FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** v. **NESTOR C. TAITANO** d.o.b. 10/18/1974 **Defendant.**	**CRIMINAL CASE NO. 10-0216** **ORDER DENYING IN PART PLAINTIFF'S MOTION TO INTRODUCE EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS PURSUANT TO NMI R. EVID. 404(b) AND 609**

I. INTRODUCTION

THIS MATTER came for hearing on February 2, 2012 at 9:00 a.m. in Courtroom 202A. Eileen E. Wisor, Esq., appeared on behalf of the Commonwealth of the Northern Mariana Islands ("Commonwealth"). Matthew Meyer, Esq., appeared on behalf of Nestor C. Taitano ("Defendant"). Subsequent to the hearing, Defendant filed an objection and the Commonwealth then filed a Memorandum in Support of Admissibility of Evidence Pursuant to NMI R. Evid. 404(b) and 609 and Response to Defendant's "Objection" ("Plaintiff's Motion").

Based on the pleadings, the papers on file and arguments of counsel, the Court DENIES in part Plaintiff's Motion.

II. BACKGROUND

On April 6, 2011, the Commonwealth charged Defendant with Assault and Battery, Robbery, Conspiracy to Commit Robbery, and Disturbing the Peace in violation of 6 CMC §§ 1202(a), 1411(a), 303(a) and 3101(a), respectively. The matter is currently set for a jury trial on February 21, 2012.

On April 2, 2011, Defendant and his co-conspirator ("Basaliso") allegedly beat up and robbed a 64-year-old Chinese man named Guo Xi Liang ("Liang") in San Antonio, Saipan. (Decl. of Probable Cause in Supp. of an Arrest Warrant at 1.) An eyewitness stated that she overheard Defendant suggest to Basaliso that they beat up Liang because he had a lot of money. (*Id.*) The eyewitness momentarily left the location and then shortly returned to find Liang badly beaten and bleeding, and asking for help. (*Id.* at 2.) The next day, on April 3, 2011, Liang identified Defendant in a photo line up as one of the two men who beat him up and stole his wallet. (*Id.*)

On February 9, 2012, the Commonwealth filed a memorandum in support of its pre-trial motion to admit into evidence Defendant's eight prior convictions and two charges dismissed per plea agreements under NMI R. Evid. 404(b), to which Defendant has opposed.

III. LEGAL STANDARD

Commonwealth Rule of Evidence 404(b) precludes the admission of evidence of a defendant's prior wrongs, crimes or acts to show that the defendant has a propensity for committing bad acts. *Commonwealth v. Cepeda*, 2009 MP 15 ¶ 18. However, such evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NMI R. Evid. 404(b).[1]

If the court determines that the Rule 404(b) evidence is relevant as to one of the enumerated proper purposes, the evidence must then be subject to a balancing test under NMI R. Evid. 403. *See Commonwealth v. Brel*, 4 NMI 200, 203 (1994) ("Before admitting relevant evidence of prior misconduct, a trial court must conduct a Com. R. Evid. 403 analysis, balancing the probative value of the evidence against the danger of unfair prejudice."). The

[1] NMI R. Evid. 404(b) provides in full:

> 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 excused pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

judge must go through a conscious process of balancing the costs of the evidence against its benefits. *Commonwealth v. Saimon*, 3 NMI 365, 376 (1992). If the probative value is substantially outweighed by unfair prejudice, the evidence may be excluded; otherwise, the evidence shall be admitted. *Id*. "Because of the highly discretionary nature of this balancing process, the [] court's decision is afforded great deference." *United States v. Bell*, 516 F.3d 432, 445 (6th Cir. 2008) (citations omitted).[2]

IV. DISCUSSION

The U.S. Supreme Court has cautioned against admitting a defendant's prior criminal acts into evidence because such evidence may "weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Old Chief v. United States*, 519 U.S. 172, 181 (1997). Similarly, the Ninth Circuit Court of Appeals noted: "Extrinsic act evidence is not looked upon with favor . . . [because] the defendant must be tried for what he did, not for who he is." *United States v. Vicarra-Martinez*, 66 F.3d 1006, 1013-14 (9th Cir. 1995) (citations and internal quotations omitted). Nevertheless, a defendant's prior convictions may be admitted under Rule 404(b) if the evidence is relevant and probative of a material issue other than character. *Huddleston v. United States*, 485 U.S. 681, 686 (1988).

