

Reverse Rule 404(b) Evidence, Part 2

The facts in *United States v. Seals*, 419 F.3d 600 (7th Cir. 2005), illustrate a case in which reverse Rule 404(b) evidence was deemed inadmissible. Edward Seals and Earnest D'Marco Johnson were each convicted of one count of aggravated bank robbery and of using a firearm in a crime of violence. The two defendants were alleged to have been part of a team of four masked, African-American men in camouflage fatigues who robbed the credit union in Cahokia, Illinois. The other two men, Jonah Paschal and Rasheed Townsend, were arrested, gave proffers admitting their involvement and explaining the planning and preparation for the robbery, and identified their fellow robbers as Johnson and Seals.

At trial, both cooperating witnesses testified as to how the robbery was planned and executed. Both witnesses also identified Seals and Johnson, whom they had known for several years. On the stand, Paschal detailed the planning, execution, and aftermath of the robbery. He also testified that, while he was being held in a cell at the courthouse, Seals threatened to kill him or his family if he testified. Three other inmates testified at trial that they overheard the threat, and all three identified Seals as the person who made it. Townsend's testimony at trial supported Paschal's version of the events.

In addition, Paschal's cousin, who shared a house with him, testified that he told her that the four intended to rob a bank, and, when he returned to the house after the robbery, he showed her his share of the money. Two used car dealers testified that the defendants paid cash for cars in the weeks following the robbery. Finally, a barber who cut Johnson's hair testified that Johnson passed him notes that outlined a false version of the events the day of the robbery and suggested that he "just keep it plain and simple and don't remember too much."

These notes were admitted into evidence, and a handwriting expert testified Johnson wrote them.

Reverse Rule 404(b) evidence

About a month before the trial, the district court ordered the government to produce police reports concerning a bank robbery in New Baden, Illinois, 31 miles from Cahokia that took place two weeks after the charged robbery. Seals's counsel claimed that the defense needed the reports to determine whether a similar modus operandi existed between the two robberies. The New Baden bank was robbed by five African-American men wearing disguises—one wore a woman's dress and another was dressed as a construction worker. The robbers, armed with handguns, directed a bank employee, at gunpoint, to hand over cash. The participants in the New Baden robbery were caught and convicted.

The government produced the reports, but moved in limine to exclude the evidence from trial. The district court granted the government's motion, ruling that there was not enough similarity between the two robberies to make the New Baden evidence relevant and that it would confuse the jury. The district court reasoned as follows:

One of the prongs in the *Huddleston* [*Huddleston v. United States*, 485 U.S. 691 (1988)] case requires a similarity of the prior bad act such that it would be fair to use it in the instant case. It seems to me that that same logic applies in determining whether or not the defense can bring out a separate crime committed by separate individuals to allege that those individuals are the ones who committed the instant crime. *I am going to hold the defense to the same standard that I held the Government*, and that is there has to be enough similarity that the jury is not confused and that the evidence becomes relevant. (419 F.3d at 606-07.)

The court of appeals agreed with the district court's result, but not with its reasoning.

The standard for Reverse Rule 404(b) evidence

The court of appeals noted that, although both prosecutors and defendants may offer Rule 404(b) evidence and all such evidence is subject to Rule

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403 balancing, the standards governing the prosecution and defense evidence differ. The court noted that it had adopted a standard set out in *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991), which meant that a lower standard of similarity should apply to defense evidence because prejudice to the defense is removed as a factor in the reverse Rule 404(b) setting. The district court had used the same similarity standard in evaluating the defense evidence as it uses to evaluate prosecutorial evidence. The court of appeals held that this was error. It nonetheless held that that district court did not err in excluding the evidence.

