

DEC 10 2003

For The Northern Mariana Islands
By _____
(Deputy Clerk) *XL*

- For Publication on the Court Web Site -

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,)
)
Plaintiff)
)
v.)
)
KE, Shi Cheng, *et al.*,)
)
Defendants)
_____)

Criminal No. 03-0006-2

ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT KE'S MOTION
TO EXCLUDE EVIDENCE

THIS MATTER came before the court on Friday, December 5, 2003, for hearing of defendant Ke's motion to exclude certain evidence. Plaintiff appeared by and through its attorney, Assistant U.S. Attorney Patrick J. Smith; defendant appeared personally and by and through his attorney, G. Anthony Long.

1 THE COURT, having considered the written and oral arguments of
2 counsel, hereby grants in part and denies in part defendant Ke's motion to
3 exclude certain evidence.
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5 On March 15, 2003, plaintiff filed a one-count criminal complaint
6 charging defendant Ke, Kazuo Toda, and others with one count of conspiracy to
7 distribute and possess with intent to distribute fifty grams or more of crystal
8 methamphetamine, more commonly called "ice," in violation of 21 U.S.C. §§
9 841(b)(1)(A) and 846. The complaint alleged a conspiracy lasting from April,
10 1999, to August, 2002, which had at least seven conspirators: this defendant,
11 Toda, and Jacinto Maranan, as well as four persons identified only as "CWs."
12 The CWs have since been identified by plaintiff as Masakazu Imamura; Darrel
13 Quitugua; Wei, Shi Zhong; and, Maria Emul. The complaint also set out acts of
14 the conspirators in furtherance of the conspiracy, including "ice" trafficking
15 activity, and described the relationships between the conspirators.
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21 On April 2, 2003, the grand jury returned an indictment charging the one
22 count of conspiracy that had been alleged in the complaint. Plaintiff has
23 produced Fed.R.Crim.P. 16 discovery materials, including reports detailing "ice"
24 seizures from various co-conspirators and other "ice" trafficking activities of the
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1 conspiracy. The discovery also included a series of audio tapes between
2 Commonwealth and Drug Enforcement Agency Task Force ("CNMI/DEA
3 Task Force") informants and members of the conspiracy.
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5 Additionally, on November 21, 2003, plaintiff provided certain Jencks
6 Act materials: debriefing memos regarding Quitugua, Wei, and Emul. These
7 memos detail the way in which the charged conspiracy operated. According to
8 the discovery provided to date, the conspiracy involved Toda, who arranged for
9 a supply of "ice" from Japan and then regularly provided it to Ke and Maranan.
10 Ke in turn supplied Quitugua, Wei, Emul, as well as others, some of whom are
11 identified in the debriefing memos. The court concludes that the scope and
12 nature of the charged conspiracy, and the manner in which plaintiff intends to
13 prove it, are set out in quite some detail in the discovery materials provided to
14 this defendant.
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20 Further, after his arrest on March 21, 2003, this defendant gave a
21 statement to the CNMI/DEA Task Force officers, which detailed the existence
22 of the conspiracy as well as his knowing participation in it. Ke identified his
23 Japanese source of supply (Toda), and admitted to distributing "ice" to Wei,
24 who defendant knew sold it in turn to others. This defendant also admitted
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1 giving "ice" to a Chamorro male he identified as Peter, and that he understood
2 the "ice" was for re-sale by Peter to others.
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4 Defendant Ke argues that several pieces of evidence should be excluded
5 from the trial on two grounds: first, that the evidence is either legally irrelevant
6 or only marginally relevant (and, consequently, that its probative value is
7 outweighed by the danger of unfair prejudice to defendant, Fed.R.Evid. 403),
8 and, second, that plaintiff wishes to introduce it primarily to inflame the
9 passions of the jury against defendant.
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12 "Relevant evidence' means evidence having any tendency to make the
13 existence of any fact that is of consequence to the determination of the action
14 more probable or less probable than it would be without the evidence."
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17 Fed.R.Evid. 401. Such evidence is admissible, unless otherwise provided.

18 Fed.R.Evid. 402. "Unfair prejudice results from an aspect of the evidence other
19 than its tendency to make the existence of a material fact more or less probable,
20 e.g. that aspect of the evidence which make conviction more likely because it
21 provokes an emotional response in the jury or otherwise tends to affect
22 adversely the jury's attitude towards the defendant wholly apart from its
23 judgment as to his guilt of innocence of the crime charged." United States v.
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1 Bailleaux, 685 F.2d 1105, 1111 n.2 (9th Cir.1982).