A. RULE 404(B) ANALYSIS

"The Government . . . must carry the burden of showing how the proffered evidence is relevant to one or more issues in the case; specifically, it must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence." *United States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982) (citation omitted). Here, the Commonwealth provided ample notice to opposing counsel of its intention to introduce into evidence Defendant's prior felony convictions involving theft and violent assault

[2] The Commonwealth Rules of Evidence 404(b) is analogous to its federal counterpart. "[W]hen our rules are patterned after the federal rules it is appropriate to look to federal interpretation for guidance." *Ishimatsu v. Royal Crown Ins. Corp*., 2006 MP 9 ¶ 7 n.3.

and battery for the purpose of showing "knowledge, intent, plan, and/or preparation."[3] (Pl's. Mot. at 2, 3.) The Commonwealth complied with Rule 404(b)'s reasonable notice requirement and articulated proper purposes for the use of the "bad acts" evidence.

Nevertheless, "a proponent's incantation of the proper uses of such evidence under Rule 404(b) does not magically transform inadmissible evidence into admissible evidence." *United States v. Morley*, 199 F.3d 129, 133 (3d Cir. 1999); *see also Commonwealth v. Hossain*, 2010 MP 21 ¶ 25. Therefore, in determining whether Rule 404(b) evidence is relevant to the asserted valid uses, the Court must analyze whether:

> (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged."

Commonwealth v. Dela Cruz, Crim. No. 10-0111 (NMI Super. Ct. July 8, 2011) (Order Den. the Government's Mot. to Transfer Venue, Granting the Government's Mot. to Compel, and Granting the Government's Mot. in Limine at 8) (quoting *United States v. Chea*, 231 F.3d 531, 534 (9th Cir. 2000)).

1. Material Point

"[T]he government's purpose in introducing the evidence must be to prove a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove." *United States v. Merriweather*, 78 F.3d 1070, 1076 (6th Cir. 1996). Here, Defendant is charged with conspiracy to commit robbery, which is a specific intent crime, making intent automatically in issue. *See id.*; *United States v. Ross*, 510 F.3d 702, 713 (7th Cir. 2007) (citing cases). Furthermore, Defendant may conceivably argue he did not have the intent or plan to assault and rob the victim, which the Commonwealth anticipates will be the primary defense. Therefore, the Commonwealth's purpose for introducing the challenged evidence does pertain to a material point.

[3] At the February 2, 2012 hearing, the Commonwealth announced it was seeking to introduce Defendant's prior convictions into evidence purely to show "absence of mistake." However, Plaintiff's subsequently filed motion omitted any reference to "absence of mistake," and instead articulated the purposes of "knowledge, intent, motive, plan, and/or preparation." (Pl's. Mot. at 3.)

2. Not Too Remote in Time

There is no specific time threshold for how old a prior conviction may be until it becomes inadmissible under Rule 404(b) as being too remote; rather, the Court must simply determine whether the "prior-act evidence will help a jury shed light on the issues before it." *United States v. Ozsusamlar*, 428 F. Supp. 2d 161, 171 (S.D. N.Y. 2006). Thus, even a prior conviction dating back longer than twelve years may not be too remote if it is highly relevant and probative of a material point other than character. *Id.* (citing cases). The Court agrees with the Commonwealth that Defendant's prior convictions are not too remote in time, particularly considering that Defendant was incarcerated for most of the time between his last conviction and the offense charged. *See Ross*, 510 F.3d at 713 (noting that 404(b) evidence was not too remote in time despite the six-year time gap because the defendant was incarcerated during many of the intervening years).

3. Sufficient Evidence that the Defendant Committed the Prior Bad Acts

The Commonwealth seeks to admit into evidence Defendant's prior convictions and charges, of which the Commonwealth possesses documentary proof. (Pl's Mot. at 4.) Also, Defendant does not contest that he committed the specified prior crimes.[4] (Def's. Objection under Com. R. Evid. 404(b) at 3.) Clearly, there is sufficient evidence that Defendant committed the prior crimes. *See United States v. Calderon*, 127 F.3d 1314, 1332 (11th Cir. 1997) ("It is elementary that a conviction is sufficient proof that [the defendant] committed the prior act."); *see also United States v. Bell*, 516 F.3d 432, 441 (6th Cir. 2008).

4. Similarity Between the Prior Bad Acts and the Offenses Charged

"To be admissible for the purposes of establishing motive, intent, course of conduct, or bent mind, the State must show . . . sufficient connection or similarity between the similar transaction and the crime alleged so proof of the former tends to prove the latter." *Payne v. State*, 674 S.E.2d 298, 299 (Ga. 2009) (citation omitted). Proof of the former conviction may

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[4] Defendant admitted that the Commonwealth's *initial* list of Defendant's prior bad acts, filed on February 2, 2012, were true and accurate; however, the Commonwealth amended this list, removing and adding multiple charges and convictions. Defendant has made no objection as to the veracity of the updated list of Defendant's prior convictions and charges. Also, the Court trusts the Commonwealth's assurance that it has documentary proof of Defendant's purported convictions.

