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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049 ~~VCR1300CR201080049~~

DEFENDANT JAMES ARTHUR RAY'S MOTION *IN LIMINE* (NO. 1) TO EXCLUDE INADMISSIBLE EVIDENCE OF PRIOR ACTS PURSUANT TO ARIZ. R. EVID. 404(B) AND 403

REQUEST FOR EVIDENTIARY HEARING

TO THE HONORABLE WARREN R. DARROW AND SHEILA POLK, YAVAPAI COUNTY ATTORNEY:

PLEASE TAKE NOTICE that, on July 20, 2010, or as soon thereafter as the matter may be heard in the Superior Court of Arizona in and for the County of Yavapai, Defendant James Arthur Ray, by and through his attorneys of record, will move this Court to exclude inadmissible evidence of prior acts pursuant to Ariz. R. Evid. 404(b) and 403. This motion is based on the attached Memorandum of Points and Authorities, the Declaration of Truc T. Do in Support of Defendant's Motions *in Limine* filed concurrently herewith, the files and records in this case, and any argument and evidence adduced at the hearing on this matter.

DATED: July 6, 2010

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The State has charged Mr. Ray with three counts of reckless manslaughter, in violation of ARS § 13-1103. The charges arise from a terrible accident that occurred in Sedona on the afternoon of October 8, 2009. The State now asserts—without elaboration, let alone the specificity mandated by Rule 15.1(b)(7)—that it will seek to introduce evidence of ill-defined "prior acts" that purportedly occurred years earlier, in different locations around the country, and in vastly different circumstances. Declaration of Truc T. Do in Support of Motions *in Limine* ("Do Decl.") ¶¶ 2-8, Exhibits 2 and 4. These acts apparently include an incident of a man fainting after he nearly struck a woman at a sweat lodge ceremony held five years ago by Mr. Ray, minor injuries at non-sweat lodge events with *no connection whatsoever* to hyperthermia or heat stroke—the purported cause of death in this case, and a tragic suicide at a shopping mall during a JRI conference. Admitting this supposed evidence would confuse jurors, generate prejudice against Mr. Ray, and consume undue judicial resources—all without shedding any appreciable light on the charges in the indictment.

The State's attempt is barred by the rule that "guilt or innocence must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing." *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994). The State has not shown that the alleged prior occurrences fall within the narrow exception to this rule set forth in Arizona Rule of Evidence 404(b). Indeed, the State has failed to identify each alleged incident in any detail, much less articulate precisely how such evidence could be probative of a material fact in this case. Any such attempt will be futile, for the prior events are so remote and dissimilar as to be irrelevant as a matter of law. Further, even if the State could identify a legitimate purpose, it plainly cannot carry its burden of showing by *clear and convincing evidence* that the prior acts occurred, and that Mr. Ray committed them. On this record, it is clear that the State is improperly attempting to carry its burden by piling on so many allegations that the jury concludes he must have done something wrong. Under Rule 404(b), as well as Arizona Rule of Evidence 403, the evidence must be excluded.

II. BACKGROUND

The indictment in this case arises from the terrible accident that occurred on the afternoon of October 8, 2009. The sweat lodge ceremony began in the afternoon and concluded in the early evening, resulting in the tragic deaths of three of Mr. Ray's friends and students. The State alleges that Mr. Ray was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that the deaths that afternoon would occur, A.R.S. §13-105; the defense submits that nothing could be further from the truth. In spite of the confined time frame and narrow legal question at issue, the State now seeks to confuse the jury and condemn Mr. Ray by introducing a litany of unrelated, unproven past events.

A. Prior Sweat Lodge Ceremonies

The State intends to introduce, as "Other Act Evidence," testimony from past participants in JRI sweat lodge ceremonies "who became ill or suffered signs of hyperthermia." Do Decl. ¶ 5, Exhibit 4. Despite repeated requests from the defense, *id.* ¶ 2-8 and Exhibits 1 to 5, the State has not identified this "Other Act Evidence" with any specificity, other than to state that the "identify [sic] of these participants and their testimony is set forth in the previously disclosed reports." *Id.* ¶ 5, Exhibit 4.

