proximity in time does not necessarily make the events “inextricably intertwined;” rather, it is the factual connection between the events. When the evidence of other crimes or acts is so connected to the ones on trial such that proof of the former encompasses the charged crimes, explains the circumstances, or tends to prove any of the elements of the charged crimes, the necessary relationship exists. United States v. Switnon, 75 F.3d 374, 378 (8th Cir. 1996). For instance, in a case where the defendants are charged with kidnaping, evidence that the defendants also killed the victim forms an integral part of the kidnaping. Heidebur, 122 F.3d at 579 (citing United States v. Williams, 95 F.3d 723 (8th Cir. 1996)). However, evidence the defendant molested his stepdaughter is not connected to the crime of possessing sexually explicit photographs of his stepdaughter. Id. at 580. In this case, Defendants’ drug use prior to the assaults and murder is not intertwined with the charged crimes, does not prove any of the elements of the crimes, and does not form part of the crimes. Drug use is part of the circumstances, but is not so “explanatory” that a strong connection is created.

In any event, it really does not matter whether Rule 404 would permit this evidence to be introduced. “This is so, because both Rule 404(b) evidence and evidence beyond the rule’s scope are subject to the dictates of Rule 403, which requires that the probative value of evidence is not substantially outweighed by the danger of unfair prejudice.” United States v. Adams, 401 F.3d 886, 899 (8th Cir.), cert. denied, 546 U.S. 966 (2005). The Court concludes the risk of unfair prejudice outweighs the probative value of this evidence, so it shall be excluded.

The Court is not certain what other crimes or acts the Government may wish to introduce at trial. In an abundance of caution, such evidence will not be mentioned in the jury’s presence until the matter has been discussed outside of the jury’s hearing. This provision does not apply to evidence of the crimes or to evidence of Defendant’s post-crime conduct (such as threatening witnesses).

5. Defendant Eye's motion to bar evidence he threatened witnesses (Doc. # 271) is denied. The Government contends this evidence is admissible to show consciousness of guilt. Eye relies on the Eighth Circuit's decision in United States v. Weir, but the threats in that case were not used by the Government to demonstrate consciousness of guilt. As the Court of Appeals explained, "the Assistant United States Attorney's statements in closing argument that appellants were dangerous, ruthless people and that a verdict of acquittal would turn the streets over to them appear to be calculated to enhance the effect of the 'other crimes' evidence on the jury in suggesting an improper basis for a verdict of guilty, and these statements contribute to the balance of unfair prejudice resulting from the admission of the 'other crimes' evidence." 575 F.3d 668, 671 (8th Cir. 1978). Later cases clarify that Weir does not establish a categorical bar on the use of threats as evidence of consciousness of guilt. E.g., United States v. DeAngelo, 13 F.3d 1228, 1232 (8th Cir.), cert. denied, 512 U.S. 1224 (1994) ("We have ruled a number of times post-*Weir* that evidence of death threats against witnesses or other parties cooperating with the government is generally admissible against a criminal defendant to show consciousness of guilt of the crime charged.").

The Government plans to introduce evidence Eye expressed a desire to kill witnesses he believed were cooperating with the Government's investigation and prosecution. So long as this evidence is used for its proper purpose and the Government does not invite the jury to convict Eye because the evidence demonstrates he is a violent or dangerous person, the evidence is admissible.

6. Defendant Eye's motion (Doc. # 275) to bar any statements made by co-conspirators is denied. Eye first focuses on evidence that would be admissible under Rule 801 of the Federal Rules of Evidence, which excludes from the definition of hearsay "statement[s] by a coconspirator of a party during the course and in furtherance of the conspiracy." By its terms, the provision applies only if the Government is able to prove a conspiracy exists, but for these purposes the conspiracy's existence need only be proved by the preponderance of the evidence. E.g., United States v. Mahasin, 362 F.3d 1071, 1084 (8th Cir. 2004). Such evidence may be conditionally admitted subject

to a later determination of whether the Government has satisfied its burden. United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978).

The only reason offered not to conditionally admit the evidence is that the Government might fail to prove the necessary foundation, thereby causing a mistrial. Eye does not suggest anything in particular that would make this risk different than that which exists in every case in which the Bell procedure is employed. Therefore, the Court intends to conditionally admit the evidence, and the Government will be allowed to refer to it during its opening statement.

The motion also addresses post-conspiracy statements. Such statements implicate the Supreme Court's holding in Bruton v. United States, 391 U.S. 123 (1968), where the Court held that in a joint trial, a defendant's right to confrontation is denied if statements from a non-testifying co-defendant inculcating him are introduced during trial. Thus, any of Sandstrom's post-arrest statements implicating Eye could not be admitted against Eye unless Sandstrom testifies. However, "there is no Confrontation Clause violation when the defendant's name and existence are excised from the statement and limiting instructions are given, even though the confession might implicate the defendant when linked to other evidence." United States v. Williams, 429 F.3d 767, 772-73 (8th Cir. 2005).³

Eye argues there is no way to redact or alter Sandstrom's statements in a manner that will satisfy Bruton, but the Record does not permit the Court to agree with this categorical conclusion. Therefore, the motion to bar any such evidence cannot be granted. However, to aid the parties and the Court in any future consideration of this issue, the Government is directed to provide Defendants with copies of any statements it intends to use at trial that have been redacted in an attempt to satisfy Bruton. This should be done on or before April 4, 2008.

7. Defendant Eye's motion (Doc. # 276) to prohibit reference to the first phase of the trial as "the guilt phase" is granted. The risk of prejudice is slight, particularly given

³The Court of Appeals discussed how to evaluate efforts to "Brutonize" a statement in United States v. Logan, 210 F.3d 820 (8th Cir.) (en banc), cert. denied, 531 U.S. 1053 (2000).

that the jury will be instructed the Defendants are presumed innocent unless and until they are proved guilty beyond a reasonable doubt. As minimal as the risk of prejudice is, however, the need or value in referring to the proceeding as the “guilt phase” is even less. Therefore, the parties (and the Court) should not refer to the first phase in this manner. It is probably best to refer to it as the “first phase.”

The Court acknowledges the common use of the term “guilt phase” by lawyers and judges. Consequently, and in light of the minimal prejudice involved, the Court is unlikely to grant a mistrial because the prohibited term is used on a few occasions. However, the Court encourages everyone involved to be mindful of the preference stated herein.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: March 17, 2008