1 be probative as to intent, motive, plan or preparation of the pending charges in two different
2 contexts: (1) completing the picture of the crime, and (2) signature crimes. *See United States v.*
3 *Carroll*, 207 F.3d 465, 468 (8th Cir. 2000).
4 With respect to "completing the picture of the crime," prior bad acts are admissible if
5 they are intertwined with the facts of the offense charged. *Id*. For instance, a defendant's prior
6 bad act of stealing weapons may be admissible in a case where the defendant is charged with
7 robbery, if the stolen weapons were used in the robbery. *Id*. A prior conviction may also be
8 admissible to illustrate the broader plan or motive of the instant crime. *U.S. v. Lamons*, 532
9 F.3d 1251, 1266 (11th Cir. 2008). The *Lamons* court held that the defendant's prior conviction
10 for making a threatening telephone call to the airlines was admissible under Rule 404(b) to
11 prove the defendant's intent of setting fire to an aircraft's lavatory. *Id*. ("Rather than creating a
12 primary inference of [plaintiff's] character or his propensity to commit criminal acts, the
13 evidence instead permitted the inference that plaintiff deliberately set the fire based on the
14 improbability of accident.").
15 The second method of satisfying the "similarity" element in admitting evidence under
16 Rule 404(b) is by showing that the prior and present acts represent signature crimes - crimes
17 that share a unique set of facts. *Payne*, 674 S.E.2d at 299. In *Payne*, the defendant was
18 charged with sexual assault, and the court admitted a prior conviction of sexual assault because
19 both crimes involved the same set of unique facts: (1) the victims were known to the defendant,
20 (2) the perpetrator used physical restraint and threats, and (3) the perpetrator engaged in the
21 same sexual acts. *Id*. at 300. In contrast, prior sexual assault convictions may not be
22 admissible if they "reflect misconduct common to all too many child sex offenders." *United*
23 *States v. LeCompte*, 99 F.3d 274, 279 (8th Cir. 1996). Similarly, a defendant's prior conviction
24 for robbery is inadmissible in later case charging the same defendant with robbery when the
25 robberies were generic in facts. *United States v. Carroll*, 207 F.3d 465, 469 (8th Cir. 2000).
26 Here, the Commonwealth does not claim that any of the Defendant's prior bad acts
27 sought to be introduced at trial are in any way connected with his current charges.
28 Additionally, given the fact that Defendant's last conviction is over ten years old, it would be

extremely difficult to draw any relationship to the prior convictions. Rather, it appears that the Commonwealth wishes to introduce the prior acts as signature crimes because they all "were committed with the *help of a co-conspirator* and involve crimes of *theft* and/or violent *assault and battery*" just like the offenses charged. (Pl's. Mot. at 2.)

It is clear that Defendant's prior convictions and the instant case do not represent signature crimes. The mere fact that the prior convictions include acts of "theft" and "violent assault and battery" is far too general to constitute signature crimes. *See, e.g., Carroll*, 207 F.3d at 469 (holding evidence of the defendant's prior robbery conviction inadmissible in his robbery case); *United States v. O'Connor*, 580 F.2d 38, 42 (2d Cir. 1978) (rejecting testimony that defendant took multiple bribes six months or a year prior to defendant's current charges for taking bribes). In *O'Connor*, the court held that "[t]here is nothing unique about receiving bribes in cash each week without conversation or spectators." *Id*. Therefore, the evidence of defendant taking the past bribes "was perhaps probative of [defendant's] habit or character, but not of the existence of a specific plan of which the charged acts were just a part." *Id*.

Defendant's prior convictions are even less probative than those rejected in the aforementioned cases, considering that not a single one of Defendant's prior convictions is for robbery or conspiracy to commit robbery. More importantly, the specific facts of Defendant's pending charges for robbery and conspiracy are general and common among the garden-variety robberies. Defendant and another person allegedly beat up an elderly man and stole his wallet. There are no factual allegations that a weapon was used, nor unusual disguises worn, nor a distinctive manner of assault and battery employed. Furthermore, Defendant has never been convicted of, or charged with, victimizing an elderly man. The only common factual thread between the prior bad acts and the offenses charged is the participation of a co-conspirator; however, crimes are often committed by two individuals.[5] The Commonwealth failed to prove

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[5] The involvement of two participants in prior convictions and the present charges may be a contributing factor to the designation of signature crimes when combined with other distinctive facts. *See Ross*, 510 F.3d at 713 (holding that prior conspiracies were sufficiently similar to the charged offenses because "[a]ll of the robberies targeted the same post office, occurred on the same day of the week, required the use of scissors, and involved two of the same participants").

that the prior convictions are sufficiently similar to the offenses charged; thus, they are not relevant as to intent, motive, plan or preparation.

