

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
 v.) CRIMINAL NO. 92-10369-2
)
 THOMAS A. SHAY)

MEMORANDUM OF LAW IN SUPPORT OF GOVERNMENT'S MOTION
IN LIMINE TO ADMIT EVIDENCE OF 1986 BOMBING

I. INTRODUCTION

The defendant Thomas A. Shay ("Shay Jr.") is charged along with Alfred W. Trenkler ("Trenkler") with, among other crimes, conspiracy to receive explosives having knowledge and intent that the explosives would be used to kill, injure or intimidate another person. As a practical matter, in order to prove the charged offense, the government will be required to prove at trial that one of the conspirators, either Shay Jr. or Trenkler,¹ had the knowledge, skill, ability and experience to build an explosive device, and that the person having this background and experience -- namely Trenkler -- was in fact a member of the charged conspiracy.

By the accompanying motion, the government seeks a ruling from the Court in limine allowing it to offer evidence, during the upcoming trial of Shay Jr., concerning Trenkler's design, construction and detonation of an explosive device in 1986, the nature and circumstances of which are remarkably similar to the

¹ The indictment charges a two-person conspiracy. It does not charge the existence of any other "known or unknown" conspirators. See Indictment, Count One.

device which exploded in Roslindale on October 28, 1991, killing Boston Police Officer Jeremiah Hurley. As further detailed below, the government is prepared to prove at trial:

1. That Trenkler designed, built and detonated an explosive device in September, 1986 containing substantially similar electronic components to those present in the 1991 device (i.e. remote-controlled, circular speaker magnet, toggle switch assembly, batteries, tape etc.);
2. That Trenkler utilized a distinctive modus operandi in 1986, similar to that involved here (i.e. product of conspiracy, device built by Trenkler for another, Trenkler used others to acquire components for him, device attached to vehicle by means of speaker magnet etc.);
3. That a computer-based analysis of over 14,000 bombings and attempted bombings occurring nationwide over a 12-year period (1979-1991) indicates that when certain features are "queried" or compared -- namely (1) bombings and attempted bombings, (2) remote control, (3) toggle switch, (4) cars and trucks, (5) affixed by circular magnet to undercarriage, (6) duct tape and (7) soldering wires -- only two explosive devices from the entire 12-year nationwide computer database appear: the 1986 device and the 1991 device.

Kline must address this. →

NOT ID

This "signature" type evidence is admissible under Fed. R. Evid. 404(b) to prove "identity", "knowledge", and "preparation", as well as for other permissible purposes consistent with the rule. United States v. Williams, 985 F.2d 634, 637 (1st Cir. 1993); United States v. Ingraham, 832 F.2d 229, 231 (1st Cir. 1987). This evidence, which goes directly to the very formation and existence of the charged conspiracy -- an issue common to both Shay Jr. and Trenkler -- is properly admitted in the severed trial involving Shay Jr. See United States v. Passarella, 788 F.2d 377, 382-83 (6th Cir. 1986).

*NOT EXIS
- too often
- not intent
etc.*

In short, and as will be detailed further below, the proffered evidence involving Trenkler's design, construction and detonation of a strikingly similar explosive device in 1986, reflecting a distinctive modus operandi, is a critically important piece of evidence which is highly probative of the formation and existence of the conspiracy charged in Count One, the membership of that conspiracy, and the very nature of the unlawful agreement.²

II. SUMMARY OF MATERIAL FACTS

A. Summary of Evidence Relating to the 1991 Bombing

At trial, the government will adduce evidence from both fact and expert witnesses explaining the design and construction of the 1991 device and the circumstances leading up to its detonation. More particularly, the government's evidence will establish the following with the respect to the 1991 Bombing:

At approximately noon on Monday, October 28, 1991, an explosion took place in the driveway of 39 Eastbourne Street, Roslindale, Massachusetts, a residential neighborhood. The source of the explosion was determined to be an improvised device which among other things, featured a radio signal receiver powered by four (4) "AA" batteries (the "1991 device"). When activated by a remote control (transmitter) unit, the receiver

² The government is prepared to demonstrate, at the appropriate time, that this evidence concerning the 1986 bombing is clearly admissible against Trenkler under Rule 404(b) in his severed trial. The government reserves its right to file a further motion, at a later date, outlining the various bases for admissibility of this evidence against Trenkler.

46 9V BATS

would activate a server motor which, in turn, would "throw" a single-throw toggle switch. The 1991 device was designed so that, when thrown, the toggle switch would close an electrical circuit allowing energy to flow, in turn initiating detonation of the explosive material. The ends of several of the wires used within the 1991 device were soldered when attached, rather than simply clipped or twisted together. Certain of the materials used in the device were consistent with those appearing on an October 18, 1991 receipt from Radio Shack, confirming sale of these items to one "SAHY JYT".³ Shay Jr. has publicly admitted having "helped purchase" certain electronic equipment (which items Shay Jr. claims that Trenkler was going to use in building "an antenna") used in the 1991 device.⁴ Among the items which

³ Dwayne Armbrister, then a store clerk at the 197 Massachusetts Ave. Radio Shack (across the street from the Christian Science Broadcast Center, where Trenkler then had a project ongoing), will testify that Shay Jr. was the customer who appeared in his store on October 18, 1991 and purchased those materials appearing on the subject receipt.

