IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

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| UNITED STATES OF AMERICA, | ) | CRIMINAL ACTION NO. 5:01CR30051 |
| | ) | |
| v. | ) | |
| | ) | MEMORANDUM OPINION |
| GORDON FRANKLIN SPROUSE, II | ) | |
| | ) | |
| Defendant. | ) | JUDGE JAMES H. MICHAEL, JR. |

Before the court are (1) the defendant's October 17, 2001 motion *in limine* to bar evidence of alleged arson fires other than those addressed in the indictment and (2) the defendant's October 17, 2001 motion to suppress statements made by the defendant to law enforcement officials on May 17, 2001. Having considered fully all motions and memoranda from the parties, and after a full hearing in open court on December 10, 2001, and for the reasons stated herein, the court denies the defendant's motion to suppress and denies the defendant's motion *in limine* to bar evidence of other alleged arson fires.

I.

On May 14, 2001, Officer Reed Johnston of the U.S. Forest Service (USFS) and Virginia State Game Warden Steve Shires were engaged in a surveillance operation in the area of Hite Hollow and Archer Run roads in Augusta County, Virginia as part of a three-year investigation into a series of arson fires set on National Forest Lands within the general area of the Hite Hollow and Archer Run intersection. At about 4:24 p.m., Officer Johnston observed the defendant, Gordon Franklin Sprouse, II, driving his truck west on Hite Hollow Road into the National Forest with a pipe bent at an angle located in the bed of the truck. At 4:25 p.m., Officer Johnston

observed the defendant exit the park and drive east on Hite Hollow Road. After the defendant's truck disappeared from sight, Officer Johnston began to smell smoke. Officer Johnston radioed Game Warden Shires for assistance and then headed west by foot on Hite Hollow road, where he observed a fire on the north side of the road about 150 yards west of the Hite Hollow and Archer Run intersection. After notifying the Augusta County Emergency Operations Center of the fire, Officer Johnston and Game Warden Shires left the fire scene to pursue the defendant, and drove east on Hite Hollow road toward what they knew was the defendant's residence where he lived with his parents.

After traveling approximately two-tenths of a mile east of the Hite Hollow and Archer Road intersection, Officer Johnston and Game Warden Shires were passed by the defendant driving his truck west on Hite Hollow road at a high rate of speed toward the park where the fire was located. The defendant had a red flashing emergency light located on the dashboard of his truck. Officer Johnston and Game Warden Shires immediately turned their vehicle around and drove west on Hite Hollow until they encountered the defendant at the location of the fire talking on a fire department radio. The defendant indicated to Officer Johnston and Game Warden Shires that he had arrived at the fire scene in his capacity as a member of the Craigsville Volunteer Fire Department. At this point Officer Johnston and Game Warden Shires questioned the defendant and read him his Miranda Rights, but did not arrest him.

Three days later, on May 17, 2001, two USFS agents arrived at the defendant's home. At this point, the parties dispute what the defendant told the agents. The defendant maintains that he indicated he was represented by counsel and had been advised not to talk to the police. The prosecution, and the agents who arrested the defendant, assert that the defendant only told the

agents that he was represented by counsel, not that he had been advised to refrain from speaking. After this disputed communication, the defendant was arrested and placed in a USFS vehicle for transport to the police station.[1]

After leaving the defendant's home, the USFS vehicle pulled over and one of the agents read the defendant his Miranda Rights. The agents then resumed driving to the jail, and one agent began explaining to the defendant the nature of the investigation and the significant amount of evidence against him. However, the defendant said that he didn't think he wanted to talk about the investigation "right now." The agent then told the defendant to think about what he had been told, and that they could maybe talk about the investigation later.

As the vehicle approached the jail, the agents informed the defendant that he would be placed in custody upon arrival, and that if he wanted to cooperate and talk about the fire, he should do so soon. At that point, the defendant indicated that he would be willing to talk, and the agents decided to stop at a restaurant to eat, because, due to the late hour, the defendant most likely would not receive a meal at the jail until the next morning. Before entering the restaurant, the defendant's handcuffs were removed, but he was reminded that he was under arrest. During the meal, the officers conversed with the defendant, but not about the investigation. However, upon leaving the restaurant and resuming the drive to the jail, the agents began questioning the defendant regarding the fires. In response, the defendant admitted that he had set eight fires during the year, the most recent being the fire set on May 14, 2001. However, the defendant stated that he had not been involved in setting the fires that had occurred before 2001. The

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[1] The defendant's mother asserts that, while the defendant was being led to the police car, she reminded the defendant, and he acknowledged, that he had no obligation to talk to the police.

defendant provided the agents with details regarding the fires to which he had admitted setting, and the agents took a statement from him.