The Commonwealth also seeks to admit Defendant's prior convictions to prove Defendant had the "knowledge" to commit the alleged crimes. For this purpose, the prior bad acts need not be intertwined with the facts of the offense charged, nor represent signature crimes, but the prior and currently-charged acts must involve the same specialized knowledge.[6]

For example, prior convictions for distribution of a controlled substance are often admissible in subsequent drug charges under Rule 404(b) to prove that the defendant possessed the knowledge of how drugs are retailed. *See, e.g., United States v. King*, 768 F.2d 586, 588 (4th Cir. 1985). Also, prior convictions of complex conspiracies may be probative of knowledge. *See United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 531 (4th Cir. 1985) (admitting prior conviction for bid rigging because "[defendant's] other bid rigging was probative of his knowledge of entering a bid rigging conspiracy"); *see also United States v. Green*, 648 F.2d 587, 592 (9th Cir. 1981) ("Without this specialized background neither of the appellants would have had the capacity, i.e., an opportunity, to commit the crimes charged.").

Unlike the cases immediately referenced above, this is not a case in which prior bad acts are probative of knowledge. *Cf. United States v. Sanders*, 964 F.2d 295, 299 (4th Cir. 1992) ("[A]ssault with a shank is not the kind of crime in which knowledge is even implicitly at issue."). No specialized knowledge, talent or background is required to enable a person to commit the charged acts of beating up and robbing an elderly man. Therefore, Defendant's prior convictions bear no relevance as to knowledge in this case.

B. RULE 403 ANALYSIS

Even assuming the prior convictions were relevant as to a proper purpose enumerated in Rule 404(b), the prior convictions would still be inadmissible under NMI R. Evid. 403. "Although relevant, evidence may be excluded if its probative value is substantially

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[6] Knowledge can also be relevant if it is an element of the crime. *United States v. Naylor*, 705 F.2d 110, 111-12 (4th Cir. 1983) (admitting a prior conviction for attempted theft of a motor vehicle as to "the issue of knowledge and absence of mistake in a 1982 charge of interstate transportation of a stolen motor vehicle, since an essential element of this crime is defendant's knowledge that the vehicle is in fact stolen."). Here, knowledge is not an element of any of the crimes Defendant is charged with.

outweighed by the danger of unfair prejudice . . . ." *Id*. As mentioned above, Rule 404(b) evidence must pass the Rule 403 balancing test, which is determined by weighing the costs of the evidence against its benefits. *Commonwealth v. Saimon*, 3 NMI 365, 376 (1992).

1. Costs

There is always a cost involved with the admission of a defendant's prior convictions due to the risk that the jury will prejudge the defendant as a "bad guy" and convict the defendant based on what he or she did in the past. *Old Chief v. United States*, 519 U.S. 172, 181 (1997). This risk is compounded when the prior convictions involve unrelated violent or sensational crimes that will likely inflame the passions of the jury. *See United States v. Gubelman*, 571 F.2d 1252, 1255 (2d Cir. 1978).

Here, the costs are extraordinarily high in light of the long list of violent and sensational crimes sought to be admitted.[7] The prior convictions do not contain any similar distinctive facts, but rather, are all of the same general nature of the offenses charged, making the Rule 404(b) evidence particularly prejudicial. *Old Chief*, 519 U.S. at 185; *United States v. Bell*, 516 F.3d 432, 444 (citation omitted). The only logical inference presented by the evidence is that the Defendant is a violent person and a thief, and therefore, he is likely guilty of the instant robbery and assault and battery charges – the exact type of inference that Rule 404(b) prohibits. *See United States v. O'Connor*, 580 F.2d 38, 42 (2d Cir. 1978) ("Not only was the evidence irrelevant, it was prejudicial because it might lead a jury to convict because it thought the defendant's character was such that he frequently committed crimes."); *see also Bell*, 516 F.3d 432, 446 (6th Cir. 2008). It is difficult to imagine how any juror could render a fair verdict on the merits of the case after gaining insight into Defendant's expansive criminal history of violence and thievery.