Applying the standard

The court of appeals found that the defense evidence was irrelevant and therefore inadmissible. The court reasoned that the only similarities between the two robberies were “generic,” so that evidence of the other robbery did not support an inference that the robbers of the other bank committed the robbery attributed to the defendants. The court reasoned that “[m]any robbers disguise their identities, carry firearms, and use a stolen vehicle in their getaway.” (419 F.3d at 607.) It also found five specific differences between the two robberies. First, the number of robbers differed—five in New Baden and four in Cahokia. Second, although disguises were used in both robberies, they were not the same. Both robberies involved a man disguised as a woman, but in Cahokia the robber wore a blond wig and fatigues whereas in New Baden the robber wore a woman’s dress. Third, the guns used in the two robberies were different. Fourth, the robbers’ modus operandi was different in the two robberies. The Cahokia robbers vaulted over the teller counter to retrieve the money themselves, whereas the New Baden robbers waited on the customer side of the counter for bank employees to bring the money to them. Fifth, the similarities in time and place were not great; although the robberies occurred two weeks and 31 miles apart, “[t]hirty-one miles might not appear very far on a globe, but in practical terms these two robberies occurred in separate counties.” (*Id.*)

The factors

A comparison of this case with *United States v. Montelongo*, 420 F.3d 1169 (10th Cir. 2005), is instructive. The factors favoring admissibility in *Montelongo* were these: First, “evidence of the prior incident tended to negate the Defendants’ guilt, and, as such, was directly—as opposed to

merely “marginally”—relevant.” Second, the evidence tended to show the prior incident involved “nearly identical conduct,” and thus “was not merely coincidental,” and “could be viewed as compelling evidence.” Third, the evidence “was neither cumulative nor repetitive.” Fourth, “the Defendants had no improper motive in seeking it.”

Applying these same factors to *Seals*, the case for admissibility is weak. The first two factors that were important in *Montelongo* are closely related in *Seals*. The New Baden incident only tended to negate the defendants’ guilt in the Cahokia robbery if it established that the New Baden robbers must have committed both crimes. The lack of similarity between the two robberies undermined the defense claim that there was a single modus operandi and thus there must have been only one group of robbers. The conduct was not nearly identical and could hardly be viewed as compelling. As for the third factor, although evidence of the New Baden incident would not have been cumulative or repetitive, it would have involved a substantial amount of trial time. After all, the five New Baden robbers were all convicted. Presumably, they would have had to be produced as witnesses along with the investigating officers and possibly other witnesses. This would have involved a trial within a trial. The burden this would have placed on the prosecution was sufficient to raise a question about the defendants’ motivation in seeking the evidence. Thus the fourth factor also cut against the defendants.

There are two other big differences between *Montelongo* and *Seals*. In *Montelongo*, the defense evidence, if believed, explained how the defendants might have been present in a truck containing marijuana without knowing the drug was present. In *Seals*, the reverse Rule 404(b) evidence could not explain the substantial evidence that existed tying the defendants to the crime charged. It might well be the case that, in doing Rule 403 balancing, a trial judge inevitably will look to see whether there is defense evidence tending to negate the prosecution’s evidence tying a defendant to a charged crime. If there is no such evidence, reverse Rule 404(b) evidence may appear to be less important.

Second, in *Montelongo*, the defendants and the truck owner denied knowing anything about the marijuana found in the owner’s truck. It was plausible that the owner was lying, just as it was plausible that the defendants were lying. The jury had to choose between the competing versions, and therefore evidence that might have tied the owner to other marijuana was particularly important. In *Seals*, the five men who committed the New Baden

robbery were all convicted. So, there was almost no chance that the two cooperating witnesses in the Cahokia robbery, Paschal and Townsend, were involved in New Baden. If they were not involved in New Baden, then there was zero probability that the same group committed both robberies.

Although there are no bright lines in Rule 403

balancing, it seems reasonable to assume that reverse Rule 404(b) evidence will be more probative in cases like *Montelongo* when there are no government witnesses who participated in the alleged crime with a defendant than in cases like *Seals* where such witnesses exist and are cooperating with the government.