2 Here, relevance can be determined by considering the elements of the
3 offense of conspiracy. "To establish a drug conspiracy, the government must
4 prove: 1) an agreement to accomplish an illegal objective; and 2) the intent to
5 commit the underlying offense." United States v. Iriarte-Ortega, 113 F.3d 1022,
6 1024 (9th Cir. 1997). Because of the secretive and clandestine nature of drug
7 conspiracies, "most conspiracy convictions are based on circumstantial evidence,
8 and we allow juries to draw inferences as to the existence of an agreement from
9 the defendants' conduct." *Id.* "We have thus recognized that '[a] conspiracy
10 may be proven by circumstantial evidence that the defendants acted together
11 with a common goal'." *Id.* (quoting United States v. Disla, 805 F.2d 1340, 1348
12 (9th Cir. 1986)). "[A] jury may infer the existence of an agreement 'if there be
13 concert of action, all the parties are working together understandingly, with a
14 single design for the accomplishment of a common purpose'." Iriarte-Ortega,
15 113 F.3d at 1024 (quoting United States v. Melchor-Lopez, 627 F.2d 886, 890 (9th
16 Cir. 1980)). See also United States v. Brady, 579 F.2d 1121, 1127 (9th Cir. 1978)
17 (circumstantial evidence is intrinsically no different than direct evidence;
18 circumstantial evidence can be used to prove any fact, including facts from
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1 which another fact is inferred).

2 Defendant's first argument is that the court should exclude as legally
3 irrelevant any evidence of uncharged crimes; *i.e.* "substantive distribution or
4 possession offenses." (Motion at 3). Defendant argues that since plaintiff does
5 not need to prove an overt act as an element of a § 846 conspiracy, evidence that
6 proves *uncharged overt acts* or *substantive offenses* is irrelevant, *id.*, and is
7 inadmissible under Fed.R.Evid. 404(b).
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11 United States v. Shabani, 513 U.S. 10, 115 S.Ct.382 (1994) established that
12 21 U.S.C. § 846 imposes no requirement that plaintiff prove an overt act as an
13 element of a drug conspiracy. However, neither Shabani nor any of the other
14 cases defendant cites hold that proof of uncharged acts within the scope of the
15 conspiracy is irrelevant as to other elements of the crime which are to be
16 decided by the jury; here, the existence of the conspiracy and whether the
17 defendant was a knowing participant in it. The Ninth Circuit has approved the
18 introduction of uncharged conduct as *direct* evidence of a drug conspiracy. In
19 United States v. Uriarte, 575 F.2d 215, 217 (9th Cir. 1978), the court approved
20 admission of a defendant's prior specific act of drug trafficking---even though it
21 was uncharged---finding that it was direct proof of the conspiracy in operation.
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1 See also United States v. Vaccaro, 816 F.2d 443 (9th Cir. 1987) (uncharged acts
2 within the scope of the charged conspiracy are admissible to prove its existence);
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4 United States v. Diaz, 176 F.3d 52, 78 (2nd Cir. 1999) (uncharged acts may be
5 admissible as direct evidence of conspiracy). The court concludes that whether
6 or not the indictment charges overt acts is not part of its determination as to the
7 admissibility of such acts. Oral testimony of witnesses about specific instances
8 of “ice” trafficking within the scope of the conspiracy is relevant.
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11 Further, the court finds that evidence of repetitive “ice” trafficking among
12 a core group of participants tends to show, circumstantially, the existence of
13 their illegal agreement to distribute “ice.” Proof of the acts of the conspirators is
14 admissible evidence of the existence of a conspiracy. See United States v.
15 Hubbard, 96 F.3d 1223, 1226 (9th Cir. 1996) (inferences of existence of
16 conspiracy may be drawn from concert of action and working together of
17 parties; agreement need not be explicit, but may be inferred from circumstantial
18 evidence).
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22 Conspiracy convictions based on circumstantial evidence of the acts of a
23 defendant and his co-conspirators have been routinely upheld. See e.g. United
24 States v. Barragan, 263 F.3d 919, 922-23 (9th Cir. 2001) (defendant’s drug sales,
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1 meetings with co-conspirators, and receipt of proceeds of drug sales sufficient
2 basis for inference of guilt based on circumstantial evidence); United States v.
3 Herrera-Gonzalez, 263 F.3d 1092, 1095 (9th Cir. 2001) (defendant's connection
4 to conspiracy was inferred from circumstantial evidence, which included his
5 presence, the purchase of items necessary for success of venture, and a
6 substantial financial relationship to conspiracy); United States v. Hubbard, 96
7 F.3d at 1227 (9th Cir. 1996) (evidence of coordination, interaction, and
8 cooperation among co-conspirators in odometer tampering conspiracy showed
9 existence of conspiracy). The Ninth Circuit has afforded generous latitude to
10 prosecutors in proving drug cases. *See e.g.* United States v. Fagan, 996 F.2d 1009,
11 1015-16 (9th Cir. 1993) (where evidence of possession of a gun was deemed
12 admissible under Fed.R.Evid. 403 because guns are tools of the drug trade).

