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

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**COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,**)

CRIM. CASE NO. 13-0049

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Plaintiff,)

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v.)

**ORDER GRANTING DEFENDANT'S
MOTION IN LIMINE TO EXCLUDE
EVIDENCE OF PRIOR ACTS**

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JOSEPH A. CRISOSTOMO,)

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Defendant.)

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I. INTRODUCTION

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This matter came before the Court on September 4, 2013 on Defendant's motion *in limine* to exclude evidence of prior acts pursuant to Rule 404(b) of the Commonwealth Rules of Evidence. Defendant Crisostomo was present and represented by Janet H. King. The Commonwealth was represented by Chief Prosecutor Shelli Neal and Assistant Attorney General Brian Flaherty.

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On August 27, 2013, just four business days before the final hearing for pretrial motions, the Commonwealth filed a Notice of Intent to Introduce Evidence of Other Crimes, Wrongs, or Acts by Defendant Pursuant to NMI R. Evid. 404 & 413.¹ Defendant filed this motion on August 30, 2013, requesting the exclusion of that evidence. The Commonwealth did not file a written opposition, but orally opposed the motion at hearing.

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¹ The trial was originally set for October 15, 2013, but was continued and is now set for April 7, 2014.

1 On October 22, 2013, the Court issued an order directing supplemental briefing. The
2 Defendant filed a supplemental brief on November 18, 2013. On November 29, 2013, the
3 Commonwealth filed a written opposition to the supplemental brief.

4 Based on a review of Defendant's motion, oral arguments made on September 4, 2013, the
5 supplemental briefing of both parties, and applicable law, the Court grants Defendant's motion to
6 exclude the evidence of other acts described in the Commonwealth's August 27, 2013 notice.

7 **II. BACKGROUND**

8 Defendant Crisostomo is facing charges of first degree murder, kidnapping, sexual assault in
9 the first degree, robbery, theft, assault and battery, and disturbing the peace, in connection with the
10 death of Emerita Romero in February, 2012. The Commonwealth filed a notice of its intent to
11 introduce evidence of alleged acts of Defendant that occurred in 2006. The Commonwealth intends
12 to introduce evidence that on or around November 23, 2006 Defendant kidnapped, murdered and
13 robbed another woman, Bao Ying Chen. The Commonwealth intends to introduce this evidence to
14 prove identity in the current case, and argues that the similarities between the 2006 acts and the
15 crimes charged in the current case indicate that Defendant has a modus operandi.

16 Defendant Crisostomo moves to exclude evidence of this alleged 2006 murder, noting that
17 he was never charged with any of the crimes described in the Commonwealth's notice, but was only
18 investigated as a suspect. Defendant argues that the notice provided by the Commonwealth was
19 insufficient. Defendant also argues that the 2006 evidence is of low probative value as the
20 similarities alleged are not unique, nor will they be supported by evidence. Defendant argues that
21 admitting evidence of the alleged 2006 acts would be unfairly prejudicial, and thus must be
22 excluded under Rule 403 of the Commonwealth Rules of Evidence. Finally, Defendant notes that
23 Rule 413 is inapplicable because the proposed evidence described in the Commonwealth's notice
24 does not include any allegations of an additional sexual offense.

1 The Commonwealth opposes Defendant's motion to exclude and notes the following
2 similarities: On the day of both the 2006 and 2012 homicides, Defendant is alleged to have rented a
3 Toyota sedan with tinted windows from Islander Rent-A-Car, used crystal methamphetamine,
4 dropped off an acquaintance at a poker establishment for several hours, cleaned the rental car, asked
5 someone else to return the rental car, and possessed a cell phone similar to the cell phone of the
6 homicide victim. The Commonwealth also notes the following similarities between the 2006 and
7 2012 homicides: Both homicides occurred in the early morning hours, both victims were women,
8 both women died from asphyxiation, and both women's bodies were found lying face-down in
9 uninhabited areas. The Commonwealth acknowledges that evidence concerning the 2006 homicide
10 would be prejudicial, but argues that the introduction of such evidence would not be unfairly
11 prejudicial.

