

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	
TYRONE SMITH, a/k/a “Tiddy,”	:	NO. 04-680-01
WILLIAM GREEN, a/k/a “Fidel,”	:	02
a/k/a “Foo,”	:	
LOUIS STILLIS, a/k/a “Lou Bop,”	:	03
KENNETH WILSON, a/k/a “Kenny,”	:	04
SHERRON MOORE, a/k/a “Manny,”	:	05
TYRONE TRADER, a/k/a “Saleem,”	:	06
JAMAL RIDEOUT, a/k/a “Dub,”	:	07
RICHARD ROBINSON,	:	08
LARRY DAVIS, a/k/a “L”	:	09

ORDER AND MEMORANDUM

ORDER

AND NOW, this 13th day of March, 2006, upon consideration of defendant Louis Stillis’ Motion to Preclude Impeachment of Defendant with Prior Convictions Under Federal Rule Evidence 609 (Document No. 205, filed December 14, 2005), joined in by defendants, Kenneth Wilson, a/k/a “Kenny”; Sherron Moore, a/k/a “Manny”; Tyrone Trader, a/k/a “Saleem”; and, Jamal Rideout, a/k/a “Dub,” and the Government’s Consolidated Response to Defendant Louis Stillis’ Pretrial Motions (Document No. 237, filed February 10, 2006), following oral argument on the Motion on February 15, 2006, **IT IS ORDERED** that defendant Louis Stillis’ Motion to Preclude Impeachment of Defendant with Prior Convictions Under Federal Rule Evidence 609 is **GRANTED**.

MEMORANDUM

Defendant Louis Stillis is charged along with eight co-defendants in a 53-count superseding indictment. The charges against defendant Stillis are conspiracy to distribute cocaine (21 U.S.C. § 846), distribution of cocaine (21 U.S.C. § 841(a)(1)), distribution of cocaine

within 1000 feet of a school (21 U.S.C. § 860), and possession of a firearm by a convicted felon (18 U.S.C. § 922(g)). Defendant Stillis has filed a Motion to Preclude Impeachment of Defendant with Prior Convictions Under Federal Rule Evidence 609, which is joined by defendants Wilson, Moore, Trader, and Rideout.¹ For the reasons that follow, defendant's motion is granted.

I. PRIOR CONVICTIONS

Defendant has a 1992 conviction for simple possession of narcotics, a 1993 conviction for rape, and a 2004 conviction for simple assault. In its Consolidated Response to Defendant Louis Stillis' Pretrial Motions, the government states that it does not intend to use any of these convictions in its case-in-chief. However, should defendant take the stand, the government requests the right to use the 2004 conviction for simple assault during its cross-examination of defendant. Gov't Response at 8. At the hearing on pre-trial motions on February 15, 2006, the government acknowledged that the 1992 and 1993 convictions are inadmissible under Fed. R. Evid. 609, because they are more than ten years old.²

II. LEGAL STANDARD

The admissibility of prior convictions for impeachment purposes is governed by Fed. R. Evid. 609. Rule 609(a)(1) provides as follows:

For the purpose of attacking the credibility of a witness, evidence that a witness other

¹ Defendants Wilson, Moore, Trader, and Rideout filed motions for joinder in their co-defendants' motions, all of which were granted by Orders dated February 2, 2006 and February 15, 2006. The Court treats their joinder in the motion at issue as a joinder in defendant Stillis' motion to preclude impeachment of defendant Stillis by his prior convictions.

² Rule 609(b) provides that "evidence of a conviction under this rule is not admissible is a period of more than ten years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date."

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.

The threshold question for admitting a conviction under Rule 609(a)(1) is whether the crime was punishable by “imprisonment in excess of one year.” In the instant case, defendant’s prior conviction, which occurred in Pennsylvania, is for simple assault. Simple assault is a second-degree misdemeanor in Pennsylvania, and punishable by up to two years in prison. 18 Pa. Cons. Stat. § 2701(b); 18 Pa. Cons. Stat. § 1104. Therefore it is a crime punishable by imprisonment in excess of one year, and potentially admissible under Rule 609(a)(1).

In determining whether the probative value of admitting this evidence outweighs its prejudicial effect to the accused, the court must consider the following four factors:

- (1) The nature of the prior crime;
- (2) The age of the prior conviction;
- (3) The importance of the defendant’s testimony; and
- (4) The importance of the defendant’s credibility.

United States v. Johnson, 388 F.3d 96, 103-04 (3d Cir. 2004) (McKee, J., concurring);

Government of the Virgin Islands v. Bedford, 671 F.2d 758, 761 n.4 (3d Cir. 1982). The government bears the burden of showing that the probative value of the evidence outweighs its prejudicial effect and is thus admissible. Bedford, 671 F.2d at 761; United States v. Tomczyk, 2005 WL 1397509, at *1 (E.D. Pa. June 9, 2005).

