IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA Plaintiff,	)	CRIM. NO. 08-50079-01
vs.	)	DEFENDANT GRAHAM'S MOTION IN LIMINE RE: RES GESTAE EVIDENCE
JOHN GRAHAM, a/k/a JOHN BOY PATTON and VINE RICHARD MARSHALL, a/k/a RICHARD VINE MARSHALL, a/k/a DICK MARSHALL, Defendants.	)	

The government has provided notice of its intent to admit evidence "regarding the victim's abduction which encompassed Defendant John Graham's aggravated sexual abuse of the victim." Govt.'s Notice of Res Gestae Evidence (Doc. 65) (hereinafter "Govt. Notice"). Specifically, the government intends to admit evidence that Anna Mae Pictou Aquash was raped by John Graham in Rapid City, South Dakota. The government contends this evidence is admissible under the res gestae theory, or, alternatively, as "other acts" evidence under Fed.R.Evid. 404(b).

Mr. Graham moves this Court for its Order in Limine prohibiting the government from introducing or eliciting any evidence pertaining to the alleged rape of Ms. Aquash. The government should be precluded from introducing or

eliciting this evidence because it is not probative, is unfairly prejudicial, and is not admissible under the res gestae theory or as an other act under Fed.R.Evid. 404(b).

A. THE EVIDENCE IS NOT PROBATIVE BUT IS HIGHLY PREJUDICIAL

Whether the rape allegation evidence is characterized as an other act under Fed.R.Evid. 404(b) or under the res gestae theory, the evidence must still be screened for admissibility under Fed.R.Evid. 403. United States v. Petary, 857 F.2d 458, 462 (8th Cir. 1988) (res gestae and 404(b) evidence must be screened under Fed.R.Evid. 403 "to ensure that its probative value is not outweighed by its prejudicial value."). In this case, the proposed evidence has little or no probative value.

The government has consistently asserted that Aquash was killed because AIM suspected she was an informant. The government has not argued, and no evidence supports the notion, that Aquash was killed to eliminate her as a witness to her own rape. The government has consistently maintained that the order to kill Aquash did not come until after she was allegedly raped, and that the order came from someone other than Graham. Thus, the rape allegation has no probative value: Whether Aquash was raped does not make any element of the charged offense more likely.

The rape allegation is not reliable, further negating its probative value. No forensic evidence supports the notion that she was raped. The only forensic evidence in existence, Dr. Brown's autopsy, showed signs of sexual activity but no signs of forcible or traumatic sexual assault.

The government relies primarily upon the statements of Frank Dillon to support its contention that Graham raped Aquash. Govt. Notice, File Doc. 65, pp. 2-3. The government has failed to disclose several key facts related to Mr. Dillon and his statements. First, Dillon stated under oath to the grand jury that he was "pretty drunk" during his conversation with Graham regarding Aquash. Graham Doc. 00652, 00654. Second, Dillon told the grand jury that statements allegedly given by him to law enforcement about his knowledge of the case were not true, and that he had not made the statements attributed to him. Graham Doc. 00653-00655. Third, in regard to the rape allegation, the only sworn testimony given by Dillon on that point contradicts the government's assertion that Graham admitted that to him. Dillon told the grand jury that his knowledge of the rape allegation came from the autopsy and what another witness thought might have happened. Graham Doc. 00657-58. Dillon never told the grand jury that Graham had told him he had raped Aquash.

Last, the government has not asserted that it will call Dillon as a witness. It is defense counsel's understanding and information that Dillon is not competent to testify and that the government may not be able to locate him. If Dillon is not going to be a witness, then the government should be absolutely prohibited from making any reference to the rape allegation until such time as the court has determined the admissibility of other evidence to be introduced at trial on this point. At present, the primary support for the government's notice is Dillon's alleged statements.

The rape allegation would be highly prejudicial to Graham. No cautionary or limiting instruction can prevent the spillover effect on the jury. The government's real reason for making this allegation is to destroy Mr. Graham's character and to impute to him a propensity to commit crimes against women. Such propensity and bad character evidence is not admissible. Fed.R.Evid. 404(a) & 608.

B. THE EVIDENCE IS NOT ADMISSIBLE AS RES GESTAE

Evidence of the alleged rape is not admissible under the res gestae theory. The case law on point, including the case law cited by the government, establishes that this theory of admissibility is narrow in scope, cautiously applied, and only

applicable where proof of the other act is inseparable from proof of the crime charged.

The government cites United States v. Forcelle, 86 F.3d 838 (8th Cir. 1996), in support of its position. Govt. Notice p. 4. This case does not support the government's position in this case.