Based on a review of the State's disclosures to date, the defense presumes the State's reference to "hyperthermia" may refer to an incident at JRI's 2005 sweat lodge ceremony in which one participant, Daniel Pfankuch, apparently fainted. Id. ¶ 4, Exhibit 3. The State has repeatedly suggested—in search warrant affidavits, police summaries, and Grand Jury testimony—that Mr. Pfankuch lost consciousness and suffered "heat stroke" at this event. Detective Diskin testified to the Grand Jury on February 2, 2010 that "Daniel was transported to the hospital. Daniel told me that he was diagnosed with heat stroke." Transcript of Grand Jury Proceedings, February 3, 2010, No. 156-GJ-17468, at page 28, lines 2-3. But the medical records, obtained by investigators and the County Attorney on November 12, 2009, reveal that the State's version of these events before the Grand Jury was inaccurate and misleading.

The Verde Valley Fire Department records show that Mr. Pfankuch was aroused within "a few minutes" of their assessment, indicating that he fainted. Furthermore, Mr.

Pfankuch denied any pain or injury and was transported to the hospital only at the insistence of his wife. Upon arriving to the emergency room, Mr. Pfankuch "was full of sand and was able to walk on his own and use the shower in the Decon Room to clean up prior to assessment in ER." *See* Declaration of Truc T. Do in Support of Motion to Change Place of Trial and Motion to Compel Disclosure ¶ 9, filed June 29, 2010. Once assessed, Mr. Pfankuch's temperature was 36.4° Celsius or 97.52° Fahrenheit, *id.—below* normal and certainly not evidence of heat stroke or hyperthermia, which according to the Coconino Medical Examiner, Dr. A.L. Mosley, require a body temperature of 42° Celsius or 106-107° Fahrenheit. *Id.*¶ 12, Exhibit 54 at 14:11-26, 19:16-27.

B. <u>Prior JRI Non-Sweat Lodge Events</u>

Under the heading "Evidence or reference to injuries or incidents that occurred in non-sweat lodge JRI events," the State, in plain violation of Rule 15.1(b)(7), reveals no more than that it "intends to introduce this evidence and testimony at trial." Do Decl. ¶ 8, Exhibit 4. The defense—again left to comb through the record for hints at what the State has in mind—presumes the State intends to introduce evidence of the following occurrences:

> — *Modern Magick conference, Kona, Hawaii*: At a JRI program in Hawaii, one or more participants allegedly sustained fractures to their hands during an activity in which they broke a brick or board. Do Decl. ¶ 9(a), Exhibit 6.
>
> — *Quantum Leap conference, Las Vegas, Nevada*: At a JRI program in Las Vegas, one participant, Curt Reinkens, allegedly sustained a skin tear near his eye when an archery arrow broke during a group exercise after he declined safety goggles. Do Decl. ¶ 9(b), Exhibits 7 and 8.
>
> — *Creating Absolute Wealth conference, San Diego, California:* During the "Creating Absolute Wealth" program in San Diego in 2009, a woman named Colleen Conway tragically committed suicide at a local shopping mall. Do Decl. ¶ 9(c), Exhibit 9.

It bears noting that literally thousands of other participants conducted the exact same activities without injury. These prior occurrences have no bearing on the events of October 8, 2009, and can serve no purpose other than to confuse and distract the jurors and waste time and judicial resources.

III. ARGUMENT AND AUTHORITIES

A. The Evidence the State Seeks To Introduce Does Not Fall Within the Limited Exceptions of 404(b) and Is Thus Inadmissible Character Evidence.

1. Rule 404 Precludes Trying a Criminal Defendant Based on His Character and Uncharged Acts to Show that He Acted in Conformity to Commit the Charged Crime.