⁴ Shay Jr.'s admissions in this respect are contained within that brief portion of the Channel 56 videotaped interview (conducted with Shay Jr. in October, 1992, at the Plymouth County House of Correction) which was aired on December 16, 1992. On that evening, Channel 56 showed the following colloquy taking place between Shay Jr. and Reporter Karen Marinella:

Shay Jr.: I am guilty of knowing --
ah -- who built the bomb after
the fact. I did not know
anything about the bomb or
explosives in this case at any
time before October 28 at 10:00 a.m.
Not one piece of information . . .

Question

(continued...)

Kline: IS THIS FALSE?
Kline must address

NO SOLDER

THE WIRE

I did not admit this & it's well.

Shay Jr. purchased ten days before the Roslindale explosion were a toggle switch, a "AA" battery holder and a small lamp (two to a package), capable of testing circuitry.

The 1991 device was held together, in part, by means of duct tape. This device was affixed to the undercarriage of a motor vehicle belonging to Shay Jr.'s father, Thomas L. Shay ("Shay Sr."), by means of a two types of magnets, including a circular magnet consistent with one taken from a stereo speaker. The 1991

(...continued)
(by Marinella): But you helped purchase the equipment for this bomb. You are admitting that.

Answer
(by Shay Jr.): I'm admitting that but not to the fact that I was helped to purchase stuff to build a bomb. I was helping to purchase stuff for his work to build antennas or lights or whatever.

Shay Jr.: He was angry that it -- that it -- had happened to me and maybe thought it was my father's fault or my mother's fault because I was in those schools.

Marinella: So he built a bomb.

Shay Jr.: So he builds a bomb and tries to kill my father and thinks that I am going to be happy over it.

(Emphasis supplied).

A transcript of the colloquy between Shay Jr. and Marinella, as aired by Channel 56 on November 3, 1992 and December 16, 1992 appears within the MEMORANDUM OF LAW IN SUPPORT OF GOVERNMENT'S MOTION FOR ORDER DIRECTING WLVI-TV (CHANNEL 56) TO PRODUCE VIDEOTAPED INTERVIEW WITH DEFENDANT THOMAS A. SHAY (filed and dated January 28, 1993) at pp. 4-5.

Kline
address
BOX

KLINE:
IS THIS
TRUE?

device was designed to receive a radio signal from a remote control transmitting unit by means of an antenna consisting of strands of wire. The effective range for remote control triggering of this device was up to one-half mile.

On October 31, 1991, investigators assigned to this case found, in Shay Jr.'s possession, a handwritten notebook containing a series of names and telephone numbers. Included in this notebook was the entry: "Al Trenkler Bpr 617-553-0778."

more to suppress as fruit of arrest

At approximately the same time, investigators assigned to this matter learned that, in 1986, a remote-control explosive device was utilized in an explosion which damaged a commercial motor vehicle in Quincy, Massachusetts. Investigators learned that the 1986 device had been affixed to the undercarriage of this vehicle by means of a circular stereo speaker magnet. Police reports reflected that, when interviewed by police shortly after the Quincy bombing, Trenkler (then residing at 35 Union Street, Quincy) initially denied involvement in the 1986 Bombing. Later, Trenkler admitted to having designed and built the device in conjunction with others.⁵

But Trenkler's admits not in consp. or in aid of

B. Summary of Evidence Relating to the 1986 Bombing

At trial, the government will adduce evidence as to the components of the 1986 device and the circumstances surrounding that bombing which will demonstrate the following:

⁵ Trenkler attended Thayer Academy and Wentworth Institute of Technology, where his studies included courses in electronics and electrical engineering. Trenkler was also a principal of ARCOMM, Inc., an electronic communications firm located in Weymouth.

In the early morning hours of September 1, 1986, Quincy Police responded to a residential driveway outside 295 Willard Street, Quincy, on receiving report of an explosion. On arrival, the police found that a commercial truck belonging to the Capeway Fish Market had sustained damage as a result of the detonation of an explosive device attached to the gas tank area of the vehicle.

NO DAMAGE

NO TO SIDE OF TRUCK

The investigation later revealed that one Donna Shea, a long-time associate of Trenkler's, had an ongoing dispute with the owners of the Capeway Fish Market and, in the days preceding the 1986 Bombing, communicated that dispute to Trenkler.

