

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

THOMAS A. SHAY

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CRIMINAL NO. 92-10369-Z

MOTION TO PRECLUDE EVIDENCE
OF A FALSE BOMB THREAT IN NOVEMBER 1990

Defendant Thomas A. Shay ("Shay Jr.") hereby moves that this Court prohibit the introduction of evidence of a false bomb threat allegedly made by him on November 13, 1990, which the government has informed him it may seek to introduce at trial, as an exception to Rule 404(b)'s prohibition against character evidence. Shay Jr. objects to the introduction of an alleged bomb threat for the following reasons:

1. The alleged bomb threat one year prior to the explosion of a bomb which is the subject of this prosecution is another crime which is not admissible to show criminal propensity under Rule 404(b).

2. As an initial matter, the government's omnibus list of theories for introduction ("intent, plan, knowledge, identity, etc.") fails utterly to adequately particularize the relevance of the bomb threat evidence. "While admissible in some circumstances, [extrinsic act evidence] is by no means a routine exercise and should not be accepted unless the government articulates with suitable precision the 'special' ground for doing so." United States v. Flores Perez, 849 F.2d 1, 8 (1st Cir. 1988).

3. A bomb threat one year earlier was in no way similar to and had no connection in time or other circumstances to the October 1991 bombing, and is therefore irrelevant to any legitimate issue in this case. See, e.g., United States v. Shackelford, 738 F.2d 776, 778 (7th Cir. 1984) (prior act offered for any purpose other than propensity must be "similar enough and close enough in time to be relevant to the matter in issue"). See also United States v. Philibert, 947 F.2d 1467, 1470-71 (11th Cir. 1991) (earlier purchase of firearms irrelevant to whether defendant made a threatening phone call where there was no connection between the two).

4. Shay Jr.'s defense will include, inter alia, that the government's evidence fails to prove that he received explosives, attempted to destroy an automobile, or conspired to do either. His lack of intent or knowledge are not in issue and cannot therefore be rebutted with prior acts. See, e.g., United States v. Rodriguez-Estrada, 877 F.2d 153, 155 (1st Cir. 1989) (other acts not admissible unless they go to a "controverted issue" in the case); United States v. Marvilla, 907 F.2d 216, 223 (1st Cir. 1990) (other acts admissible because defendant raised lack of knowledge and ability); United States v. Powell, 587 F.2d 443, 448 (9th Cir. 1978) (where defendant sought only to show that the source of the drugs was not him, intent was not in issue).

5. In any event, making a false bomb threat, which requires only knowledge of how to use a telephone, has no relevance to knowledge of how to receive explosives or destroy a

vehicle. See United States v. Welch, 1992 WL 58739 (D.Mass.) (that defendant rifled mail in an unrelated incident inadmissible to show knowledge of proper mail procedures in trial on charges of misappropriating postal funds).

6. Making a false bomb threat has no relevance to intent to kill or a plan to kill Shay Jr.'s father with a real bomb, where there is no connection in time or other circumstances between the two events. See, e.g., United States v. Lynn, 856 F.2d 430, 435 (1st Cir. 1988) (prior offense inadmissible where only connection was same illicit substance; other offense was remote in time, there was no evidence indicating a continuing scheme over time, the participants in the two events were completely different, and the two sales were dissimilar in quantity).

7. Evidence of a bomb threat in 1990 is inadmissible to show identity, since the two events share no characteristics, much less any that are "so idiosyncratic as to constitute a signature." Ingraham v. United States, 832 F.2d 229, 233 (1st Cir. 1987). The bomb threat is in no way "methodologically reminiscent of the crime charged as to earmark [the bombing] as the defendant's handiwork." Id. at 231. See also United States v. Wright, 901 F.2d 68 (7th Cir. 1990) (recorded telephone conversation in which defendant claimed he was a street dealer inadmissible to establish identity in prosecution for distribution of cocaine on wholesale level).

8. Use of a prior act to raise an inference that the defendant may have been disposed to commit an offense of the type with which he is presently charged is precisely what is forbidden by Rule 404(b) and the Due Process Clause.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(c), Shay requests that the Court schedule a hearing on this motion on the ground that oral argument will be of assistance to the court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney or record for each other party by mail (by hand) on 6/24/93

Amy Baron-Evans