"One of the oldest principles of Anglo-American law is that evidence of other bad acts is not admissible to show a defendant's bad character." *State v. Aguilar*, 209 Ariz. 40, 42 (2004) (citation omitted). *See also State v. Roscoe*, 145 Ariz. 212, 216 (1984) ("The general rule, of course, is that evidence of prior bad acts is inadmissible to prove the bad character of the perpetrator."). This is because "when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone." *State v. Moore*, 108 Ariz. 215, 218 (1972) (quoting *Quen Guey v. State*, 20 Ariz. 363, 368, 369 (1919)). "The rationale for this principle is the recognition that character evidence would have a highly prejudicial effect on a defendant's case - the jury might use the character evidence to improperly conclude that the defendant is a bad person and therefore more likely to have engaged in the charged offense." *Aguilar*, 209 Ariz. at 42. Thus, the use of "extrinsic acts evidence is not looked upon with favor." *United States v. Bradley*, 5 F.3d 1317, 1320 (9th Cir. 1993). As the Arizona Supreme Court explained in *State v. Terrazas*, "[s]uch evidence is quite capable of having an impact beyond its relevance to the crime charged and may influence the jury's decision on issues other than those on which it was received, despite cautionary instructions from the judge." 189 Ariz. 580, 584 (1997). Indeed, "[s]tudies confirm that the introduction of a defendant's prior bad acts can easily tip the balance against the defendant." *Id.* (citation omitted).

Accordingly, when the State seeks to introduce evidence of prior bad acts, the Court must engage in four protective inquiries: it must (1) find that the act is offered for a proper

purpose under Rule 404(b); (2) find that the prior act is relevant to prove that purpose; (3) find that any probative value is not substantially outweighed by unfair prejudice; and (4) give upon request an appropriate limiting instruction. *State v. Anthony*, 218 Ariz. 439, 444 (2008); *Terrazas*, 189 Ariz. at 583.

2. The Purported Evidence that the State Intends to Offer Does Not Fall within the Limited Exceptions of Rule 404(b).

The State's attempt to substantiate its case by introducing a slew of ill-defined and entirely irrelevant prior acts must fail. As an initial matter, the State has wholly failed to meet its burdens, under Rule 404(b) and Arizona Rule of Criminal Procedure 15.1(b)(7), to identify the other-acts evidence and articulate with precision how it supports any permissible inference regarding the charged offenses. More fundamentally, the State *cannot* meet that burden, because even based on the State's own account, the prior acts are so dissimilar and remote that as a matter of law they support no proper 404(b) purpose. Further, in all events, the State has not even attempted to—and cannot—satisfy its burden of proving the prior acts by clear and convincing evidence.

a. <u>The alleged prior acts are not "substantially similar" to the charged conduct.</u>

As the proponent of the uncharged acts, the State bears the burdens of identifying with specificity each prior act in accordance with Rule 15.1(b)(7),[1] and of showing its relevance and admissibility, *see State v. Vigil*, 195 Ariz. 189, 191–92 (Ct. App. 1999). Specifically, to demonstrate that the evidence is offered for a proper purpose under 404(b), the State "must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence." *Mayans*, 17 F.3d at 1181; *see also State v. Coghill*, 216 Ariz. 578, 583 (Ct. App. 2007). The State has wholly failed to meet that burden here: It has not articulated

[1] "The prosecutor *shall* make available to the defendant . . . (7) a *list of all prior acts* of the defendant which the prosecutor intends to use to prove motive, intent, or knowledge or otherwise use at trial." Ariz. Rule Crim. P. 15.1(b)(7). *See State v. Martinez-Villareal*, 145 Ariz. 441, 447, 702 P.2d 670, 676 (Ariz. 1985) (purpose of rule is to give 'full notification of each side's case-in-chief so as to avoid unnecessary delay and surprise at trial'" (quoting *State v. Dodds,* 112 Ariz. 100, 102, 537 P.2d 970, 972 (1975)). This the State has not done. Do Decl. ¶¶ 2-8, Exhibits 1 to 5.

any evidentiary theory.