III. ANALYSIS

The Court will consider each of the four factors in turn.

1. The Nature of the Prior Crime

Although rule 609(a)(1) applies to all felony convictions that do not involve dishonesty or false statements,³ some felonies are more probative of a witness's veracity than others. 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 609.05[3][b] (2d ed. 2005). Crimes such as robbery and larceny have been found to reflect dishonesty on the part of the witness and are thus considered to be more probative of truthfulness. See United States v. Fromal, 733 F. Supp. 960, 973 (E.D. Pa. 1990) (“[T]he crime of larceny has been held in this district to involve dishonesty, as has robbery.”). However, crimes of violence, such as simple assault, are not generally considered to be probative of a defendant's veracity. “Acts of violence . . . may result from a short temper, a combative nature, extreme provocation, or other causes, [and] generally have little or no direct bearing on honesty and integrity.” Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967) (Burger, J.);⁴ see also Miller v. Hoffman, 1999 WL 415402, at *3 (E.D. Pa. June 22, 1999) (“Courts have found that crimes involving physical violence, such as assault . . . are not significantly associated with veracity.”); United States v. Sallins, 1993 WL 427358, at *4 (E.D. Pa. Oct. 18, 1993) (“Assaultive crimes are not probative of truthfulness.”). Therefore, this factor weighs against admission.

2. The Age of the Prior Conviction

Defendant was arrested on the simple assault charge on April 30, 2003, and pled guilty on May 24, 2004. He was arrested on state drug charges which led to the instant case on February

³ Under Rule 609(a)(2), “evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statements, regardless of the punishment.”

⁴ While Gordon pre-dates the Federal Rules of Evidence, its analysis on this point is still relevant today, as a recent Second Circuit case noted. See United States v. Estrada, 430 F.3d 606, 617-18 (2d Cir. 2005) (describing Gordon as “an influential case”).

18, 2004. Thus, defendant's arrest for the assault charge was less than one year before his arrest in the current case, and his conviction on the charge was approximately three months after his arrest in the current case. The fact that defendant's conviction was essentially concurrent with his current charges makes the prior conviction more probative. See United States v. Causey, 9 F.3d 1341, 1344 (7th Cir. 1993) (finding it was within district court's discretion to admit 6-month old conviction because its recency made it more relevant); cf. Robinson v. Clemons, 1998 WL 151285, at *3 (D. Del. Mar. 24, 1998) (finding that the greater age of a conviction decreased its probative value); United States v. Paige, 464 F. Supp. 99, 100 (E.D. Pa. 1978) (holding that the length of time between a conviction and trial lessened its probative value). Therefore, this factor weighs in favor of admission.

3. The Importance of the Defendant's Testimony

If a defendant's testimony is important to his defense, this factor weighs against admitting a prior conviction. 4 Weinstein's Federal Evidence § 609.05[3][e]. "If, on the other hand, the defense can establish the subject matter of the defendant's testimony by other means, the defendant's testimony is less necessary, so a prior conviction is more likely to be admitted." Id.; see also United States v. Causey, 9 F.3d 1341, 1344 (7th Cir. 1993) (upholding admission of a prior conviction because other witnesses reiterated defendant's testimony). At this point in time, the government's evidence against defendant largely consists of wiretapped conversations and police surveillance of his activities. Should any of defendant's co-defendants decide to plead guilty and testify against him, their testimony will also be a significant component of the government's case.

If defendant decides to testify, it is difficult to anticipate what he would testify about. Presumably any such testimony would be based on a joint decision by defendant and his attorney

that his testimony is important, and that there is no other way for defendant to present this evidence. See United States v. O'Driscoll, 2003 WL 1401891, at *2 (M.D. Pa. Jan. 22, 2003) (“We cannot determine at this time the importance of [defendant’s] testimony. However, we assume that [defendant] and his counsel determine it important that he testify.”). Therefore, the importance of defendant’s testimony weighs against admitting the conviction. Id.; Miller, 1999 WL 415402, at *3 (finding that, because there was no other means of introducing evidence, aside from defendant’s testimony, this factor weighed against admissibility).

4. The Importance of Defendant’s Credibility

Whether or not defendant’s account of events is found credible will be crucial to his case should he decide to testify. Therefore, this factor weighs in favor of admitting the conviction.

IV. CONCLUSION

Of the four factors to consider in admitting a conviction under Rule 609(a)(1), two weigh in favor of admission in this case, and two weigh against. Faced with this balance, the Court concludes that defendant’s prior conviction for simple assault should not be admitted, because it is not probative of his veracity and thus does not outweigh any potential prejudicial effect. The Court agrees with the reasoning articulated by then-Judge Burger when he wrote the opinion in Gordon for the Court of Appeals for the District of Columbia. Defendant’s simple assault conviction may show that he has violent tendencies, but it is not probative of defendant’s veracity. For the foregoing reasons, defendant’s motion to preclude impeachment by his prior convictions is granted.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.