

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA

Big Stone Gap Division

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| UNITED STATES OF AMERICA |) | Criminal No. 2:07CR00015 |
| |) | |
| v. |) | Judge James P. Jones |
| |) | |
| DANIEL DOVE, |) | Trial: June 24, 2008 |
| |) | |
| Defendant. |) | |

**MOTION IN LIMINE FOR A RULING PERMITTING THE
GOVERNMENT TO INTRODUCE EVIDENCE OF OTHER
CRIMES, WRONGS OR ACTS UNDER FED. R. EVID 404(b)**

COMES NOW the United States of America by and through its undersigned counsel and moves this Honorable Court for a ruling in advance of trial to permit the government to introduce evidence of other crimes, wrongs or acts of the Defendant, Daniel Dove, under Federal Rule of Evidence 404(b). The grounds for the Government's motion are set forth below.

I. BACKGROUND

On August 28, 2007, the Grand Jury returned a two-count Indictment charging Defendant Daniel Dove with one count of conspiracy to commit criminal copyright infringement, in violation of 18 U.S.C. § 371, and one count of criminal copyright infringement, in violation of 18 U.S.C. § 2319(b)(1), 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2. The Indictment alleges Defendant was an administrator in a private, Internet piracy group known as "Elite Torrents," which used Bit Torrent technology to copy and distribute pirated movies, software and video games to other Elite Torrents members.

On June 9, 2008, the Government provided written notice to Defendant's attorney of the Government's intent to offer evidence at trial of Defendant's participation in a scheme to send

massive quantities of unsolicited, fraudulent electronic advertisements for software to thousands of unwitting recipients. Defendant's own written statements characterized these communications as "spam." This scheme occurred during part of the same time frame as the conspiracy alleged in the Indictment. The Government would introduce evidence showing that the Defendant intended to, and in fact did, use his role in the alleged Elite Torrents conspiracy to collect thousands of Internet Protocol addresses – the addresses of computers connected to the Internet – to which he would direct fraudulent advertisements. The evidence would further show the Defendant expected to earn commissions from sales generated by his fraudulent spam messages.

On June 11, 2008, Defendant's attorney informed the Government he would object to the introduction of such evidence.

II. ARGUMENT

A. Legal Standard

Federal Rule of Evidence 404(b) provides in pertinent part:

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...

Evidence that is admissible under Rule 404(b) is not limited to prior bad acts, and can include subsequent conduct by the defendant. *See, e.g., United States v. Mohr*, 318 F.3d 613, 617-21 (4th Cir. 2003).

The Fourth Circuit has held that Rule 404(b) "is an inclusive rule that allows admission of evidence of other acts relevant to an issue at trial except that which proves only criminal disposition." *United States v. Watford*, 894 F.2d 665 (4th Cir. 1990); *see also United States v.*

Sanchez, 118 F.3d 192, 195 (4th Cir. 1997) (same). Furthermore, the reasons for admissibility of Rule 404(b) evidence are not confined to those stated in the text of the rule. *Id.* at 671. “Under Rule 404(b),... prior bad acts are admissible if they are (1) relevant to an issue other than character; (2) necessary, and (3) reliable.” *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988) (footnotes omitted). In addition, the probative value of the evidence must not be substantially outweighed by its unfair prejudicial effect. *See United States v. Queen*, 132 F.3d 991, 995 (4th Cir. 1997). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable; than it would be without the evidence.” Fed. R. Evid. 401. For evidence to be relevant, it must be sufficiently related to the charged offense. *Rawle*, 845 F.2d at 1247 n.3.

B. The Evidence of Defendant’s Spam Scheme Is Relevant to His Motive and Intent

The Government would introduce evidence of Defendant’s spam scheme as proof of Defendant’s motive, preparation and intent regarding his alleged participation in the Elite Torrents criminal copyright infringement conspiracy. Specifically, this evidence would show Defendant used a computer program to collect thousands of Internet Protocol addresses from other members of Elite Torrents who were downloading pirated copyrighted files. The evidence would further show that Defendant continued to participate in the Elite Torrents conspiracy so that he could build an ever-expanding list of recipients of his fraudulent spam messages in an effort to enrich himself.