A trial in this action has been set for January 3-4, 2002. The defendant is charged with wilfully and without authority setting on fire timber, underbrush, and grass on National Forest lands in violation of 18 U.S.C. § 1855. On October 17, 2001, the defendant filed a motion *in limine* to bar any evidence of arson fires other than the fires alleged in the Indictment. The defendant argues that the probative value of such evidence is substantially outweighed by its potentially prejudicial impact. In addition, the defendant filed a motion to suppress any and all statements of the defendant given on or about May 17, 2001, to law enforcement authorities. The defendant argues that he told the agents upon their arrival at his house that he would remain silent on the advice of counsel. Therefore, the defendant asserts that he invoked his right to deal with law enforcement only through counsel, and thus any further questioning was in violation of his *Miranda* Rights. The defendant also notes that his confession was not obtained until after the stop at the restaurant, where he was allowed to move freely. The defendant maintains that he was, in effect, not in custody during the restaurant stop, and thus upon re-entering the vehicle, the agents should have re-read the defendant his *Miranda* rights.

II.

The United States Supreme Court in *Miranda v. Arizona,* 384 U.S. 436 (1966), held that if "the individual indicates in any manner at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease" and that if he "states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda,* 384 U.S. at 473-474. Nevertheless, statements made by a person after he has indicated that he intends to exercise his

right to remain silent are not *per se* inadmissible. In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court stated that "the critical safeguard [provided by the right to remain silent] is a person's 'right to cut off questioning'." *Mosley*, 423 U.S. at 103 (quoting *Miranda*, 384 U.S. at 474). Thus, the Court concluded that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut of questioning' was 'scrupulously honored.'" *Mosley*, 423 U.S. at 104. The Court set forth the following factors for a court to consider when determining whether a person's "right to cut of questioning" was "scrupulously honored": (1) whether the police had given the suspect Miranda warnings at the first interrogation and the suspect acknowledged that he understood the warnings; (2) whether the police immediately ceased the interrogation when the suspect indicated that he did not want to answer questions; (3) whether the police resumed questioning the suspect only after the passage of a significant period of time; (4) whether the police provided a fresh set of *Miranda* warnings before the second interrogation; and (5) whether the second interrogation was restricted to a crime that had not been a subject of the earlier interrogation. *Id.* at 104-107. *See also Burket v. Angelone*, 208 F.3d 172, 199 n.20 (4th Cir. 2000) (discussing the five factors for consideration set forth in *Mosley*).

In contrast to the right to remain silent, the Court in *Edwards v. Arizona*, 451 U.S. 477 (1981), established a *per se* rule proscribing any interrogation of a person held in custody after has invoked his right to counsel unless the individual subsequently initiates conversation. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.9(f) (2d ed. & Supp. 2001) (stating that *Edwards* established a *per se* rule against further interrogation after a defendant had invoked his right to counsel). Thus, while statements made by a person who has invoked his right to remain

silent may be admissible even if obtained as the result of police initiated interrogation as long as during such interrogation the person's "right to cut off questioning" was "scrupulously honored," statements made by a person after he has invoked his right to counsel are *per se* inadmissible unless the person, and not the police, initiated the subsequent conversation. Due to the different effect that invoking the right to counsel has compared to the right to remain silent, in addressing the motion now before the court it may be necessary to determine not only if the defendant invoked one of his *Miranda* rights, but also which *Miranda* right he in fact invoked.

A. *Right to Counsel*

The defendant asserts that, when the agents arrived at his house, he told them that his counsel had advised him not to speak with the police. Therefore, the defendant argues that he invoked his right to counsel, and thus any subsequent conversation with the agents is *per se* inadmissible unless he in fact initiated such conversation. The prosecution, and the agents who arrested the defendant, claim that, in fact, the defendant only stated that he was represented by counsel, not that he had been advised to remain silent.

In this case, it is not necessary to determine which version of the defendant's statement is correct. In *Burket v. Angelone*, 208 F.3d 172 (4th Cir. 2000), the Fourth Circuit held that the defendant's Miranda rights were not violated when he stated "I think I need a lawyer" and the police failed to cease the interrogation, not only because the statement did not constitute an unequivocal request for counsel, but also because the defendant was not actually in custody at the time he made the statement. That is, a person cannot invoke the protections provided by *Miranda* when he is not in custody. The court noted that a person is "in custody" for the purposes of Miranda if the person has been arrested or if his freedom of action has been curtailed to a degree

associated with arrest. *See Burket*, 208 F.3d at 197. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the U.S. Supreme Court stated that the test for determining whether an individual is "in custody" for *Miranda* purposes is whether, under the totality of the circumstances, the "suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *Berkemer*, 468 U.S. at 440 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)).