12 **III. LEGAL STANDARD**

13 A defendant is never on trial for who he is, but rather, the trial process seeks to determine
14 what, if anything, he did. *See Commonwealth v. Guiao*, Crim. No. 12-0055 (NMI Super. Ct. Aug.
15 30, 2012) (Amended Order Granting Defendant's Motion to Exclude 404(b) Evidence at 3). To
16 ensure that a defendant's character does not become the focal point of a trial, Rule 404(b) prohibits
17 the introduction of evidence of other crimes, wrongs or acts of the defendant, unless that extrinsic
18 evidence is relevant for a purpose other than establishing the defendant's propensity to commit the
19 alleged crime. NMI R. Evid. 404(b). In addition to being relevant to an admissible purpose, the
20 evidence is subject to Rule 403's balancing test. *Commonwealth v. Brel*, 4 NMI 200, 203 (1994);
21 NMI R. Evid. 403. Its probative value cannot be "substantially outweighed by the danger of unfair
22 prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,
23 waste of time, or needless presentation of cumulative evidence." *Id.* In order to be admissible,
24 evidence of other acts must: (1) be reliable and sufficient to support a finding that the defendant

1 committed the other acts; (2) be similar to the crimes charged; (3) be relevant to a material issue
2 that is distinct from the defendant's character; and (4) have probative value that is not substantially
3 outweighed by the risk of unfair prejudice to the defendant, confusing the issues, or misleading the
4 jury. *See, e.g. United States v. Bradley*, 5 F.3d 1317, 1320 (9th Cir. 1993); *and United States v. Van*
5 *Metre*, 150 F.3d 339, 349 (4th Cir. 1998).

6 In order to introduce evidence of other crimes, wrongs or acts of the defendant, the
7 Commonwealth has the burden of demonstrating that the proposed evidence is relevant for an
8 admissible purpose, and the burden of establishing that it is more probative than prejudicial. *United*
9 *States v. Hernandez-Miranda*, 601 F.2d 1104, 1108 (9th Cir. 1979).

10 **IV. ANALYSIS**

11 The Court finds that the proposed evidence of the alleged 2006 acts is minimally relevant,
12 and that its probative value is substantially outweighed by the risk of undue prejudice to Defendant
13 Crisostomo.

14 Identity is at issue in this case, and is distinct from the Defendant's character or
15 propensities. However, the proposed evidence is only minimally relevant to identity. The relevance
16 of the alleged 2006 actions is directly tied to a question of fact: whether it was in fact Defendant
17 Crisostomo who kidnapped, murdered and robbed Bao Ying Chen. Defendant Crisostomo was
18 never charged with such crimes. While being charged or convicted of a crime is not a prerequisite
19 to admissibility of a past act, the danger that a defendant will be unfairly prejudiced by the
20 introduction of evidence of crimes that did not lead to a conviction is "particularly great." *United*
21 *States v. Bradley*, 5 F.3d 1317, 1321 (9th Cir. 1993). Also, in the end, there must be enough
22 evidence to support a finding that it is more likely than not that Defendant committed the alleged
23 acts. *See* NMI R. Evid. 104(b); *Huddleston v. United States*, 485 U.S. 681, 690-91 (1988). The
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1 Court is particularly concerned that there does not appear to be evidence indicating that Defendant
2 Crisostomo ever had contact with Bao Ying Chen.² And that is a large gap.

3 In contrast, the cases cited by the Commonwealth involve situations where there was very
4 reliable evidence that the defendants committed the other acts. In *Bey v. Bagley*, 500 F.3d 514, 522
5 (6th Cir. 2007), the defendant confessed to committing the other murder. Similarly, in *Boyde v.*
6 *Brown*, 404 F.3d 1159, 1173 (9th Cir. 2005), the defendant's presence during the earlier offense
7 was undisputed, and the defendant admitted such information at trial.

8 The Court is also persuaded by the Defendant's arguments that the similarities between the
9 alleged 2006 acts and the crimes charged are not unique. There are some similarities between the
10 two homicides, for example, both victims were women whose bodies were found in uninhabited
11 areas. However, there are also differences. One of the victims was fully-clothed, the other was
12 found naked. One of the victims was found at Lao Lao Bay, the other was found in La Fiesta Mall.

13 Again, these two homicides can be contrasted with the facts of the cases cited by the
14 Commonwealth. In *Bey v. Bagley*, 500 F.3d 514, 522 (6th Cir. 2007), the same 7-11 store was the
15 site of the robbery, the store was robbed at gun-point, and the 7-11 clerk was kidnapped. And in
16 *Boyde v. Brown*, 404 F.3d 1159, 1173 (9th Cir. 2005):

17 both victims were small business owners whose shops were robbed and who were
18 killed by stab wounds to their chests; both victims were apparently alone when the
19 crimes occurred; the pants of each victim had been removed; the shoes of each
20 victim had been removed and placed neatly next to the victim's body; and the killer
21 did not remove jewelry from either victim.