MONTHS BEFORE DAY OF INCIDENT

THE DAY OF

In the days immediately before the September, 1986 explosion, and in the vicinity of the Lake Street, Weymouth, public housing project, Trenkler noticed an abandoned stereo speaker. From his automobile, Trenkler told another individual to go over to the speaker, take it apart and retrieve for him the "donut"-shaped magnet inside; the individual did as Trenkler directed. Within a day or two thereafter, Trenkler drove this same individual to a nearby Radio Shack store and handed him a piece of paper containing a hand-written list of items which the individual was to purchase; Trenkler ultimately joined this individual inside the store, picked out certain electronic items, paid for them and left.

TODD LORENZ STORY-FALSE DONNA SHEA PURCH BEFORE GOING TO LAKEST.

DID NOT HAPPEN

This witness is also expected to testify that he observed the 1986 device several times while it was being built. Particularly, this individual recalls that this device: featured the "donut"-shaped magnet which the individual had previously

SEEK: who is this? SAW IT ON THE DAY IT WAS BUILT

obtained for Trenkler; came wrapped in duct tape; and featured silver soldering. Finally, this individual is expected to testify that all of the foregoing took place within in approximately one week before the 1986 Bombing.

NOT TRUE
SC DEW
WAS MADE
THE DAY
OF
MAGNET
TOO
LGAH
NEVER IN
MY CAR

One of Trenkler's former roommates is likewise expected to testify that the 1986 device was constructed with, among other things, parts taken from a remote-control car and a magnet stripped from a stereo speaker; the device was ultimately wrapped in duct tape. The former roommate is also expected to testify that Trenkler conceived the idea to affix this device to the target vehicle by magnetic means.

DONNA'S
1 DCA

The government's other evidence, both from forensic examination and the Quincy detectives who took Trenkler's confession shortly after the blast, will show the following: The 1986 device used four (4) "AA" batteries to power a remote-control radio signal receiver and was equipped with a wire antenna to receive the signal. The device could be triggered from a distance up to one-half mile away. The device featured a toggle switch assembly and was wrapped in duct tape. The ends to the wires in the 1986 device were soldered at points of connection, rather than clipped or twisted. The 1986 device was affixed to the undercarriage of a motor vehicle by means of a circular magnet. Before the explosive material was inserted into this device, Trenkler utilized a small test bulb to determine

+ 2 6V BATS

100%
MAX

DAY OF

SCOTT:
WHO IS
THIS?
BOB (DAB)
HE WOULD SAY THAT
DEVICE PUT TOGETHER
DAY OF INCIDENT.
CRAIG + I LEFT DONNAS
+ DONNA BROUGHT DEV
TO 35 UNION

Kline's
tree?

that the wiring circuitry was working properly.⁶

C. Computer-Based Search of Features
Common to the 1986 and 1991 Devices

*Kline
must
deal
with*

Finally, the government will be prepared to adduce testimony at trial from a representative of the ATF's Explosives Incident Systems ("EXIS") Branch as to the nature of the detailed forensic information stored in the EXIS system -- compiled from investigation of explosive incidents throughout the United States -- and the manner and means of retrieval of such information for intelligence and investigative purposes. This representative will provide a description of the computer-based search undertaken of over 14,000 bombings or attempted bombings occurring within the United States from January, 1979 through December, 1991 bearing certain features common to the 1986 and 1991 devices. Particularly, the government's evidence will establish that, when the EXIS database encompassing these thousands of bombings and attempted bombings was "queried", that is, programmed to search for and identify all devices with features determined to be common to both the 1986 and 1991 Bombings (i.e., bombings and attempted bombings; remote control; cars and trucks; device affixed by round magnet to undercarriage) and further comparison conducted (i.e., toggle switch; duct tape; soldering) only two devices resulted: the 1986 device and the

⁶ The explosive material utilized in the 1986 device was an M-21 artillery simulator, a military pyrotechnic known as a "Hoffman Device", and was detonated electronically. The explosive used in the 1991 device was dynamite, which was detonated by means of blasting caps.

NO

1991 device. The government's explosives expert will testify that the presence, in each device, of this combination of features, coupled with the similar modus operandi, amply demonstrates the "signature" quality of the devices, that is, that it is more probable than not that the 1986 and 1991 devices were designed and constructed by the same person.

III. ARGUMENT

THE GOVERNMENT'S EVIDENCE AS TO THE 1986 DEVICE AND THE CIRCUMSTANCES SURROUNDING THE 1986 BOMBING IS ADMISSIBLE UNDER RULE 404(b) SINCE: (1) SUCH EVIDENCE IS PLAINLY RELEVANT TO THE "EXISTENCE OF THE CONSPIRACY" ISSUE IN COUNT ONE; AND (2) IN VIEW OF ITS GREAT PROBATIVE VALUE, SUCH EVIDENCE IS NOT EXCLUDABLE UNDER RULE 403, ON ANY CLAIM THAT IT IS SUBSTANTIALLY OUTWEIGHED BY ANY CLAIMED RISK OF UNFAIR PREJUDICE.

