



similar charges involving two additional patients and also intends at trial to offer evidence of similar uncharged conduct involving approximately twenty other patients.

Based on this disclosure, the defendant has filed the present motion, seeking to exclude any evidence of similar uncharged conduct, pursuant to rules 404(b) and 403 of the Federal Rules of Evidence. The motion was argued by conference telephone call and this opinion memorializes my ruling.

Relevant evidence is admissible unless it is excluded for some other purpose authorized by the Federal Rules of Evidence. *See* Fed. R. Evid. 402. Federal Rule of Evidence 404(b) provides that prior-acts evidence, when relevant, is admissible unless it is offered to prove “the character of a person in order to show action in conformity therewith.” The rule includes a non-exhaustive list of those purposes for which prior-acts evidence may be admitted, including “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Fed. R. Evid. 404(b).

All relevant evidence, however, whether offered under rule 402 or rule 404(b), is subject to exclusion under Federal Rule of Evidence 403 when 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.” The Fourth Circuit has defined “prejudice” in such circumstances as follows:

[T]he possibly prejudicial effect of evidence can require exclusion only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.

*See Morgan v. Foretich*, 846 F.2d 941, 945 (4th Cir. 1988) (internal quotation marks and citations omitted).

The Fourth Circuit has also articulated a four-prong test for the admissibility of evidence under rules 404(b) and 403 as follows:

[W]e hold that evidence of prior acts becomes admissible under Rules 404(b) and 403 if it meets the following criteria: (1) The evidence must be relevant to an issue, such as an element of an offense, and must not be offered to establish the general character of the defendant. In this regard, the more similar the prior act is (in terms of physical similarity or mental state) to the act being proved, the more relevant it becomes. (2) The act must be necessary in the sense that it is probative of an essential claim or an element of the offense. (3) The evidence must be reliable. And (4) The evidence's probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the fact-finding process.

*United States v. Queen*, 132 F.3d 991, 997 (4th Cir.1997).

In the present case, there is no question but that the evidence sought to be admitted meets the tests described above.<sup>1</sup> It is likely relevant and probative of the defendant's unlawful intent, as well as of his plan, motive, and absence of mistake or accident. Particularly since the conduct is similar to the conduct charged, it is not unfairly prejudicial. *See Westfield Ins. Co. v. Harris*, 134 F.3d 608, 615 (4th Cir. 1998) ("Prejudice under Federal Rule of Evidence 403 is certainly not established from the mere fact that the evidence is highly probative.").

While the additional evidence may prolong the trial and require additional preparation by defendant's counsel, I intend to grant the defendant's request for a continuance of the trial, so that the defendant will not be harmed in this regard.

For these reasons, it is **ORDERED** that the Defendant's Motion in Limine to Exclude 404(b) Evidence, or, in the Alternative, Motion for Continuance, is, in each case, denied in part and granted in part. The court will not grant the motion to exclude evidence, but will grant the motion for continuance.

ENTER: February 8, 2001

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United States District Judge

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<sup>1</sup> The defendant does not contend that the proposed evidence is unreliable in nature, although of course the defendant does not admit such conduct.