22 Unlike these two cases cited by the Commonwealth, the similarities between the two
23 homicides at issue are not unique identifiers. Even though the acts such as renting a car, using

24 ² All of the evidence suggested by the Commonwealth is couched in terms of uncertainty. For example, in 2006 the Defendant is alleged to have been looking at "a lady," and in the possession of a cell phone "similar to" Bao Ying Chen's cell phone. *Opp'n to Def.'s Supp. Brief* at 2, 3. Similarly, the Commonwealth alleges that a car "similar to" the car rented by Defendant Crisostomo was seen leaving the area where Bao Ying Chen's body was discovered. *Id.* at 2.

1 crystal methamphetamine, and dropping off an acquaintance at a poker establishment, could be
2 Defendant's usual way of passing an evening, these acts are not necessarily tied to the alleged acts
3 of kidnapping, robbery and murder.

4 It is this combination of the lack of certainty that Defendant Crisostomo committed the
5 alleged 2006 crimes and the lack of similarity between the two homicides that leads the Court to
6 find that the proposed evidence is relevant, but only minimally probative to the question of identity
7 in the case at hand.

8 Next, the Court conducts the balancing test articulated in Rule 403, and considers whether
9 the proposed evidence, even if relevant, should be excluded because "its probative value is
10 substantially outweighed by the danger of unfair prejudice, confusing of the issues, or misleading
11 the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative
12 evidence." NMI R. Evid. 403; *Brel*, 4 NMI at 203.

13 In this situation, there is a great risk of unfair prejudice. It is highly inflammatory to allege
14 that Defendant Crisostomo is a murderer who has gone unpunished in the past, only to strike again.
15 The risk is that the proposed evidence will cause members of the jury to find the Defendant guilty
16 in this case, regardless of their assessment of the facts of this case. Instead of weighing the evidence
17 in the case at hand, members of the jury are likely to rely on a belief that the Defendant is a bad
18 person with a propensity to kill people and thus deserves punishment. Such inferences are forbidden
19 and go against fundamental principles of our legal system. *See Commonwealth v. Guiao*, Crim No.
20 12-0055 at 5 (quoting *United States v. Bradley*, 5 F.3d 1317, 1320 (9th Cir. 1993) "guilt or
21 innocence [must] 'be established by evidence relevant to the particular offense being tried, not by
22 showing that . . . [he] has engaged in other acts of wrongdoing.'"); and *Commonwealth v. Cepeda*,
23 2009 MP 15 ¶ 18.

1 Additionally, introducing the proposed evidence will unduly delay the trial. This finding is
 2 supported by the Court's assessment that the probative value of the proposed evidence is minimal,
 3 and that the amount of time it would take to introduce evidence sufficient to demonstrate that
 4 Defendant Crisostomo was the perpetrator of the 2006 crimes against Bao Ying Chen is significant.
 5 *See Duran v. City of Maywood*, 221 F.3d 1127, 1133 (9th Cir. 2000) (affirming exclusion of other
 6 acts evidence where introduction of such evidence would require a "full-blown trial within this
 7 trial"). Furthermore, the Court is not convinced that a limiting instruction would adequately protect
 8 against unfair prejudice, if, after the introduction of all of the proposed evidence, the Court found
 9 that such evidence was insufficient under Rule 104(b). *See Brel*, 4 NMI at 203; *Guiao*, Crim No.
 10 12-0055 at 6-7.

11 Moreover, there are less prejudicial and more probative manners of proving identity than the
 12 introduction of the proposed evidence. *See Guiao*, Crim. No. 12-0055 at 5; *Old Chief v. United*
 13 *States*, 519 U.S. 172, 184-85 (1997) (trial courts have discretion to consider evidentiary alternatives
 14 when determining probative value of evidence under Rule 403). The Commonwealth intends to
 15 pursue these less prejudicial methods of proving identity, such as voice identification, DNA
 16 analysis and cell phone tower activation data.

17 Thus, the Court finds that the probative value of the proposed evidence is substantially
 18 outweighed by the risk of unfair prejudice to Defendant Crisostomo, and the undue delay that
 19 would occur should such evidence be introduced with minimally probative value. The law requires
 20 that such proposed evidence be excluded.

21 **V. CONCLUSION**

22 Accordingly, the Court **GRANTS** the Defendant's motion to exclude evidence of the 2006
 23 acts described in the Commonwealth's August 27, 2013 notice.

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IT IS SO ORDERED this ^{15th} day of January, 2014.



JOSEPH N. CAMACHO
Associate Judge