

1 **II. BACKGROUND**

2 The defendant is facing several charges for hitting and running over John Saimon with her
3 car. The Commonwealth seeks to introduce evidence (1) that on or about October 2011, Defendant
4 intentionally threw a knife at Mr. Saimon and (2) that on or about December 2011, Defendant
5 assaulted Mr. Saimon with a frying pan². The other act evidence is sought to prove intent, absence
6 of mistake, plan, and motive. The defense asks the court to exclude the introduction of this
7 evidence based upon its prejudicial effect.

8 **III. DISCUSSION**

9 **A. Legal Standard**

10 Rule 404(b) of the Commonwealth Rules of Evidence prohibits the admission of other
11 crimes, wrongs, or acts “to prove the character of a person in order to show that he acted in
12 conformity therewith.” However, such evidence may be admissible to prove “motive, opportunity,
13 intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” *Id.* In deciding
14 whether to admit this type of evidence, the court is required to perform a Rule 403 balancing test to
15 determine whether “the probative value is substantially outweighed by the danger of unfair
16 prejudice, confusion of the issues, or misleading the jury”. NMI R. Evid. 403; *Comonwealth v.*
17 *Brel*, 4 NMI 200, 203 (1994).

18 **B. Analysis**

19 Other act evidence may be admissible in order to prove something other than a defendant’s
20 criminal propensity. NMI R. Evid. 404(b). Here, the Commonwealth wants to introduce other acts
21 to prove intent, absence of mistake, plan, and motive. The court understands the Commonwealth’s
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² The frying pan incident went to trial and resulted in a conviction. *CNMI v. Guiao*, Crim. Case No. 12-0001D.

1 discussion as to admissibility of this evidence under Rule 404(b). The defense, itself, has conceded
2 that this evidence is admissible under Rule 404(b).

3 However, evidence normally admissible under Rule 404(b) may still be excluded if the court
4 finds a danger of unfair prejudice. NMI R. Evid. 403. As such, the court can exclude other act
5 evidence if it believes that the introduction of such evidence will lead the jury to judge the
6 defendant for who he is as opposed to what he did in the particular crime for which he is being
7 tried. *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013-14 (9th Cir. 1995); see also, for
8 example, *Boyd v. United States*, 142 U.S. 450, 458 (1892). This idea, that a defendant be tried for
9 what he did instead of who he is, is "fundamental to American jurisprudence". *United States v.*
10 *Foskey*, 636 F.2d 517, 523 (D.C. Cir. 1980); *United States v. Myers*, 550 F.2d. 1036, 1044 (5th
11 Cir. 1977).

12 In this case, the Commonwealth takes the position that this other act evidence is required to
13 show intent, absence of mistake, plan, and motive. However, the court does not believe that this
14 evidence is of high value for those purposes, particularly in comparison to the substantial risk of
15 prejudice to the defendant. Thus, this evidence does not pass the Rule 403 balancing test and
16 should be excluded.

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18 **1. There is limited, if any, evidence to support the government's position that these other
acts support a showing of intent, absence of mistake, plan, and motive.**

19 In an effort to support its theory of intent, plan, and motive, the Commonwealth has
20 advanced the idea that the defendant struck Mr. Saimon with her car to keep him from testifying
21 against her in a separate case. (Opposition p. 6). However, this theory is not supported by any
22 corroborating evidence. The detective in the present case submitted an affidavit of probable cause
23 concluding that the defendant drove her car into Mr. Saimon immediately after having a heated
24 argument involving an exchange of insults and allegations of adultery. (Declaration of Probable

1 Cause, Compl. at 2). There was absolutely no mention of any intent to cover-up the act which
2 comprised the first case or to intimidate Mr. Saimon to keep him from testifying. Conversely, the
3 apparent motive for the assault in the earlier case was that Mr. Saimon was not listening to the
4 defendant. (Declaration of Probably Cause in the prior case, Compl. at 2). In order to establish a
5 common scheme or plan, "there must be some 'logical relationship' between the occurrences."
6 *United States v. Ford*, 632 F.2d 1354, 1371-72 (9th Cir. 1980) (overturned on other grounds).
7 Merely espousing a theory does not make it true, particularly when such espousals are unsupported
8 by the evidence. Given these declarations of the investigating officers, it is highly unlikely that the
9 government can prove a common plan or intent to intimidate or eliminate a key witness from
10 testifying.