A review of the record reveals that any explanation the State might offer would be futile. Evidence of the prior events supports, at most, the very character inferences regarding Mr. Ray and JRI that Rule 404 prohibits. The State may try to link the prior acts to Mr. Ray's intent or knowledge, but such an attempt is barred as a matter of law: evidence of a prior act cannot be introduced to prove a defendant's mental state unless it is "sufficiently similar" to the act for which the defendant is on trial. *See State v. Woody*, 173 Ariz. 561, 563 (Ct. App. 1992) (citing *United States v. Miller*, 874 F.2d 1255 (9th Cir. 1989)). "[E]vidence simply lacks probative value unless it is sufficiently similar to the subsequent offense," because "if the prior act is not similar, it does not tell the jury anything about what the defendant intended to do in his later action." *Miller*, 874 F.2d at 1269. The similarity must be sufficient to "permit the jurors to infer either that the defendant intended the act in question or had knowledge of its consequences." *Woody*, 173 Ariz. at 563. Similarly, "[w]hen the government's theory is one of knowledge," courts have "emphasized that the government must prove a logical connection between the knowledge gained as a result of the commission of the prior act and the knowledge at issue in the charged act." *Mayans*, 17 F.3d at 1181–1182. And when the State alleges that a prior accident put a defendant on notice of the risk of a later accident, "[i]t must be shown that prior accidents occurred under circumstances the same or similar to the present accident." *DeElena v. Southern Pac. Co.*, 121 Ariz. 563, 567–68 (1979).

Under this case law, the prior acts the State wishes to introduce are simply too dissimilar and remote to support any permissible 404(b) inference. The indictment's charges of manslaughter require the State to prove that Mr. Ray acted recklessly—that Mr. Ray was "aware of and consciously disregard[ed] a substantial and unjustifiable risk" that the deaths would occur. A.R.S. §13-105.[2] In fact, Mr. Ray had no such awareness; the deaths were as unforeseeable as they were tragic. But for the State's theory even to be coherent, the prior acts would have to connect a JRI sweat lodge ceremony to a risk of death, or at the very least, to heat stroke, the

[2] "The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." *Id.*

State's asserted cause of death. *See, e.g.*, 2B Arizona Practice § 404 ("It is prejudicial error . . . to permit such evidence to be admitted without a foundational showing that the prior accidents occurred under conditions that were substantially similar to the accident in issue."). No such connection exists.

First, nearly all of the evidence the State seeks to introduce has nothing to do with sweat lodge ceremonies at all. There is no conceivable relevance to the fact that, over the years of many different personal development programs with thousands of participants involving a wide variety of confidence-building exercises, a handful of JRI participants have been injured. Nor is there any relevance to the fact that a single individual, acting entirely apart from the scheduled JRI program, tragically took her own life at a shopping mall. The State obviously cannot show that "the prior accidents occurred under circumstances the same or similar to the present accident." *DeElena*, 121 Ariz. at 567–68. To the extent the State seeks to insinuate that the mere occurrence of prior mishaps over years of JRI programs in some way makes Mr. Ray a reckless individual, that insinuation is both entirely unsupported by the evidence and flatly barred by Rule 404. *State v. Vandever*, 211 Ariz. 206, 209 (Ct. App. 2006) (holding that "testimony as to 'how [defendant] acted in the past is not indicative of a pertinent character trait and does not inform the question of whether [defendant] acted ... recklessly ... on the evening in question" in a prosecution of reckless manslaughter, ARS § 13-1103) (citation omitted).