As will be shown below, Rule 404(b) is a rule of inclusion which permits introduction of evidence -- first during trial as against Shay Jr., and later as against Trenkler -- relating to the 1986 device and the circumstances of that conspiracy. This evidence is offered not to show criminal propensity, but to meet the government's exacting burden of proof as to the genesis and formation of the charged 1991 conspiracy. See United States v. Passarella, supra; United States v. Eirin, supra.

A. Admissibility of Evidence, Generally, Under Rule 404(b)

Rule 404(b) provides, in pertinent part, as follows:

Other crimes, wrongs, or acts - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, provided

that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial.

Rule 404(b).⁷

When considering the admission of "prior bad act" evidence, the trial court undertakes a two-pronged analysis: First, the trial court must determine whether the evidence offered is probative of a material issue other than character. Id.; see Huddleston v. United States, 485 U.S. 681, 685 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct") (emphasis supplied); United States v. Williams, 985 F.2d 634, 637 (1st Cir. 1993) (trial court must first determine whether evidence has any "special relevance" to material issue).

Second, the court must consider whether, under Rule 403, such relevant evidence is nonetheless inadmissible on grounds that the probative value of the proffered evidence is "substantially outweighed by the danger of unfair prejudice."

⁷ The list of permissible purposes set out in Rule 404(b) is by no means exhaustive. See United States v. Fields, 871 F.2d 188, 196 (1st Cir. 1989) ("[T]he range of relevancy outside the ban is almost infinite; and further, . . . the purposes are not mutually exclusive for the particular line of proof may fall within several of them"), quoting McCormack, Evidence § 190, at 448 (Cleary ed. 1972).

Huddleston, *supra*, at 687;⁸ see United States v. Mazza, 792 F.2d 1210, 1222 (1st Cir. 1986) (where "prior act" evidence proves relevant to legitimate issue, such evidence admissible subject only to balancing test of Rule 403); United States v. Ferrer-Cruz, 899 F.2d 135, 138 (1st Cir. 1990) ("similar act" evidence survives Rule 404(b)'s absolute ban against "bad character" evidence where at least one permissible inference possible).

Indeed, current First Circuit law characterizes Rule 404(b) as an evidentiary rule of inclusion, rather than exclusion:

The most striking aspect of the Rule is its inclusive rather than exclusionary nature: Should the evidence prove relevant in any other way it is admissible, subject only to the rarely invoked limitations of Rule 403. (citation omitted). Moreover, the test of admissibility is committed primarily to the trial court (citation omitted).

United States v. Zeuli, 725 F.2d 813, 816 (1st Cir. 1984) (emphasis supplied); see generally Huddleston, *supra*, at 688-89 (" . . . Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was

⁸ Huddleston went on to resolve a split between the circuits relating to the standard by which trial courts are to determine whether the quality and quantity of such "similar act" evidence is sufficient to be presented to the jury: Under Huddleston, "similar act" evidence is admissible if the evidence is sufficient to allow the jury to find that the defendant committed the prior act. Huddleston, *supra*, at 685, citing, among others, United States v. Ingraham, 832 F.2d 229, 235 (1st Cir. 1987).

"Sufficiency of the evidence" is not an issue here where, as the evidence will show, Trenkler confessed to his involvement in the 1986 Bombing.

with insuring that restrictions would not be placed on the admission of such evidence").

B. Identity, Skill, Experience and Knowledge Are Legitimate Means of Proving the Existence of the Count One Conspiracy In the Shay Jr. Trial

The central task in the government's case-in-chief on the Count One conspiracy -- first as against Shay Jr. and later as against Trenkler -- will be to establish the existence of the conspiracy. Whether cast as a question of "identity" of conspirators or a question of the "skill", "experience" or "knowledge" of one or more of those said to be a member of the charged conspiracy, the government must adduce evidence sufficient to show that one of the co-conspirators was capable of building such a device, and that the individual capable of building such a device was in fact the same individual who participated in the charged conspiracy. In short, the government must adduce evidence sufficient to permit a reasonable jury to determine that the Count One conspiracy to violate federal explosives laws indeed took place. See United States v. Stubbert, 655 F.2d 453, 456 (1st Cir. 1981).

means same thing

can only do this w. other acts w. violates dp

Rule 404(b) Evidence as Proof of Identity

The First Circuit has found a "special relevance" between the charged crime and a prior crime if the prior act is "methodologically so reminiscent of the charged crime as to earmark them as the defendant's handiwork." United States v. Ingraham, 832 F.2d 229, 231 (1st Cir. 1987); see United States v. Williams, supra, 985 F.2d at 635 (evidence of modus operandi

admissible to prove identity), citing Wright and Miller, Federal Practice and Procedure, § 5246 at 512-13 (1978).⁹ Ingraham

⁹ Williams, a cocaine conspiracy case in which the First Circuit recently considered, and ultimately found erroneous, admission of certain Rule 404(b) evidence, is readily distinguished from our case. At trial in Williams, the government offered testimony from one Gray, a former girlfriend of defendant Williams, that Williams had, during the course of the conspiracy, told her that he had "killed a couple of people." Williams, supra, at 637. At sidebar, the government argued, successfully, that the statement was relevant because (as the First Circuit restated the argument) "Williams was or claimed to be a murderer, [and thus] was more likely than not also to be a cocaine trafficker who uses guns in his business." Id.

