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BY ECF & E-MAIL

Hon. Dennis M. Cavanaugh, U.S.D.J.
U.S. District Court, District of New Jersey
Post Office Building & Federal Courthouse, Room 451
Newark, New Jersey 07101-0999

Re: United States v. Bergrin, Crim. No. 09-369 (DMC)

Dear Judge Cavanaugh:

At the conclusion of yesterday's proceedings, standby counsel informed the Government that Mr. Bergrin intends to object to any testimony showing that he engaged in sexual relations with the prostitutes who worked at New York Confidential. Because that issue will ripen tomorrow, please allow us to address it in advance.

Initially, Bergrin cannot claim that the evidence in question is not probative of a matter in issue. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. "The definition of relevant evidence is very broad and . . . Rule 401 does not raise a high standard." Gibson v. Mayor & Council of Wilmington, 355 F.3d 215, 232 (3d Cir. 2004). Here, to prove Racketeering Act 5 of Count 1 (and Counts 14 through 16), the Government must prove that Bergrin traveled in interstate commerce with the intent to promote the New York crime of promoting prostitution. The stipulation regarding Bergrin's New York guilty plea—which was entered into at *Bergrin's* request—contains no factual detail about the conduct that led to his guilty plea. Thus, Bergrin's knowledge that New York Confidential was a brothel clearly is a "fact . . . of consequence in determining the action," and testimony that Bergrin had sex with New York Confidential prostitutes plainly tends to "make [that] fact more or less probable than it would be without the evidence." Fed. R. Evid. 401.

To the extent Bergrin concedes that the evidence is probative but objects to its danger for unfair prejudice, this Court has discretion to exclude the evidence *only if* Bergrin agrees to stipulate that he knew that New York Confidential was a brothel.

District courts may exclude otherwise relevant evidence only where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. Courts may invoke Rule 403 to exclude evidence that tends to "'suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" Carter v. Hewitt, 617 F.2d 961, 972 (3d Cir. 1980) (citation omitted). But "consideration should be given to the effectiveness or lack of effectiveness of a limiting instruction." Fed. R. Evid. 403 advisory comm. notes. And as the Third Circuit has stressed, evidence "cannot be excluded under Rule 403 merely because its unfairly prejudicial effect is greater than its probative value. Rather, evidence can be kept out only if its unfairly prejudicial effect '*substantially* outweigh[s]' its probative value." United States v. Cross, 308 F.3d 308, 323 (3d Cir. 2002) (emphasis added). Importantly, "Rule 403 does not provide a shield for defendants who engage in outrageous acts, permitting only the crimes of Caspar Milquetoasts to be described fully to a jury. It does not generally require the government to sanitize its case, to deflate its witnesses' testimony, or to tell its story in a monotone." Cross, 308 F.3d at 325 (quoting United States v. Gartmon, 146 F.3d 1015, 1021 (D.C. Cir. 1998)).

The Third Circuit has rejected Rule 403 challenges to evidence that had a much higher danger for unfair prejudice than the evidence Bergrin seeks to exclude. United States v. Green, 617 F.3d 233, 252 (3d Cir. 2010) (evidence that the defendant sought to buy dynamite to murder an undercover police officer was not unfairly prejudicial because it rebutted the defendant's attack on the informant's motive for testifying); United States v. Sriyuth, 98 F.3d 739, 748 (3d Cir. 1996) (rejecting Rule 403 challenge to evidence that the defendant raped his kidnap victim because it showed his motive); United States v. Scarfo, 850 F.3d 1015, 1020 (3d Cir. 1988) (rejecting Rule 403 evidence of uncharged murders to establish the credibility of Government's witnesses); accord Gartmon, 146 F.3d at 1021 (Rule 403 did not bar evidence that defendant inserted a gun into his girlfriend's vagina in an attempt to coerce her into continuing to help him commit fraud because it demonstrated the defendant's intent and controlling role in the scheme, even though it "may have dramatically injured [his] cause").

To be sure, evidence tending to show that Bergrin engaged in sexual relations with New York Confidential prostitutes raises the kind of danger Rule 403 was designed to address. But if Bergrin intends to claim before the jury that he had no knowledge that New York Confidential was a prostitution business, then he cannot simultaneously object to the introduction of highly probative evidence that puts the lie to such an assertion. See United States v. Becht, 267 F.3d 767, 771-74 (8th Cir. 2001) (holding that where

stipulation that images recovered from defendant's computer constituted child pornography removed only one element of the offense from jury's consideration, the District Court did not abuse its discretion by declining to exclude the images under Rule 403 because they helped proved defendant's knowledge that the images were child pornography, which was the most hotly contested element at trial); United States v. Stewart, 325 F. Supp. 2d 474, 489-91 (D. Del. 2004) (rejecting Rule 403 challenge to witness's testimony about threats to her safety after defendant on cross-examination tried to discredit her by eliciting testimony about guns found in her house), aff'd 79 Fed.Appx. 814, 819-20 (3d Cir. 2006); cf. United States v. Miller, 688 F.3d 322, (7th Cir. 2012) (agreeing that defendant had opened the door to otherwise inadmissible evidence and faulting trial court for not conducting an explicit Rule 403 balancing before allowing the Government to elicit the evidence in question, but finding any error harmless).

Thus, before testimony resumes tomorrow, this Court should have Bergrin affirmatively state whether he will stipulate that he knew New York Confidential was a brothel, and not merely an escort service. If Bergrin refuses to do so, then this Court should overrule his Rule 403 objection by conducting an on-the-record balancing of probative value versus unfair prejudice.[1] If Bergrin agrees to so stipulate, then the Government will refrain from offering that evidence.

We thank the Court for its consideration.

Respectfully submitted,

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[1] The Government agrees that a forceful limiting instruction should be issued to limit the jury's consideration of that evidence to the purpose for which it is admitted. See Fed. R. Evid. 105.