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18 Evidence of acts that defendant and other conspirators committed in
19 furtherance of the charged conspiracy is relevant to the charge because it helps
20 prove both the existence of the conspiracy and this defendant's participation in
21 it. This includes evidence of defendant's association with "ice" traffickers,
22 which tends to show that such repeated contacts are knowing. Further,
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24 defendant Ke's own acts may also be used to prove the "state of mind" element.
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1 See Brady, *supra* 579 F.2d at 1127 n.1 (intent may be proved circumstantially and
2 can rarely be proved by other means). Proof that defendant personally
3 distributed “ice” to his co-conspirators is probative of his knowing participation
4 in the conspiracy charged and the probative value outweighs the prejudice to
5 him.
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8 Similarly, all of the other exhibits which defendant seeks to have excluded
9 are relevant, not unfairly prejudicial, and admissible under the authority of the
10 cases. The only exhibits which deserve more consideration are proposed
11 exhibits 4, 5, and 6. These items are drug paraphernalia found in the possession
12 of a member of the conspiracy during its existence and they are relevant on that
13 basis. However, the court agrees with plaintiff “that there would be some
14 unfairly prejudicial effect from the introduction of...the pipe,” and because it
15 concludes that possession of the pipe by a co-conspirator is too remote to the
16 conspiracy, evidence of the pipe will be excluded and defendant’s motion is
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1 granted as to that one exhibit.¹ On the other hand, the two plastic bags
2 containing methamphetamine residue are relevant and admissible. Both parties
3 may examine plaintiff's expert and argue to the jury the weight which should be
4 accorded such evidence. Photographs of members of the conspiracy are relevant
5 to the issue of the existence of the conspiracy and the identity of its members.
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8 Defendant's Fed.R.Civ.P. 16 objection to plaintiff's exhibits 24 and 25 was
9 withdrawn, assuming he receives access to them within the next week.
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11 The court finds that proof of defendant's acts and those of his co-
12 conspirators within the scope of the alleged conspiracy are probative of the two
13 elements that plaintiff must prove beyond a reasonable doubt at trial. Plaintiff
14 is entitled to offer proof of such acts, and to argue that the existence of the
15 conspiracy can also be inferred from the circumstantial evidence of what the
16 conspirators did together. Similarly, defendant's knowing participation in the
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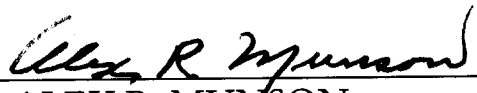
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21 The court also agrees that because plaintiff is offering as direct evidence the
22 exhibits defendant seeks to exclude, Fed.R.Evid. 404(b) has no application. *See*
23 *e.g. United States v. Boone*, 951 F.2d 1526 (9th Cir. 1991) (*citing United States*
24 *v. Vaccaro*, 816 F.2d 443, 452 (9th Cir. 1987)); *United States v. King*, 200 F.3d
25 1207, 1214-15 (9th Cir. 1999) (direct evidence that is "inextricably intertwined"
26 with crime charged is not subject to Rule 404(b)); *United States v. Soliman*, 813
F.2d 277, 279 (9th Cir. 1987) (evidence that is "inextricably intertwined" with
the crime charged is not subject to Rule 404(b)).

1 alleged conspiracy may be inferred from his repeated distribution of "ice" with
2 his co-conspirators. Federal Rule of Evidence 404(b) has no application here
3 because the evidence at issue in this motion will be offered as direct, not
4 circumstantial, proof of the crime charged.
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7 FOR THE FOREGOING REASONS, defendant Ke's motion to exclude
8 evidence of the pipe found in Ms. Emul's purse is granted, the motion to
9 exclude is denied as to the other specified pieces of evidence, and defendant's
10 motion as to plaintiff's exhibits 24 and 25 is withdrawn, subject to being re-filed
11 if defendant does not receive access to them within one week.
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14 DATED this 10th day of December, 2003.
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19 ALEX R. MUNSON
20 Judge
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