The sole prior act the State has identified from a prior sweat lodge ceremony fails for a related reason: the alleged injury bears no resemblance to the deaths at issue in this case. The theory behind admitting prior acts to show intent is that "*similar results* do not usually occur through abnormal causes." *State v. Lee*, 25 Ariz. App. 220, 226-227 (Ct. App. 1975) (emphasis added). But the State offers no evidence of similar results. The fact that a single individual fainted clearly is insufficient to put Mr. Ray on notice of the risk of death.

b. <u>The State cannot prove the alleged prior acts by clear and convincing evidence.</u>

Moreover, *even* if the State could articulate a proper purpose—which it cannot—the State cannot carry its evidentiary burden. "[B]efore admitting evidence of prior bad acts,

trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act." *Terrazas*, 189 Ariz. at 582.

In light of the Verde Valley medical records regarding Mr. Pfankuch's 2005 episode, it is abundantly clear that the State cannot support, let alone by clear and convincing evidence, its assertion that Mr. Pfankuch suffered from heat stroke as it claimed before the Grand Jury or was in any grave danger. *See* Declaration of Truc T. Do in Support of Motion to Change Place of Trial and Motion to Compel Disclosure ¶¶ 9 and 12, Exhibit 54 at 14:11-26, 19:16-27, filed June 29, 2010.

Nor can the State prove that the incidents at other JRI events involved *any* misconduct by Mr. Ray, let alone recklessness. For example, Sheryl Stern who states that she fractured her hand during the 2007 brick-breaking exercise in Hawaii explained that she "went for it when I shouldn't have and I knew that and so I accepted responsibility for that." Do Decl. ¶ 9(a), Exhibit 6. Ms. Stern further stated she "didn't do it properly" and "James jumped up right away and picked me up and was taking care of my hand." *Id.* Curt Reinkens, who stated he only had a "skin tear of the eye lid on the outside of the lid" and was treated with Neosporin, declined to wear safety goggles that were offered by JRI staff. Id. ¶ 9(b), Exhibits 7 and 8. And finally, the State cannot produce a scintilla of evidence, let alone clear and convincing evidence, that Mr. Ray caused Ms. Conway to commit suicide. Without clear and convincing evidence as to both the commission of the alleged other acts and that *Mr. Ray committed them*, Arizona law does not allow the State to introduce these prior acts at trial.

B. <u>Even If Evidence Were Admissible Under Rule 404(b), It Should Be Excluded Under Rule 403 Because The Evidence Will Unfairly Prejudice Mr. Ray, Confuse The Jury, And Consume Undue Time and Judicial Resources.</u>

Arizona courts have "repeatedly cautioned that '[t]here will be situations in which evidence sought to be introduced is more prejudicial than probative, and those situations are very likely to arise in the prior bad act context.'" *Anthony*, 218 Ariz. at 445 (quoting *State v. Ives,* 187 Ariz. 102, 111 (1996)). Indeed, "[w]hen the evidence concerns prior bad acts," the rules of evidence "have a different thrust, and the suppositional balance no longer tilts towards admission." *State v. Salazar*, 181 Ariz. 87, 91 (Ct. App. 1994). Instead, "[t]he discretion of the

trial judge under Rule 403 to exclude otherwise relevant evidence because of the risk of prejudice should find its most frequent application in th[e 404(b)] area." *State v. Taylor,* 169 Ariz. 121, 124 (1991) (quoting 1 Morris Udall et al., *Arizona Practice: Law of Evidence* § 84 (3d ed. 1991)).

The courts' traditional practice of exercising discretion to exclude prior-acts evidence is warranted here. The State, lacking evidence of Mr. Ray's misconduct on October 8, 2009, seeks to manufacture a case by introducing evidence of remote, dissimilar events that occurred at different times, in different places, and in vastly different circumstances. Such evidence would serve only to confuse the jury, distract attention from the charges at issue, and squander precious time and judicial resources. The evidence should be excluded.

IV. CONCLUSION

For the foregoing reasons, Mr. Ray requests the Court grant his motion to exclude evidence of prior acts pursuant to Arizona Rules of Evidence 404(b) and 403.

DATED: July 6, 2010

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