IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	NO. 04-382
Plaintiff,	:	
	:	
v.	:	
	:	
CHRISTOPHER MILLER,	:	
	:	
Defendant.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. NOVEMBER 16, 2004

I. INTRODUCTION

Defendant Christopher Miller, has been charged, by way of indictment, with sixteen (16) counts of embezzlement of funds by a bank employee, in violation of 18 U.S.C. § 656. The indictment charges that, on the sixteen dates specified in the indictment, the defendant, being an employee (i.e., a bank teller) at Sovereign Bank, knowingly embezzled, abstracted, purloined, and willfully misapplied the specified amounts of funds and monies intrusted to the custody and care of Sovereign Bank, by making unauthorized withdrawals (each withdrawal being a separate count of the indictment).

Two motions are currently pending before the Court. First, the government has filed a motion in limine to exclude defendant's so-called "reverse 404(b)" evidence of other bad acts of a third person to show that the third person, and not the defendant, committed the crime with which the defendant is charged. The defendant has filed a response. Second, the defendant has filed a motion in limine, arguing that Federal Rule of Evidence (F.R.E.) 609 precludes the government from attempting to impeach the defendant's testimony with a prior car-theft conviction if the defendant decides to testify. The government did not file a response to this second motion.

II. ANALYSIS OF THE REVERSE 404(b) MOTION

A. The Legal Standard

Federal Rule of Evidence 404(b) provides:

> **(b) 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, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it

intends to introduce at trial.

Fed. R. Evid. R. 404(b). Although offering character evidence under Rule 404(b) is generally an inculpatory tactic of a prosecutor, the Third Circuit has recognized the "rarely used" variant of 404(b)known as "reverse 404(b)." This phrase refers to character evidence used not to inculpate defendants, but to exculpate them. The Third Circuit articulated the concept of reverse 404(b) evidence in United States v. Stevens, 935 F.2d 1380, 1402 (3d Cir. 1991):

> It should be noted that ["other crimes"] evidence may be also available to negative the accused's guilt. E.g., if A is charged with forgery and denies it, and if B can be shown to have done a series of similar forgeries connected by a plan, this plan of B is some evidence that B and not A committed the forgery charged. This mode of reasoning may become the most important when A alleges that he is a victim of mistaken identification.

Id. (quoting 2 Wigmore, Wigmore on Evidence § 304, at 252 (J. Chadbourn rev. ed. 1979) (emphases in original)).

The Stevens Court outlined the framework for analyzing a reverse 404(b) issue. Step one is to conduct a Rule 401 relevancy analysis, i.e., determine whether the defendant, who is the proponent of the evidence, has demonstrated that the proffered evidence "has a tendency to negate his guilt." Id. at 1405. Step two is to apply a modified Rule 403 balancing

test: balance the evidence's probative value against countervailing considerations of confusion of the issues, undue delay, or misleading the jury, but not prejudice to the defendant. Id. at 1403. The probative value of the "other bad acts" evidence turns on the similarity between the other bad act and the bad act in question. Id. In this regard, the Third Circuit stated that

> [O]ther-crimes evidence submitted by the prosecution has the distinct capacity of prejudicing the accused. . . . Therefore a fairly rigid standard of similarity may be required of the State if its effort is to establish the existence of a common offender by the mere similarity of the offenses. But when the defendant is offering that kind of proof exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of admissibility, since ordinarily, and subject to rules of competency, an accused is entitled to advance in his defense any evidence which may rationally tend to refute his guilt or buttress his innocence of the charge made.

Id. (quoting State v. Garfole, 388 A.2d 587 (N.J. 1978))); see also id. at 1402 ("[The defendant] should . . . have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person are so closely connected in point of time and method of operation as to cast

doubt upon the identification of the defendant as the person who committed the crime charged against him." (quoting State v. Bock, 449, 39 N.W.2d 887 (Minn. 1949)).