Sprouse was not in custody when he made the disputed statement to the agents. When the agents arrived at the defendant's door, they told the defendant's mother only that they wished to speak with the defendant. When the defendant came to the door, the agents told him that "they would like to speak to him in regards to some fires and some other issues that occurred in the area in recent years." At this point, the defendant told the agents that he had spoken with an attorney and, according to the defendant, that he had been advised not to speak with the police. When the defendant made this statement, his freedom of action had not been curtailed to the degree associated with arrest, and, in fact, he had not yet been arrested. Thus, the defendant's statement, whatever its content, was insufficient to invoke his *Miranda* rights.

*A. Right to Remain Silent*

Any unequivocal declaration of a desire to terminate the communication or interrogation is sufficient to assert one's right to remain silent. In this case, when the agents first initiated an interrogation of the defendant in the car, the defendant stated that he didn't think he wanted to talk about the investigation "right now." This statement most likely qualifies as an invocation of the defendant's right to remain silent. However, according to the agents, before entering the restaurant, the defendant indicated his willingness to discuss the investigation, and after returning to the car, the defendant admitted to setting 8 fires, including the fire on May 14, 2001.

The defendant argues that, because his handcuffs were removed and he was allowed to go to the restroom while at the restaurant, he had technically left custody while at the restaurant and then re-entered custody upon being returned to the car. The defendant asserts that, "when an individual leaves the custody of law enforcement and re-enters custody, common sense dictates the re-reading of Miranda and a knowing and voluntary waiver before any statement can be admissible." (Def's. Mem. in Opp'n at 4.) Furthermore, the defendant maintains that the length of time spent at the restaurant necessitated a re-reading of *Miranda* after the agents and defendant returned to the car.

This court does not agree with the defendant's contention that he was out of custody during the restaurant visit. While the agents did remove the defendant's handcuffs, the defendant was reminded that he was under arrest and should not try to escape. That is, the defendant was under the agents' control while at the restaurant, and his movement was subject to the agents' approval. While the agents' decision to permit the defendant to enter the restroom unattended arguably was careless, the agents may have determined that the situation presented a low risk of flight. Moreover, while a re-reading of the defendant's *Miranda* rights upon returning to the car may have been prudent, it was not necessary. The defendant argues that a re-reading was needed due to the amount of time that passed during the restaurant visit. However, in *United States v. Frankson*, 83 F.3d 79 (4th Cir. 1996), the Fourth Circuit noted that, "[t]he mere passage of time...does not compromise a *Miranda* warning. Courts have consistently upheld the integrity of Miranda warnings even in cases where 'several hours' have elapsed between reading the warning and the interrogation." *Frankson*, 83 F.3d at 83 (quoting *United States v. Diaz*, 814 F.2d 454, 461 (7th Cir. 1987)). Furthermore, according to agent testimony, the defendant agreed to discuss

the investigation with the agents *before* he entered the restaurant. Thus, it is doubtful that the defendant was not fully cognizant of his *Miranda* rights at the time of his confession. In fact, not only was the defendant read his *Miranda* rights upon entering the car, but he was also read his rights three days earlier, on May 14, when he was discovered at the scene of the fire. In addition, according to the defendant's mother, as the defendant was being led to the agents' car, she reminded him, and the defendant acknowledged, that he had a right not to speak with the police.

In fact, the court finds that, according to the elements set forth by the Supreme Court in *Mosley*, the defendant's "right to cut of questioning" was "scrupulously honored" throughout the ride to the Charlottesville jail. The agents gave the defendant his *Miranda* warnings prior to the first interrogation in the vehicle, and he acknowledged that he understood the warnings. When the defendant indicated that he "didn't think" he wanted to talk about the investigation "right now," the agents immediately ceased the interrogation, only stating that if he wanted to resume the conversation later, he could. Furthermore, as the defendant suggests, the agents waited a significant period of time before initiating the second interrogation after their visit to the restaurant. While the agents did not provide the defendant with a new set of *Miranda* warnings prior to the second interrogation, this omission is not determinative, particularly due to the fact that the defendant already had been read his *Miranda* rights twice, and had spoken to a lawyer who apparently advised the defendant regarding his right to remain silent, a fact that the defendant was reminded of by his mother has he was escorted to the agents' car. Despite being thoroughly familiarized with his rights, the defendant chose to speak with the agents, and in fact indicated that he might be willing to do so later when he stopped the first interrogation. Because the defendant's right to remain silent was not infringed, the defendant's motion to suppress the

statements he made to the agents on May 17, 2000 shall be denied.