On appeal, the government argued that such evidence was admissible, under Rule 404(b), to prove both Williams' "plan" and his "identity" as the drug trafficker in the case. Williams' "plan", the government urged, was to establish a cocaine distribution system, featuring a packaging center and several retail outlets operating out of Boston-based apartments. The distinctive feature of this plan, according to the government on appeal, was the "carrot and stick" approach used by Williams in his efforts to "locate an apartment from which to sell cocaine." Id. In this respect, Gray testified that Williams had (unsuccessfully) offered Gray's mother "double rent" for an apartment near another outlet. Id.

While the First Circuit did not question the validity of the government's theory as to "plan", the appeals court ruled the statement as having been improperly admitted for this purpose where the government failed to show that Williams had made the challenged statement to intimidate either Gray or her mother, or to otherwise connect the challenged statement to Williams' attempt to rent any apartment. Id. at 637-38. In short, the First Circuit ruled that the government's evidence did not "link the 'carrot' and the alleged plan to the 'stick.'" Id.

The government's "identity" theory was likewise found wanting: Although the First Circuit acknowledged that "[e]vidence of modus operandi is admissible under Rule 404(b) to prove identity", the appeals court ruled that there was no question of "identity" in that case. Id. Instructive for our purposes, the First Circuit went on to indicate that, even if identity were indeed an issue there, the challenged evidence as to modus operandi fell short of the degree of "distinctiveness" required:

For conduct to be characterized as a modus operandi, it
(continued...)

involved a charge of interstate (i.e., telephone) threats to kidnap or injure another. Defendant Ingraham stipulated at trial that he had previously authored some thirty letters sent to four public officials all relating to Ingraham's ongoing civil rights actions brought against the University of Maine. On comparing the substance of the earlier letters and the charged (telephone call) offense, the Ingraham Court affirmed the trial court's admission, under Rule 404(b), of Ingraham's letters where there were "numerous substantial and distinctive points of agreement [i.e., the targets of Ingraham's written threats were the same as those threatened by telephone; the letters and the charged telephone call all centered on the lawsuits against the University of Maine] . . . more than ample to constitute the

²(...continued)

generally must be "so unusual and distinctive as to be like a signature." 22 Wright & Miller at 513 (quoting C.T. McCormick, Evidence, § 190, at 449 (1972)). On this record, neither Williams's boast of committing or actual commission of murder is so distinctive a device as to prove his identity as the drug trafficker in this case.

Id. at 637 n.5.

In the instant case, unlike Williams, the proffered evidence is properly admissible because it cuts, with substantial probative effect, to establishing both "skill, knowledge and ability" and "identity" of one of the members of the charged conspiracy, and thus serves purposes for which Rule 404(b) was expressly designed. The particulars as to the 1986 Bombing -- both as to the device itself and the conspiracy underlying it -- are, as demonstrated above, indeed significantly similar to the device and conspiracy at issue in Count One. Rather than showing "bad character", this evidence serves the crucial, and plainly permissible, purpose of proving the existence of the charged conspiracy by way of identifying one member of that conspiracy as having the experience, skill and knowledge required to build such a device.

requisite signature . . ." The Ingraham Court described this as "signature"-type evidence:

Because of the evidence on (special identifying) characteristics and distinctive touches, we have said that, for a practice to be attributable to the accused, it must contain what amounts to "his signature." But the required signature need be but a fair condenser, not a facsimile or exact replica. See United States v. Scelzo, 810 F.2d 25 (1st Cir. 1987) (requirement is that the evidence "must have a similarity sufficient to be probative") (citation omitted). In the last analysis, the court must make a reasoned determination as to "whether the characteristics relied upon are sufficiently idiosyncratic to permit an inference of pattern for purposes of proof."

Id. at 231-32 (emphasis supplied).¹⁰

Another case exemplifying "sufficiently similar" evidence admissible under Rule 404(b) is found in United States v. Gutierrez, 696 F.2d 753 (10th Cir. 1982). Gutierrez involved evidence of similar modus operandi used in a prior bank robbery and the charged robbery. The trial court found, and the appeals court later affirmed, that the two robberies were sufficiently similar where, in each case, the government showed that: 1) one of the two defendants, armed with a gun, robbed a bank while; 2) the other defendant, a female, drove the getaway car; and 3) one or more children were present in the getaway vehicle as "cover" for the robbers' escape. Gutierrez, supra, 696 F.2d at 755.