This evidence is both necessary and admissible to prove defendant’s criminal intent and motive to participate in the Elite Torrents copyright infringement conspiracy. *See Sanchez*, 118 F.3d at 196 (a not-guilty plea puts one’s intent at issue and thereby makes relevant evidence of

similar prior crimes when that evidence proves criminal intent). Here, the Defendant's alleged participation as an administrator in Elite Torrents effectively gave him access to data that would become Defendant's spam mailing list. He used his position in the organization to collect address information for his own personal gain. This evidence is relevant to Defendant's motive and intent to continue participating in Elite Torrents. The evidence is also reliable. The Government will introduce Defendant's own written statements and the testimony of a co-conspirator who will describe the spam scheme.

C. The Evidence Is Not Unfairly Prejudicial

The probative value of evidence regarding Defendant's spam scheme is not substantially outweighed by the risk of unfair prejudice. Under Federal Rule of Evidence 403, evidence that would otherwise be admissible may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, all incriminating evidence is inherently prejudicial. *United States v. Haney*, 914 F.2d 602, 607 (4th Cir. 1990). Therefore, the necessary question under Rule 403 is whether the evidence has the potential to cause unfair prejudice, and whether the danger of such prejudice substantially outweighs any probative value that the evidence might have. *United States v. Mark*, 943 F.2d 444, 449 (4th Cir. 1991). There is no such danger here. Defendant's scheme to enrich himself through sending spam messages to Internet Protocol addresses he gathered through Elite Torrents is highly relevant to his motive, intent and state of mind. This type of evidence would not play to the fact finder's emotions, but would help to explain why Defendant participated in Elite Torrents.

Furthermore, any potential for prejudice can be remedied with a curative instruction. In *Mark*, 943 F.2d at 449, the Fourth Circuit concluded that potential for unfair prejudice can be obviated by a cautionary or limiting instruction, particularly if the danger of prejudice is slight in view of the overwhelming evidence of guilt. The same applies here, and the Court can fashion a cautionary instruction to the jury that the defendant is not on trial for any conduct not alleged in the indictment.

D. The Evidence Puts Defendant's Alleged Crime in Context

Additionally, the proposed evidence is admissible independently of Rule 404(b), as it describes the context of the conspiracy charge for which Defendant has been indicted. The Fourth Circuit has held that evidence of uncharged criminal activity is admissible where it furnishes part of the context of the crime. *See Mark*, 943 F.2d at 448 (quoting *Rawle*, 845 F.2d at 1247 n.4). Courts have held that “evidence of uncharged conduct is not considered ‘other crimes’ evidence if it is necessary to complete the story of the crime on trial.” *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994) (police officer’s testimony regarding past investigations of the defendant did not constitute “other crimes” evidence; testimony was properly admitted as proof of the existence of and structure of the conspiracy); *see also United States v. Masters*, 622 F.2d 83, 87 (4th Cir. 1980) (defendant’s expansive recorded statements regarding his possession of firearms put into context the charged offense for dealing in a firearm without a license).

III. CONCLUSION

For the reasons stated above, the Government respectfully requests that it be permitted to introduce evidence at trial of Defendant’s participation in a scheme to send fraudulent spam

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF, which will then send a notification of such filing (NEF) to the following:

Michael B. Gunlicks, Esq.
VSB No. 39375
Gunlicks Law, L.C.
604 N. Boulevard
Richmond, Virginia 23220
(804) 355-9700
(804) 355-4933 (fax)
michael@gunlickslaw.com

Counsel for Daniel Dove

/s/ Tyler G. Newby
TYLER G. NEWBY
Trial Attorney
Computer Crime and Intellectual Property Section
U.S. Department of Justice
1301 New York Ave., NW, Suite 600
Washington, DC 20005