

UNITED STATES v. JONES
28 F.3d 1574 (11th Cir. 1994)

CARNES, CIRCUIT JUDGE:

On February 19, 1991, two detectives from the Atlanta police department observed Willie Ward on a streetcorner engaging in what they believed was drug dealing. Ward would take money from passersby in exchange for small packages from a brown paper bag which he kept in the wheel well of a pickup truck. He would then cross the street and pass something to the defendant, Gregory Louis Jones, who was standing in front of what appeared to be a video store. The detectives sent a confidential informant to buy drugs from Ward with \$20 in city funds; the informant returned with what appeared to be cocaine and marijuana, and the officers observed Ward hand the money to Jones.

The detectives left the scene to confer with backup units, and returned a few minutes later and arrested Ward and Jones. Retrieving the paper bag from the wheel well of the pickup, they found that it contained crack cocaine and marijuana. They also seized from the seat of the truck two strips of paper with lottery numbers of the kind used in illegal commercial gambling operations. Jones then gave the officers permission to search the store, where they found \$140 in cash, including the bill that the informant had used to make his purchase. Subsequently, the police discovered that Jones was leasing the store, and that he owned the pickup truck in which the drugs had been stashed.

Five months later, on July 19, 1991, the Atlanta police department executed a search warrant at 138 Griffin Street, Apartment II, in Atlanta ("the apartment"), to investigate reports of drug dealing at that address. No one was home. The officers found crack cocaine in the kitchen, along with a triple-beam scale and a digital scale. They also found, throughout the apartment, small bags of the kind used to package crack cocaine. In the bedroom, they found a large, undivided piece, or "cookie," of crack cocaine on the bed. In a closet, which an officer described as "4 to 7 feet away from the bed," they found a loaded, sawed-off shotgun propped up against the wall. In a briefcase next to the bed, they found \$9,200 in cash; there was a total of more than \$12,000 in cash in the apartment.

The officers found a copy of Jones's birth certificate in the apartment, as well as power and telephone bills in Jones's name, bearing the apartment's address. They also found pictures of Jones wearing clothes and jewelry that were in the apartment, and they found a necklace with Jones's initials hanging from a chain. On the walls were plaques bearing his name. The police seized from the apartment several pieces of paper with lottery numbers and lists of bets written on them. Later investigation revealed that Jones's driver's license and truck registration listed the apartment as his address. When Jones was arrested eleven days later, he gave the apartment's address to the booking clerk as his home address.

At trial, lists of lottery numbers and bets made in illegal street lotteries, which had been found in the apartment, were admitted into evidence along with similar commercial gambling documents found in Jones's truck in February 1991 and evidence of Jones's 1987 conviction for commercial gambling. The government argues that this evidence tends to show that: the occupant of the apartment in July 1991 was involved in illegal commercial gambling; because Jones had been convicted of illegal commercial gambling in 1987, and because he had been involved in such gambling in February 1991, it was more likely that Jones was involved in such gambling in July 1991; and, therefore, it was more likely that Jones was the one who occupied the apartment in July 1991. Jones argues that the prejudice created by the admission of the extrinsic evidence linking him to commercial gambling substantially outweighed any probative value that the evidence had in establishing the identity of the apartment's resident.

The application of a three-part test determines the admissibility, under Fed. R. Evid. 404(b), of evidence that a defendant has committed other crimes: 1) the evidence must be relevant to an issue other than the defendant's character; 2) there must be proof sufficient for a jury to find that the defendant committed the extrinsic act; and, 3) the evidence must possess probative value that is not substantially outweighed by its undue prejudice, and it must otherwise meet the requirements of Fed. R. Evid. 403. *United States v. Miller*, 959 F.2d 1535, 1538 (11th Cir.) (en banc). We review a district court's admission of evidence under Rule 404(b) for an abuse of discretion. *United States v. Hogan*, 986 F.2d 1364,

1373 (11th Cir. 1993).

To satisfy the first prong of the test, the evidence of Jones's prior gambling activity must be relevant to an issue other than Jones's character, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." Fed. R. Evid. 404(b). The government offered the gambling evidence to show the identity of the person involved in the illegal commercial gambling going on in the apartment, and thereby to establish the identity of the apartment's resident. The 404(b) standard has been described as "particularly stringent" when evidence of extrinsic crimes is offered to show identity by showing that because the defendant committed one crime, it was the defendant who committed another. *United States v. Stubbins*, 877 F.2d 42, 44 (11th Cir.).

"[T]he likeness of the offenses is the crucial consideration. The physical similarity must be such that it marks the offenses as the handiwork of the accused. In other words, the evidence must demonstrate a *modus operandi*." *Miller*, 959 F.2d at 1539. The test has also been described as requiring a "'signature' trait" sufficient to identify both crimes as the work of one individual.

The "uniqueness of the *modus operandi* and the degree of similarity" between the prior crimes and the one that the government is trying to attribute to the defendant determine the probity of the evidence of the prior crimes. Whether evidence of extrinsic crimes is relevant to show identity, or is merely evidence of character or propensity, may therefore be described as turning upon the evidence's probative value. If the *modus operandi* of the crimes is sufficiently rare, then the probative value of that evidence is high enough to constitute evidence of the defendant's identity. If the evidence of the prior crimes includes no significant signature trait, then its probative value is so low that it is considered to be mere propensity or character evidence.