¹⁰ The Ingraham Court went on to note that the First Circuit had previously sanctioned the admission of "signature"-type evidence where a comparison between the crimes "involved the conjunction of several identifying characteristics or the presence of some highly distinctive quality" (citation omitted). The more distinctive the identifiers, the fewer of them need be present to demonstrate the requisite signature." Id. at 232.

Rule 404(b) Evidence as Proof of Specialized
Knowledge, Experience, Ability And Skill

The First Circuit has also upheld the admissibility of "similar act" evidence, under Rule 404(b), in cases where such evidence tended to show knowledge, experience and skill common to an earlier and the charged offense. For example, in United States v. Scelzo, 810 F.2d 2 (1st Cir. 1987), evidence of a defendant's involvement in a prior credit card scheme was deemed especially probative of defendant's knowledge and intent with respect to the charged credit card scheme. Id. at 4. Likewise, in United States v. Maldonado-Medina, 761 F.2d 12 (1st Cir. 1985), the First Circuit approved the admission of evidence of a prior kidnapping where it showed that it had been perpetrated in a manner "very similar" to the later, charged kidnapping. Id. at 15.

Other circuits are in accord: In United States v. Hughes, 729 F.2d 1302 (11th Cir. 1984), defendants were charged with engaging in "bust out" schemes in violation of RICO. At trial, allowed evidence of a number of earlier fraudulent schemes, some of them "bust out", involving some of the defendants. Among other legitimate issues (including criminal intent to commit the substantive offenses as well as to engage in the RICO conspiracy), the appeals court upheld the admission of such prior bad acts evidence where it "depicted the plan of operation and showed the defendants' experience and ability to execute such schemes . . ." Id. at 1315 (emphasis supplied).

Likewise, in United States v. Garcia, 880 F.2d 1277 (11th Cir. 1989), defendant was charged with making false statements on a loan application. In its case-in-chief, the government introduced testimony that defendant had previously signed another individual's name on a document purporting to be a purchase and sale agreement. Id. at 1278. The 11th Circuit found no error, ruling that the government's evidence as to defendant's prior act of forging a signature (even if done, as defendant had claimed, in a joking fashion) was relevant to the legitimate issue of defendant's:

. . . ability to prepare documents purporting to bear signatures which were faked. There was no question but that documents submitted to the bank on behalf of appellant where such documents; signatures were forged on them.

Id. (emphasis supplied).


C. The Proffered Evidence As To the 1986 Bombing is Clearly Probative Of the Existence Of the Count One Conspiracy Between Shay Jr. and Trenkler

As noted, Count One charges Shay Jr. and Trenkler with conspiracy to violate certain federal explosive laws "with the knowledge and intent that [the charged explosives] would be used to kill, injure and intimidate another individual and damage and destroy real and personal property, including an automobile" Count One goes on to assert in the "Manner and Means" section, that it was part of the conspiracy that: (1) "the conspirators discussed and agreed to kill" Shay Sr.; (2) "the conspirators assisted one another in acquiring explosives and

other materials to be used in the construction of a remote-controlled explosive device"; and (3) "that one or more of the conspirators affixed the explosive device to the undercarriage" of Shay Sr.'s automobile. Moreover, the "Overt Acts" section of Count One states, in pertinent part, that in October, 1991 and in furtherance of the conspiracy and to effect the objects thereof, Trenkler: (1) built a remote-controlled device; and (2) together with Shay Jr., "surreptitiously affixed the explosive device" to Shay Sr.'s automobile.

To meet its burden here, the government must adduce evidence sufficient for a reasonable jury to find two elements: first, that the specific conspiracy charged in the indictment existed; and second that the defendant under consideration knowingly and intentionally joined the conspiracy. E.g. Braverman v. United States, 317 U.S. 49, 53 (1942); United States v. Stubbert, supra, 655 F.2d at 456 (1st Cir. 1981); United States v. Thompson, 621 F.2d 1147, 1151 (1st Cir. 1980).¹¹

¹¹ Neither the existence of the illegal agreement nor the fact of any particular defendant's participation in it need, of course, be proved by direct evidence. See e.g., United States v. Ruiz, 905 F.2d 499, 506 (1st Cir. 1990); United States v. Guerro, 693 F.2d, 10, 12 (1st Cir. 1982). Rather, "a common purpose and plan may be inferred from a 'development and a collocation of circumstances'." Glasser v. United States, 315 U.S. 60, 80 (1942).