In Forcelle, a defendant's conviction was reversed because the district court improperly admitted other acts evidence under the res gestae theory. The analysis in Forcelle began with the proposition that evidence of uncharged crimes is not admissible against a defendant. Id. at 841 (citation omitted). The Court went on to explain that admissibility under the res gestae theory is premised on the notion that the other act is "an integral part of the immediate context of the crime charged." Id. (citation omitted).

The facts in Forcelle demonstrate how even closely related facts are not admissible under the res gestae theory unless proof of the other acts directly proves the crimes charge. Forcelle was charged with stealing money from his employer (through a mail fraud scheme) so that he could build a summer house and buy a car chassis. Id. at 840. At trial, the government was allowed to admit evidence that Forcelle had also stolen platinum from his employer, and had his

employer improperly pay for repairs to his primary residence. Id.

The appellate court held that this evidence should not have been admitted as res gestae or 404(b) evidence. Id. at 842. The Court held that the proof of the other acts did not incidentally prove the charges related to the summer home and car chassis. Id. at 842. The Court concluded by noting that "[t]he evidence about the platinum is evidence showing a discrete example of Forcelle's mis-appropriation of company resources, and provides no additional context for the crimes charged." Id. at 842.

The relationship between the other acts and the crimes charged in Forcelle was much closer than the rape allegation is related to the murder charge in Graham's case. Both involved stealing from the same employer for the same purposes (housing and cars) during the same time frame. Still, in Forcelle, the Court found that relationship too attenuated to be admitted.

In this case, the allegation that Aquash was raped by Mr. Graham does not incidentally prove that Graham murdered Aquash. The rape allegation is a discrete allegation of an entirely separate, uncharged criminal act allegedly committed by Mr. Graham. It is factually and legally the same scenario presented in Forcelle. Accordingly, the evidence should be excluded.

The same narrow, cautious approach to res gestae evidence is demonstrated in other cases cited by the government in its notice. In United States v. Reibold, 135 F.3d 1226 (8th Cir. 1998), Govt. Notice p. 3-4, the defendant in a fraud case had been convicted and served time twice in the past for fraud. The district court allowed the government to introduce evidence of these prior fraud convictions in a pending fraud prosecution involving the same kind of scheme. This decision was upheld by the Court of Appeals, but the Court expressly declined to adopt a broad policy of admissibility in such circumstances. Id. at 1229.

The Court upheld the admission because the facts in the past and present cases were "very similar," and because the past convictions were pivotal to an issue in dispute: whether Reibold had obtained money by false pretenses. Id. The evidence of his prior convictions was admitted because investors had asked Reibold whether he had a criminal background, and Reibold had lied and denied a prior record. "Thus, Reibold's concealment of his prior convictions was an important part of the scheme; otherwise, investors would have been hard to come by." Id. It was Reibold's lying about his convictions that satisfied the false pretense element of the charged crime.

United States v. Honken, 378 F.Supp.2d 928 (N.D.Iowa 2004), Govt. Notice p. 4, further supports the proposition that evidence should only be admitted as res

gestae after a direct, causal connection is made between the other acts and the crimes charged. Honken was charged with murdering people involved in his drug distribution activities. Id. at 934-37. He had been convicted of drug distribution in the past, and had other pending drug charges at the time of the murder prosecution. The indictment specifically charged that the murder charges were directly related to Honken's drug dealing activities, and that the victims were drug dealing associates he wished to silence. Id. at 934-37. Evidence from his prior drug dealing case was admitted as res gestae. A direct link had been established. The past drug conviction, and Honken's own statements during sentencing, established his connection to the victims in the present case and his motive for wanting them silenced in his pending drug case. Id. at 941-42.

In United States v. Holliman, 291 F.3d 498 (8th Cir. 1996), Govt. Notice p. 4, the defendant was charged with conspiracy to transport stolen vehicles. The Court held that evidence from co-conspirators about specific vehicles that were stolen was admissible as res gestae. The connection between the underlying act and the crime charged was obvious and direct:

> The testimony of the co-conspirators concerned the very crime, conspiracy to transport stolen vehicles, for which Holliman was standing trial. The evidence of other vehicles stolen by the conspiracy was admissible under the doctrine of res gestae, as this evidence was sufficiently connected to the charged crimes that it tended logically to prove elements of these crimes.

Id. at 502.

The same kind of causal relationship existed in United States v. Roberts, 253 F.3d 1131 (8th Cir. 2001), also cited by the government. In that case, prior bank robberies were admitted in a pending bank robbery case because, in the prior robberies the defendant had coached an accomplice on how to commit a bank robbery, which was how the pending robbery was in fact committed. Id. at 1134-35. The similarity in offenses and the relationship they had to each other was clear, and warranted admission under the res gestae theory.

The government seeks to have this Court take a more expansive view on the admissibility of evidence under the res gestae theory. The government cites Wilkerson v. United States, 342 F.2d 807 (8th Cir. 1965), for the proposition that Mr. Graham's contact immediately before, during and after the murder is admissible as part and parcel of the entire transaction and of his intent to commit the murder. Govt. Notice pp. 4-5. This is not what Wilkerson holds.