III.

In addition to his motion to suppress statements allegedly made in violation of his *Miranda* rights, the defendant has moved to bar evidence of alleged arson fires occurring on dates other than those alleged in the indictment. Because the court denies the defendant's motion to suppress the statements he made to law enforcement officers on May 17, 2001, evidence addressing the 8 fires that the defendant has admitted to setting during the year 2001 is admissible. However, the government seeks to introduce evidence regarding 10 fires other than those that the defendant has admitted to setting, and as to these fires, the defendant's motion to bar evidence remains relevant.

The government intends to introduce evidence regarding uncharged fires that occurred as early as April 1998, arguing that

> [E]vidence concerning these other fires should properly be admitted to complete the story behind what Sprouse did and because it is inextricably intertwined with the evidence concerning the offenses with which Sprouse is charged. The evidence is further necessary to provide the context and the history behind how Sprouse came to be charged with setting fires in the National Forest. It is also relevant to show that these crimes were committed wilfully. (U.S. Notice of intention to Use Evidence at 3.)

The government notes that investigators believe that Sprouse set all or most of the uncharged fires at issue.

The defendant argues that evidence regarding the other fires constitutes prejudicial "other crimes" evidence under Fed. R. Evid. 404(b). Rule 404(b) provides that evidence of prior bad acts is not admissible to prove a defendant's character in order to show conduct in conformity therewith, but is admissible to show "motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident. Fed. R. Evid. 404(b). However, Rule 404(b) does not apply to acts intrinsic to the crime charged. *See United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996). "Other criminal acts are intrinsic when they are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *Id.* Nevertheless, even if a prior bad act is extrinsic to the crime charged, evidence of it is admissible under Rule 404(b) if it is "(1) relevant to an issue other than character, (2) necessary, and (3) reliable." *United States v. Aramony*, 88 F.3d 1369, 1377 (4th Cir. 1996). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." *Id.* (quoting Fed. R. Evid. 401). "Evidence is necessary if its furnishes part of the context of the crime." *Id.* And, evidence is reliable "unless it is 'so preposterous that it could not be believed be a rational and properly instructed juror.'" *Id.* at 1378 (quoting *United States v. Bailey*, 990 F.2d 119, 123 (4th Cir. 1993)).

The evidence of the other fires arguably is intrinsic to the criminal episode referenced in the indictment. The fact that the other fires were set in the same area, and in a manner similar to, the fires charged in the indictment corroborates other evidence suggesting that the fire Sprouse allegedly set on Mary 14, 2001 was one of many fires set by the defendant during a prolonged arson spree. Even if the other fire evidence could be considered extrinsic to the crime charged, evidence of these other fires is admissible under the three factors set forth by the Fourth Circuit in *Aramony*. The other fires evidence is relevant and necessary because, at the very least, it has a tendency to establish that the two

fires the defendant is charged with setting were set intentionally as part of a prolonged series of arson fires. Furthermore, the evidence is reliable, as investigators have determined that the limited area in which the fires were set, and the similar manner in which they are set, suggest that Sprouse was involved. Therefore, the defendant's motion to bar evidence of the other arson fires shall be denied with regard to those fires for which the government has filed a notice of intention to use evidence.

IV.

In accordance with the foregoing, (1) the defendant's October 17, 2001 motion to suppress statements made by the defendant to law enforcement officials on May 17, 2001 shall be denied and (2) the defendant's October 17, 2001 motion *in limine* to bar evidence of alleged arson fires other than that alleged in the indictment shall be denied. An appropriate order this day shall enter.

ENTERED: _____
Senior United States District Judge

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Date

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| UNITED STATES OF AMERICA, | ) | CRIM. ACT. NO. 5:01CR30051 |
| | ) | |
| v. | ) | |
| | ) | ORDER |
| GORDON FRANKLIN SPROUSE, II | ) | |
| | ) | |
| Defendant. | ) | JUDGE JAMES H. MICHAEL, JR. |

After a careful review of the record in this case and for the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The defendant's October 17, 2001 motion to suppress statements made by the defendant to law enforcement officials on May 17, 2001 shall be, and it hereby is, DENIED;

2. The defendant's October 17, 2001 motion *in limine* to bar evidence of alleged arson fires other than that alleged in the indictment shall be, and it hereby is, denied.

The Clerk of the Court is hereby directed to send a certified copy of this order and the accompanying memorandum opinion to all counsel of record.

ENTERED: _____
Senior United States District Judge

_____
Date