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[7] Some of the particularly inflammatory convictions sought to be admitted into evidence include: Assault with a deadly weapon (i.e. a machete), Assault and Battery on a female victim, and Involuntary Manslaughter. Also, the Commonwealth seeks to admit convictions for unlawful possession or use of firearms even though no firearms were reportedly used in the offenses charged. Lastly, the cumulative effect of admitting multiple convictions of unrelated thefts, burglaries, and assaults will undoubtedly be highly prejudicial.

2. **Benefits**

The Commonwealth contends that the admission of Defendant's prior convictions is useful to show Defendant had the "intent, knowledge, plan, and preparation" to commit the charged offenses. (Mot. at 3.) As discussed above, "knowledge" is not at issue in this case. Also, "intent" is not a substantial concern either. Although "intent" is implicitly at issue because it is an element of the specific-intent crimes Defendant is charged with, the factual basis for the charges do not place "intent" at issue. Unlike in the case[8] where the defendant admitted to committing the robbery but argued he lacked the requisite mental state because he was under hypnosis, "[h]ere, the Commonwealth anticipates that Defendant will argue that his co-conspirator planned and perpetrated the entire crime on his own." (Pl's. Mot. at 3.) Therefore, the anticipated defense is not that Defendant lacked the intent to commit the act, but rather, Defendant did not commit the act at all.[9]

The prior convictions also contain little probative value of Defendant's plan or preparation to commit the offenses charged. As discussed above, the prior convictions do not paint a picture of a common scheme or connect the pending charges to a broader plan or goal. Furthermore, the past and present bad acts do not share any distinctive facts, which would otherwise tend to imply Defendant was actively involved in the charged crimes. Because Defendant has never previously been charged with Robbery or Conspiracy to Commit Robbery or the act of assaulting an elderly man, the only benefit the prior convictions would serve

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[8] *United States v. McCollum,* 732 F.2d 1419, 1424 (9th Cir. 1984) ("Evidence of this armed robbery conviction was probative as to McCollum's proffered defense that he acted under hypnosis without any intent to rob the bank.").

[9] If the defense theory at trial is that Defendant was present when Basaliso robbed Liang, but that Basaliso acted on his own initiative without any intent or planning on Defendant's part, then "intent" and "plan" would be critical issues for the Commonwealth to prove. *See United States v. Taylor*, 767 F. Supp. 2d 428, 441 (S.D. N.Y. 2010). Even so, the prior convictions would be of little value because they involved conspiracies to commit burglary and theft, which involve different types of intent. *See id*. Showing that Defendant previously had the intent to commit a crime against property upon entering a residence (burglary) does not tend to prove that he had the intent to use force to remove property from another's possession (robbery) in the instant case.

would be to show Defendant has a general disregard for the law, which is a prohibited use under Rule 404(b).[10]

C. Rule 609 Analysis

The Commonwealth Rules of Evidence 609 permits the admissibility of prior convictions, under certain conditions, for the purpose of attacking the credibility of a witness. The Commonwealth intends to introduce Defendant's prior convictions at trial "should he choose to testify." (Pl's. Mot. at 2.) Because Defendant may choose *not* to testify at trial, a ruling on the admissibility of Defendant's prior convictions under Rule 609 is premature at this time. If Defendant does choose to testify at trial, the Court will then make a Rule 609 ruling at that time.

V. CONCLUSION

For the reasons set forth above, the Court hereby **DENIES** Plaintiff's Motion as to the admissibility of Defendant's prior convictions into evidence under Rule 404(b). The Court hereby **STAYS** Plaintiff's Motion as to the admissibility of same evidence under Rule 609 until the time of trial *if* a ruling is required.

IT IS SO ORDERED this _14th_ day of February, 2012.

/s/______________________________________

ROBERT C. NARAJA, Presiding Judge

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[10] At the February 2, 2012 hearing, the Commonwealth sought to admit multiple traffic-related offenses of Defendant for the purpose of showing that "Defendant has a general disregard for the law." The Commonwealth wisely removed these completely unrelated and irrelevant traffic charges, and also changed its tone for justifying the admission of Defendant's prior convictions. Despite the Commonwealth's more recent attempt to better comply with Rule 404(b), the true purpose still appears to show that "Defendant has a general disregard for the law," which is improper character evidence.

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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **v.** **NESTOR C. TAITANO** d.o.b. 10/18/1974 **Defendant.**	**CRIMINAL CASE NO. 11-0095** **ERRATA**

The Court's February 14, 2012 Order in the above-captioned matter was erroneously docketed as Criminal Case Number "10-0216" while the actual number is Criminal case Number 11-0095. The Court hereby corrects the February 14, 2012 Order to read "CRIMINAL CASE NO. 11-0095."

IT IS SO ORDERED this 15th day of February, 2012.

/s/
ROBERT C. NARAJA, Presiding Judge