11 The Commonwealth has also stated that this evidence is necessary in order to prove the
12 contempt charges during the course of the trial. However, the court must remind the government
13 that contempt charges are not matters for the jury to decide. Thus, this argument fails. Evidence of
14 the underlying act would come more appropriately before the bench at a contempt hearing. In
15 relation to this particular case, the court has already suggested taking judicial notice of the
16 underlying action. It is therefore completely unnecessary to present this evidence to the jury in
17 relation to charges they are not qualified to judge.

18 Lastly, the Commonwealth claims that this evidence will be used to prove that the defendant
19 intended to harm Mr. Saimon and that hitting him with her vehicle was no accident. While the
20 court agrees that the proposed other act evidence could support these claims, it believes that these
21 incidents are more closely aligned with the defendant's propensity for violence than any actual
22 intent to have committed an attempted murder in the case at bar. Moreover, the admission of these
23 other acts is highly prejudicial and unnecessary, particularly in light of the other more probative
24 evidence available to the government.

1 **2. The evidence is unduly prejudicial.**

2 It is essential to the overall fairness to the accused that guilt or innocence “be established by
3 evidence relevant to the particular offense being tried, not by showing that...[she] has engaged in
4 other acts of wrongdoing.” *United States v. Bradley*, 5 F.3d 1317, 1320 (9th Cir. 1993), quoting
5 *United States v. Hodges*, 770 F.2d 1475, 1480 (9th Cir. 1985) (overturned on other grounds).
6 There is a serious risk in the present case that the jury may use the other act evidence to
7 improperly infer a criminal disposition, as all three incidents involve outrageous violent acts that
8 will likely brand the defendant as having a violent disposition, which could impermissibly
9 influence the jury in its decision.

10 This evidence is likely to prevent the jury from viewing the facts establishing guilt or
11 innocence as separate in this case from those facts surrounding the other incidents. “That juries
12 treat prior convictions as highly probative has been confirmed by empirical investigations.”
13 *United States v. Daniels*, 770 F.2d 1111, 1116 (D.C. Cir. 1985), referencing H. Kalven & H.
14 Zeisel, *The American Jury* 160 (1966). The jury selected in this trial is likely to be similarly
15 affected by such evidence, particularly in light of the egregious nature of the act for which she
16 will be tried in this current proceeding. The court believes that this jury will already be inflamed
17 given the severity of the charges in this case and the nature of the defendant’s conduct. To add
18 evidence of other violent acts will only encourage an assessment of guilt based upon the
19 defendant’s character in that it will almost certainly “subordinate reason to emotion in the
20 factfinding [*sic*] process.” *United States v. McBride*, 676 F.3d 385, 396 (4th Cir. 2012).

21 **3. There is less prejudicial evidence readily available to the Commonwealth.**

22 One of the factors a court may consider when making a Rule 403 determination is whether
23 there is less prejudicial evidence available. *Old Chief v. United States*, 519 U.S. 172, 184 (1997),
24 citing Advisory Committee’s Notes on Fed. Rule Evid. 403 and 404(b); see also, for example,

1 *Huddleston v. United States*, 485 U.S. 681, 688 (1988); *United States v. Merriweather*, 78 F.3d
2 1070, 1077 (6th Cir. 1996); *United States v. Kennedy*, 643 F.3d 1251, 1256 (9th Cir. 2011);
3 *United States v. Varoudakis*, 233 F.3d. 113, 122-24 (1st Cir. 2000) (in weighing other acts
4 evidence, the risk of improper propensity inference “should be considered in light of the totality
5 of the circumstances, including the government’s need for the evidence given other available
6 testimony”). This factor goes toward the probative value of the evidence at issue.