B. Application

In the instant case, the apparent core defense theory is that of misidentification. In support of this theory, the defendant seeks to offer evidence that a person named V.H., who was defendant's fellow employee at the bank, stole $23 in coins from Sovereign Bank. (The $23 had apparently been inadvertently left at the bank by a customer). Defendant will offer this evidence to show that V.H.'s theft of the $23 tends to show that V.H. and not defendant committed the crime of making unauthorized withdrawals from customer accounts, with which defendant is currently charged.

Both parties argue under the Stevens analysis. The government asserts that the evidence of V.H.'s theft is inadmissible because it is not relevant in that is does not logically tend to exonerate the defendant. At bottom, the government's argument is based on Rule 402: "evidence which is not relevant is inadmissible"; the evidence of V.H.'s theft is not relevant because V.H.'s modus operandi, or method of stealing by means of basic asportation, was not similar to defendant's

method, which involved forgery, and because the two thefts did not occur within the same time frame.[1]

The defendant argues that V.H.'s theft of the coins shows that V.H. had the motive, opportunity, and/or intent to embezzle funds from customer accounts, as currently charged against the defendant. Further, the defendant points out that the crimes, while not sufficiently similar to be "signature crimes," are sufficiently similar to pass the 403 balancing test. In other words, defendant argues, the probative value of V.H.'s theft of the coins is not substantially outweighed the danger of undue confusion of the issues, waste of time, et cetera, presented by the proffering of this evidence.

Applying Stevens to this case, one, under the lenient relevance standard of Rule 401, whether evidence has "any tendency" to exonerate the defendant, the evidence of V.H.'s theft is relevant to the case because it has at least a de minimis tendency to show that V.H. had the motive and opportunity to steal from clients and, therefore, was in the position to unlawfully withdraw the money from clients' accounts instead of the defendant. The similarity between the crimes is tenuous, however. Granted, the crimes are both forms of theft, but the

[1] The government asserts that defendant had long been dismissed from the bank when V.H. stole the coins.

methods of theft are different. The times of the thefts are also different: the defendant's alleged fraudulent withdrawals occurred in November and December of 1999, whereas V.H.'s theft of the coins occurred in September 2000, 11 months after the defendants' alleged crimes.

Two, under the modified Rule 403 analysis applicable in reverse 404(b) cases, while the probative value of the evidence of V.H.'s theft appears slight, there is little if any danger that the evidence will unduly confuse the issues, mislead the jury, or cause undue delay. Fed. R. Evid. R. 403.

Indeed, the Third Circuit's rationale for admitting the reverse 404(b) evidence at issue in the Stevens case seems applicable here:

> Our resolution of this issue is informed by our general belief that a criminal defendant should be able to advance any evidence that, first, rationally tends to disprove his guilt, and second, passes the Rule 403 balancing test. To garner an acquittal, the defendant need only plant in the jury's mind a reasonable doubt. Had Stevens been allowed to adduce at trial evidence of the similarities between the Mitchell robbery and the Smith and McCormack robbery/sexual assault--including the Fort Meade connection--the jury might have determined that it was possible that another person had committed both crimes, thereby giving rise to a reasonable doubt. We do not know, of course, how a jury would weigh this evidence, but we do think that, at the very least, Stevens was

> entitled to have the jury consider the evidence and draw its own conclusions.

Stevens, 935 F.2d at 1406. Because Mr. Miller's evidence of V.H.'s theft has at least some tendency to exonerate him and because the probative value of V.H.'s theft is not substantially outweighed by the countervailing considerations in Rule 403 (minus prejudice to the defendant), defendant will be permitted to have the jury consider this evidence and draw its own conclusions about the weight of the evidence.

III. ANALYSIS OF THE F.R.E. 609 MOTION

To reiterate the substance of this motion, the defendant has filed a motion in limine, arguing that F.R.E. 609 precludes the government from attempting to impeach the defendant's testimony with a prior theft conviction if the defendant decides to testify.