 The government is aware of no evidence linking Shay Jr. to the 1986 bombing.¹² Evidence concerning the 1986 Bombing however, is manifestly relevant to the background, development, formation and, ultimately, existence of the conspiracy which the government must prove in its case against Shay Jr. Certainly, unequivocal evidence -- including Trenkler's admissions -- of Trenkler's previous planning, design and construction of a remote-control explosive device: (1) likewise borne out of a conspiracy, where others acted at Trenkler's specific direction, (2) carrying many of the earmarks later seen in the 1991 device, and (3) ultimately affixed by speaker magnet to the undercarriage of the target motor vehicle, tends to "to make the existence of [the charged conspiracy] more . . . probable than it would be without the evidence." Fed. R. Evid. 401; see United States v. Williams, supra, 985 F.2d at 635 (evidence of modus operandi admissible under Rule 404(b) to prove identity).

In United States v. Passarella, 788 F.2d 377 (6th Cir. 1986), the sole defendant was charged with, among other offenses, engaging in a counterfeiting conspiracy. Id. at 382. At trial, the government adduced admissions-type evidence concerning other, similar counterfeiting crimes committed before the charged conspiracy by Passarella's (un-indicted) co-conspirators, and not involving Passarella. Id. Following conviction and on appeal, Passarella argued that, because there was "no showing that this

¹² The government's evidence does not put Shay, Jr. and Trenkler together before approximately 1988 or 1989.

evidence was connected" to him, this evidence was irrelevant and prejudicial, and thus necessitated reversal. *Id.* The Sixth Circuit rejected Passarella's argument with little difficulty. Immediately upon restating the Rule 401 definition of "relevant evidence", the appeals court ruled as follows:

In light of [the Rule 401] standard, we are convinced that the challenged evidence was relevant to the background, development, and existence of the conspiracy, a crime which was charged in the indictment and of which Passarella was convicted. Count One of the indictment charged Passarella with conspiring to buy, sell, exchange, receive, and deliver counterfeit obligations of the United States in violation of 18 U.S.C. §§ 472 and 473.

. . .

. . . [W]e believe that the testimony concerning crimes committed by others was properly admitted over Passarella's objection. Specifically, Passarella objected to the testimony of Don Parsons and Hugh White concerning their admitted activities in passing counterfeit currency in Oklahoma, Texas, and Arkansas. Although Passarella was not shown to have specifically participated in these particular criminal activities, our review of the record convinces us that this evidence was relevant to the background and the nature of the conspiracy charged in the indictment.

Id. at 382-83 (emphasis supplied); see also United States v. Coiro, 922 F.2d 1008, 1015-1016 (2d Cir. 1991) (evidence of drug crime committed by other than sole defendant to RICO conspiracy relevant, under Rule 401, to "informing the jury of the background of the conspiracy charged" and "to complete the story of the crime charged"); United States v. Simmons, 923 F.2d 934, 948 (2d Cir. 1991) (evidence of earlier drug sale by non-defendant third-party, who subsequently meets with defendant, admissible as background evidence in defendant's drug conspiracy

trial; evidence relevant to conspiracy charged where it tends to prove subject meeting dealt with contemplated drug transaction). Cf. United States v. Fields, 871 F.2d 188, 197 (1st Cir. 1989) (evidence of co-conspirator's post-conspiracy activity admissible if probative of existence of conspiracy).

Simply put, Count One places the existence of the 1991 conspiracy at issue in the trial of each defendant. Any evidence tending to show the background, nature, and thus, existence, of the charged conspiracy and the identities of its members -- whether in the form of Shay Jr.'s actions and statements in this respect, or proof of Trenkler's knowledge, experience and ability to execute the charged scheme, in turn derived from the distinctive configuration of the 1986 device and the contours of the earlier conspiracy -- bears directly on this fundamental jury issue. See United States v. Eirin, *supra*; United States v. Passarella, *supra*.

D. In View of Its Great Probative Value,
Evidence of the 1986 Bombing Would In No Way
Be Excludable, Under Rule 403, As
Substantially Outweighed By Any Claimed
Danger of Unfair Prejudice

Under Rule 403, otherwise admissible evidence may yet be excluded, but only should the court determine that the unfair prejudice or confusion it will create substantially outweighs its probative value. As the First Circuit puts it, 404(b) evidence may be excluded only where the trial judge believes there is a genuine risk that the emotions of the jury will be excited to

irrational behavior, and that this risk is "unjustly disproportionate to the probative value of the offered evidence." United States v. Zeuli, 725 F.2d 813, 817 (1st Cir. 1984); see also United States v. Day, 591 F.2d 861, 878 (D.C. Cir. 1978), where the appeals court stated:

In determining whether "the probative value is substantially outweighed by the danger of unfair prejudice", it is a sound rule that the balance should generally be struck in favor of admission when the evidence indicates a close relationship to the offense charged.

which this isn't

Id. (emphasis in original).