7 Here, the government will introduce evidence from the victim himself who is in the best
8 position to describe the events that took place on the day in question. His previous testimony, in
9 conjunction with other evidence, resulted in a separate conviction against this defendant.³ There
10 is no evidence that this witness is unwilling or unable to testify in the present trial. Additionally,
11 the prosecutor has one other eye-witness who can provide testimony about what he saw. Both of
12 these witnesses can testify as to the events that unfolded and can also provide evidence as to any
13 absence of mistake. The government also has numerous photographs of the victim’s injuries⁴ in
14 this case, the testimony of investigating police officers, and the audio-recording of the 911 calls at
15 its disposal. The court believes that this evidence is much more probative than the prior act
16 evidence and has no risk of unfair prejudice to the defendant.

17 **4. A limiting instruction would not cure the potential unfair prejudice of the other acts.**

18 Finally, the Commonwealth has stated that any inherent prejudice could be cured by a
19 limiting instruction. The court disagrees. Exclusion of this type of evidence is based upon the
20 understanding that juries often treat past convictions and other bad acts as highly probative and may
21 therefore improperly construe these prior acts against the defendant, even after limiting instructions

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23 ³ The defendant was convicted of assault with a dangerous weapon in the incident involving the frying pan. Crim. Case
24 No. 12-0001A.

⁴ At the conference on August 23, 2012, the Commonwealth disclosed numerous pre-marked photographs of the
victim’s injuries.

1 have been given. *Daniels*, 770 F.2d at 1116. Once a jury hears the other acts evidence, it is highly
2 unlikely that it will be able to properly apply what it has heard merely to a legal principle, such as
3 motive or absence of mistake. Rather, it is much more likely that the jury will view these other
4 incidents as part and parcel of the defendant's innate character. *United States v. Bailey*, 426 F.2d
5 1236, 1241 (D.C. Cir. 1970) (“The native assumption that prejudicial effects can be overcome by
6 instructions to the jury [is]...unmitigated fiction.”); *Nash v. United States*, 54 F.2d 1006, 1007
7 (2nd Cir.); *United States v. Carter*, 482 F.2d 738, 740 (D.C. Cir. 1973) (“well-nigh inescapable
8 prejudice” despite the trial court's limiting instructions even when evidence is properly introduced.)
9 Hence, while the court acknowledges that limiting instructions are a necessary tool in some court
10 proceedings, it equally acknowledges the inherent flaws in giving such instructions. In this case, a
11 limiting instruction will not cure the prejudicial nature of the proposed other act evidence. The
12 charges brought against the defendant relate to an outrageous and shocking act. The court does not
13 believe that the jury will adhere to the court's limiting instructions which are already confusing to
14 the average juror under these circumstances.

15 **5. The evidence is inadmissible under a Rule 403 balancing test.**

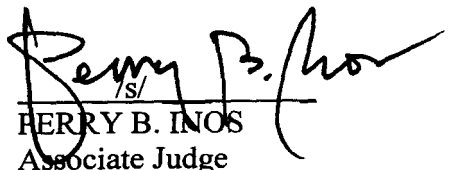
16 The court understands the Commonwealth's arguments and recognizes that several of the
17 cases cited by the prosecution discuss similar situations wherein other act evidence was admitted at
18 trial. However, the Commonwealth is a unique jurisdiction, and the court must take into account
19 factors affecting the overall fairness of trials here as opposed to only looking at those of other
20 jurisdictions. Moreover, the court is not persuaded that the introduction of this evidence will not
21 improperly influence the jurors. Further, given the egregious nature of the charges in this case, the
22 court does not believe that the prior acts are highly probative. Lastly, the government has a wealth
23 of other non-prejudicial evidence at its disposal. As such, the proposed other act evidence should
24 be excluded at trial.

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V. CONCLUSION

Based on the foregoing, Defendant's Motion to Exclude 404(b) Evidence is **GRANTED**.

SO ORDERED this 30th day of August, 2012.


/s/
PERRY B. INOS
Associate Judge