A. The Legal Standard

Federal Rule of Evidence 609 governs the impeachment of witnesses with a prior conviction:

> (a) General rule. For the purpose of attacking the credibility of a witness,

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. R. 609. The provisions of sub-parts (1) and (2) are at issue in this case; the issue here is whether the defendant's 1997 conviction for car theft is admissible to impeach him under either sub-part (1) or (2) of Rule 609.[2]

B. Applying Rule 609(a)(2) (Crimes of Dishonesty)

The Third Circuit has emphasized that courts should construe Rule 609(a)(2) narrowly because the conclusion that a crime involved dishonesty means that the crime is automatically admissible insofar as the court has no discretion to weigh the conviction's probative value against its prejudicial effect. See Walker v. Horn, 385 F.3d 321, 333 (3d Cir. 2004)

[2] As a consequence of this car theft, the defendant received a sentence of 9-23 months imprisonment with 3 years probation.

("Because Rule 609(a)(2) does not permit the district court to engage in balancing, . . . Rule 609(a)(2) must be construed narrowly to apply only to those crimes that bear on a witness' propensity to testify truthfully.") (citations omitted).[3] In Walker, the Third Circuit held that robbery is not a crime involving dishonesty and is therefore not "automatically" admissible for impeachment purposes. See id. at 334.

[3] The original Conference Committee Report on Rule 609(a)(2) elaborates on the meaning of "dishonesty" and "false statement":

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 9, reprinted in 1974 U.S.C.C.A.N. p. 7051, 7058, 7103. Additionally, the Advisory Committee note following the 1990 amendment to Rule 609(a)(2) reads:

> The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment [to the dishonesty and false statement provision] is necessary, notwithstanding some decisions that take an unduly broad view of "dishonesty" admitting convictions such as for bank robbery or bank larceny.

Fed. R. Evid. 609 Advisory Comm. Note to 1990 amendment (emphasis added).

The Walker court based its decision on two Third Circuit decisions. The court first discussed Gov't of V.I. v. Toto, 529 F.2d 278 (3d Cir. 1976). Toto held that petit larceny did not involve crimen falsi, i.e., "communicative, often verbal, dishonesty," unlike the classic crimen falsi crimes of perjury and theft by false pretenses. See id. at 281.

After discussing Toto, the Walker court relied on Cree v. Hatcher, 969 F.2d 34 (3d Cir. 1992). The Cree court held that "a crime must involve expressive dishonesty to be admissible under Rule 609(a)(2)." Id. at 38. Based upon this principle, the Walker court concluded that robbery is not a crime of dishonesty because it involves no expressive dishonesty:

> The proper test for admissibility under Rule 609(a)(2) does not measure the severity or reprehensibility of the crime, but rather focuses on the witness's propensity for falsehood, deceit or deception. Applying that teaching here, we readily conclude that, although robbery is certainly a very serious crime, it does not involve communicative or expressive dishonesty. Therefore, the district court erred by holding that robbery is a crime involving dishonesty that is automatically admissible under Rule 609(a)(2).

Walker, 385 F.3d at 334.

The instant case is governed by the principle

stated in Walker. The facts indicate that Mr. Miller's car theft did not involve "expressive dishonesty" and, thus, under Walker, this crime is not automatically admissible under Rule 609(a)(2). The remaining question, therefore, is whether the crime will be admissible to impeach Mr. Miller under Rule 609(a)(1), which requires the Court to balance the evidence's probative value against the danger of prejudice to the defendant.