Wilkerson involves a Mann Act prosecution for the interstate transportation of prostitutes. The Court's analysis is specifically limited to Mann Act cases, particularly the specific requirement that an intent to transport prostitutes in interstate commence be proven. Id. at 813. Moreover, the court notes that the

defense failed to object to the evidence at trial, and actually elicited some of the offending acts through its own examination. Id. at 812-13. The acts of violence (beating of prostitutes) in Wilkerson were directly and causally related to the intent requirement at issue under the Mann Act, and were admitted for that purpose.

The res gestae theory does not support the government's position in this case. Like in Forcelle, supra, 86 F.3d at 841, the uncharged conduct alleged in Mr. Graham's case is not an integral part of the immediate context of the crime charged. Instead, the rape allegation refers to a discrete event isolated from the crime charged. Unlike the circumstances in Reibold, supra, 135 F.3d at 1229, the crimes alleged are not similar, there is no causal relationship between the other acts and the pending charges, and the rape allegation does not prove an element of the crime charged. Id. Similarly, unlike the facts in Honken, supra, 378 F.Supp.2d at 934, and Holliman, supra, 291 F.3d at 502, there is no direct cause and effect relationship between the other act and the charged conduct.

There is an insufficient nexus between the unproven, uncharged rape allegation and the murder charge. Because of that, the res gestae theory does not support admission of the evidence.

C. THE EVIDENCE IS NOT ADMISSIBLE AS OTHER ACTS

The government has proposed as an alternate theory of admissibility that the rape allegation constitutes an admissible other act under Fed.R.Evid. 404(b). The government's claim is perfunctory and fails to set forth any specifics of its claim that the evidence is admissible under this rule. Govt. Notice pp. 5-7. Instead, the government merely sets forth a laundry list of potential theories of admissibility under the rule. Govt. Notice p. 5.

Other acts evidence is admissible under Rule 404(b) if it is 1) relevant to a material issue raised at trial, 2) similar in kind and close in time to the crime charged, 3) supported by sufficient evidence to support a jury finding the defendant committed the other act, and 4) its probative value is not substantially outweighed by its prejudicial value. United States v. Johnson, 439 F.3d 884, 887 (8th Cir. 2006) (citation omitted). It is not admissible to prove a defendant's propensity to commit the kind of criminal act charged in an indictment, even when the same general subject matter is at issue. Id. (reversing child pornography conviction where court admitted evidence defendant possessed stories about child rape).

In the present case, the proposed evidence fails to meet the minimum standards for admissibility under Rule 404(b). First, the evidence is not relevant to a material issue in dispute in this case. The issue before the jury is whether John Graham murdered or aided others in murdering Aquash. He is not charged with rape, and he is not charged with felony murder. The government has never alleged that the murder occurred during a rape or as a result thereof. In fact, the government's consistent theory of the case has been that at some point after the rape allegedly occurred, AIM leaders ordered the execution of Aquash because she was an informant. There is no material connection between the charge pending against Mr. Graham, the government's theory of prosecution, and the rape allegation.

Second, there is no similarity between the crime charged and the other act alleged. According to the government's pleading, Graham allegedly raped Aquash in an empty apartment in Rapid City before Aquash was transported to the Pine Ridge and Rosebud reservations. This allegation of a discrete event has no correlation to the politically motivated and orchestrated killing alleged by the government.

Third, no credible evidence produced so far supports a jury finding that Mr. Graham raped Ms. Aquash. The forensic evidence is inconclusive in that it

suggests sexual activity occurred but finds no evidence of force or trauma. The only testimony on point comes from a witness who has repeatedly contradicted himself on key matters, and who did not report Graham's alleged confession during his grand jury testimony.

Fourth, as set forth in the first section of this pleading, the probative value of this evidence is substantially outweighed by its prejudicial effect. Since rape is not charged and proof of rape is not an element of the charged offense, the primary value of this evidence would be to create a mini-trial within the trial as to Mr. Graham's character and propensities. Beginning with jury selection, the issue of a rape allegation would become a focal point of the case. Many jurors' reactions to such an accusation, based on their own experiences or the experiences of people close to them, may prevent them from fairly sitting in judgment in this case. The highly inflammatory and emotional nature of a rape allegation would make curative or limiting instructions meaningless.

For these reasons, Mr. Graham asks this Court to issue its Order prohibiting the government from introducing or eliciting any evidence pertaining to the rape allegation.

Dated December 19, 2008.

/s/ John R. Murphy

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
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	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
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DANA HANNA	☐	U.S. Mail, postage prepaid
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	☒	Electronic Case Filing

Dated December 19, 2008.

/s/ John R. Murphy
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