The signature trait requirement is therefore a recognition that "[a] defendant cannot be identified as the perpetrator of the charged act singly because he has at other times committed the same commonplace variety of criminal act except by reference to the forbidden inference of propensity," i.e., of bad character. In the typical case in which evidence of other crimes is introduced to show identity, the government introduces evidence that the defendant committed a prior offense in a manner similar to that in which the crime charged was committed. The signature trait requirement is imposed to insure that the government is not relying on an inference based on mere character - that a defendant has a propensity for criminal behavior.

In this case, the connection between Jones's prior gambling activity and his identity as a drug trafficker is attenuated. The government wanted the jury to conclude that Jones occupied the apartment because slips that evidenced illegal commercial gambling were found in the apartment, and because Jones had been involved in such gambling in the past. Such a conclusion was based upon reasoning that because Jones had been a numbers runner in the past, Jones was likely to have been numbers running when the apartment was raided. The fact that Jones was not charged with illegal gambling does not alter the inference that the government wished the jury to draw - that because Jones committed gambling offenses previously, he was more likely to commit them in the future. Absent evidence of an unusual *modus operandi*, that inference relies on mere propensity. The signature trait requirement therefore must be applied in this situation as well.

To be admissible under Rule 404(b), Jones's 1987 and February 1991 gambling crimes must demonstrate a *modus operandi*, or signature trait, similar to that demonstrated by the July 1991 gambling crime committed by the occupant of the apartment involved in this case. In *Leal*, at the defendant's trial for two bank robberies, the government introduced evidence of a third, earlier, bank robbery.... All three robberies were committed within a period of one month, by a lone gunman, armed with a handgun, who made no effort to disguise himself. Nevertheless, we held that the evidence of the third robbery was inadmissible under Rule 404(b), because the government failed to demonstrate a similar *modus operandi* - the robber in the third incident carried dynamite, posed as a businessman, and made two trips to the bank, none of which was true of the later robberies.

In the present case, the government presented no evidence of a *modus operandi*. The government's expert witness testified only that the documents taken from Jones's truck in February and those found in the apartment in July, were related to illegal commercial gambling in general - not that they represented any particular *modus operandi* or indicated that any particular gambling operation was involved. There was no indication that Jones wrote the documents. According to the government's own gambling expert, ten to fifteen thousand people place bets with illegal gambling operations in Atlanta, and there are fifteen to twenty major illegal gambling operations; yet the government made no effort to distinguish the gambling docum

ents found in the apartment from the kind of documents used by any of the other operations. We do not know how many scores, or hundreds, of people in Atlanta possess such documents each day. The government offered no evidence to narrow the possibilities. Instead, the government simply argued that because Jones was involved in illegal commercial gambling in 1987, and in February 1991, it was Jones who was involved with such gambling in the apartment in July 1991. Without any evidence that Jones's earlier gambling crimes and the July 1991 gambling crime were committed in some unusual manner, the probative value of the evidence was so slight that the documents do not constitute relevant evidence of identity, but are merely inadmissible evidence of Jones's character - of his propensity to commit gambling offenses. The district court therefore abused its discretion in admitting the gambling documents and Jones's prior conviction.

Even if the gambling evidence satisfied the first prong of the three-prong test laid out in Miller, the third prong calls for "the incremental probity of the evidence ... to be balanced against its potential for undue prejudice." United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978). In applying this prong, we are mindful that "prior crime evidence has significant potential for prejudicial effect, and therefore should not be employed unless really necessary." If the government has a strong case without the extrinsic offense, then the prejudice to the defendant will more likely outweigh the marginal probative value. "In other words, if the government can do without such evidence, fairness dictates that it should; but if the evidence is essential to obtain a conviction, it may come in. This may seem like a 'heads I win; tails you lose' proposition, but it is presently the law."

The government's case on the identification of Jones as the resident of the apartment was strong without the evidence of Jones's prior illegal gambling activity, which was at most merely cumulative evidence that Jones occupied the apartment. The police found photographs of Jones at the apartment, and in the photographs he was wearing clothes that were also found in the apartment. The police also found utility bills made out in Jones's name, and bearing the apartment's address, as well as his birth certificate. Finally, not only did Jones's driver's license and truck registration list the apartment as his address, but Jones himself gave the apartment as his address when he was arrested. Given the low probative value of the prior gambling crimes evidence and the great potential to prejudice the defendant involved in the admission of evidence of past crimes, the gambling evidence is inadmissible under the third prong as well.

Having determined that the district court abused its discretion in admitting the evidence of Jones's prior gambling activity, we turn to the question of whether that error was harmless. Although a risk of prejudice might justify the exclusion of evidence as an initial matter, "[a] district court's erroneous admission of evidence does not warrant reversal if the purported error had no substantial influence on the outcome and sufficient evidence uninfected by error supports the verdict." United States v. Fortenbeny, 971F.2d 717, 722 (11th Cir. 1992). We have previously held that an error in the application of Rule 404(b) is harmless when there is overwhelming evidence of the defendant's guilt.

The evidence of Jones's illegal gambling activity should not have been admitted into evidence. In view of the overwhelming evidence against him, however, we are confident that the error was harmless.