C. Applying Rule 609(a)(1) (Felonies)

Because Mr. Miller's prior conviction of car theft is a felony, the government may use it to impeach his testimony if the Court determines under Rule 609 that the probative value of the evidence outweighs its prejudicial effect on Mr. Miller.[4] Gov't of V.I. v. Bedford, 671 F.2d 758, 761 (3d Cir. 1982); see also United States v. Johnson, 2004 WL 2472341, at *3, ---F.3d--- (3d Cir. Nov. 4, 2004). Under the Rule 609 analysis, unlike the analysis under Rule 403, the government has the burden of proving that the probative value of Mr. Miller's prior theft conviction outweighs its prejudicial effect on him. Bedford, 671 F.2d at 761. Under the Rule 609 analysis, the Court may consider

[4] In this regard, it is important to note that the "probative value versus prejudicial effect" balancing test under Rule 609 differs from the 403 balancing test in that evidence is less likely to be admitted under the 609 balancing test. The 609 test is thus more protective of a criminal defendant.

four factors in balancing probative value versus prejudicial effect:

(1)the kind of crime involved;
(2)when the conviction occurred;
(3)the importance of the witness' testimony to the case; and
(4)the importance of the credibility of the defendant.

Id. at 761 n.4.

Applying the factors here, one, the crime of car theft is similar to embezzlement in one important respect: they are both species of the same theft genus. This similarity creates an elevated danger that the jury will draw an impermissible inference of the defendant's guilt should the jury hear this evidence. See, e.g., United States v. Hart, 1997 WL 634519 at 2 (E.D. Pa. Oct. 15, 1997).[5] Two, the conviction for car theft occurred two years prior to the alleged crime for which defendant is charged. This temporal factor is relatively neutral with respect to admissibility of the car theft offense. Factors

[5] In Hart, the court precluded the prosecutor from impeaching the defendant with a robbery conviction where the defendant was charged with illegal possession of a firearm. 1997 WL 634519 at *2. The court reasoned that because "notion of possession of a firearm is instinct with the [related] notion of force or the ability to do force," there was a heightened danger that the jury would draw an impermissible inference if allowed to hear evidence of the defendant's prior robbery convictions. See id. Because, here, the crimes of car theft and embezzlement are both "instinct with" a propensity to steal, the Court finds that the potential for the jury to draw an impermissible inference of guilt in the instant case is even greater than that present in Hart.

three and four weigh in favor of Mr. Miller because his testimony to the case seems critical to his defense of misidentification, as is his credibility.

On the whole, Mr. Miller's prior car theft conviction has little probative value regarding whether he committed the offense for which he is currently charged. The danger of unfair prejudice to him is present, as this evidence is likely to cause the jurors to base their decision on something other than the evidence presented in the case. See Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). The evidence of the defendant's 1997 car theft does more than "suggest guilt." Cf. United States v. Blyden, 964 F.2d 1375, 1378 (3d Cir. 1992) ("Any evidence suggesting guilt is 'prejudicial' to a defendant and obviously Rule 403 is not intended to exclude all such matter."). Rather, the evidence of the 1997 car theft is unfairly prejudicial in that there is a substantial probability that the jury will use this evidence as proof of the embezzlement crime charged in this case. In this respect, the government "would secure an advantage that results from the likelihood the evidence would persuade [the jury] by

illegitimate means." United States v. Cross, 308 F.3d 308, 324 (3d Cir. 2002) (emphasis in original) (citations omitted). It thus cannot be said that the government has satisfied its burden of proving that the probative value of the car theft outweighs its prejudicial effect on defendant. Accordingly, the government will be precluded from impeaching him with that conviction.

IV. CONCLUSION

For the foregoing reasons, the government's motion in limine to exclude other acts evidence of V.H. will be denied. The defendant's motion in limine to preclude impeachment of defendant's testimony by evidence of prior convictions under Rule 609 will be granted. An appropriate order follows.

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v.	:	
	:	
CHRISTOPHER MILLER,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this **16th** day of **November, 2004**, upon consideration of the government's Motion in Limine as to Christopher Miller (doc. no. 24), and defendant's response thereto (doc. no. 29), it is hereby **ORDERED** that the Motion is **DENIED**.

It is **FURTHER ORDERED** that, upon consideration of defendant's Motion in Limine to Preclude Evidence of Prior Convictions (doc. no. 30), the Motion is **GRANTED**.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.