The First Circuit has characterized the burden to be met by one claiming unfair prejudice as "a high one" (United States v. Fahey, 769 F.2d 829, 841 (1st Cir. 1985)) and has noted that resort to this "rule has not proved an especially fertile source of assistance to criminal defendants." United States v. Zeuli, supra, at 817. The Eleventh Circuit, quoting United States v. McRae, 593, F.2d 700, 707 (5th Cir. 1979), concurs in this construction of the rule:

Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the applications of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of prejudicial effect.

United States v. Pirolli, 673 F.2d 1200, 1203 (11th Cir. 1982).

NOT

In Shay Jr.'s case, the government's evidence as to the conspiracy giving rise to the 1986 device and the Capeway Fish truck bombing certainly reflects a "close relationship" (United States v. Day, supra) to the charged 1991 device and conspiracy, and is obviously prejudicial; to prevail under Rule 403, however, a defendant must show that such evidence is unfairly so. See Onujiogu v. United States, 817 F.2d 3, 6 (1st Cir. 1987) (all evidence meant to be prejudicial; only unfair prejudice proscribed under Rule 403). The First Circuit conceded the inevitability of prejudice to a defendant by admission of Rule 404(b) evidence in United States v. Scelzo, 810 F.2d 2 (1st Cir. 1987):

Scelzo further argues that [the 404(b) evidence as to earlier credit card fraud] was prejudicial because he was being tried for the exact same crime: fraudulent credit card activity. It is true that this evidence has the possibility of being prejudicial; but this is inevitably true since, for such evidence to be properly admitted, it must have a similarity sufficient to be probative Thus the possibility of prejudice is always present in these cases, since the prior unlawful acts will be at least similar if not nearly identical. The prior unlawful act was not, however, shocking or heinous and so was not likely to inflame the jury.

Id. at 5.

Moreover, any risk of unfair prejudice is substantially reduced by the giving of cautionary limiting instructions. See United States v. DeVincent, 632 F.2d 147, 152 (1st Cir.), cert. denied, 449 U.S. 986 (1980); United States v. Gonsalves, 668 F.2d 73, 76 (1st Cir. 1982).

In conducting this balancing test, the First Circuit and other federal courts also encourage trial courts to assess the

Due process arg.

"prosecutorial need for the evidence." See United States v. Vest, 842 F.2d 1319, 1327 (1st Cir. 1988) ("necessity can be an important element of Rule 403 balancing"); United States v. Erin, 778 F.2d 722, 732 (11th Cir. 1985); United States v. Scott, 795 F.2d 1245, 1252 (5th Cir. 1986). See also United States v. Ingraham, 832 F.2d 229, 234 (1st Cir. 1987) (trial judge more directly familiar than court of appeals with need for evidence and its likely effect on jury).

To summarize, therefore, a defendant seeking to exclude "prior bad act" evidence may prevail under Rule 403 only where the trial court first determines: (1) that the prior act constitutes "shocking" or "heinous" behavior; which (2) gives rise to a "genuine risk that the emotions of the jury will be excited to irrational behavior"; and (3) that such risk of irrational jury behavior is disproportionate to the probative value of the offered evidence. Scelzo, supra; Zeuli, supra. Any argument raised as to the proffered evidence under Rule 403 falls far short of satisfying any of these cumulative obligations: On points (1) and (2) of the above calculus, the circumstances surrounding the 1986 Bombing simply cannot be said to be "shocking" or otherwise of the variety of conduct which would even remotely create a real risk that a jury would then run amok and dishonor its obligations to weigh the evidence evenhandedly. Indeed, the usual concern in assessing potential prejudice is missing here, where -- as he will certainly argue at trial -- Shay Jr. had nothing whatsoever to do with either the 1986 device

~~conspiracy or the device resulting from it.~~

As to point (3), and even assuming arguendo contrary conclusions as to each of points 1) and 2), this evidence is not barred by Rule 403. The weight to be afforded the government's proffered Count One conspiracy evidence is unquestionably great. Largely by means of Trenkler's admissions, this evidence establishes the existence of an earlier, similar conspiracy furthered by a remarkably similar modus operandi, resulting in the construction and planting of a significantly similar explosive device in a residential neighborhood.¹³

Accordingly, even if the Court were to somehow consider the proffered evidence "shocking", with the potential to create a "genuine risk" of jury misconduct, one simply cannot say that these elusive, if not imponderable, concerns substantially outweigh the clear probative value of the evidence. Finally, the government's need for the proffered evidence is unquestionably

NEED

great: Although the government has substantial evidence as to Trenkler and Shay Jr.'s social relationship, as it existed before the 1991 Bombing, and further, has direct evidence of Shay Jr.'s visit, on October 18, 1991, to the Radio Shack store, there is no eyewitness or other direct testimony regarding the design, construction or placement of the 1991 device. Stated otherwise, the evidence as to the 1986 Bombing is neither cumulative nor

¹³ Given Trenkler's extensive admissions as to the facts and circumstances surrounding the 1986 device and Bombing, there is virtually no risk of confusion or waste of time in placing that evidence before the jury.