IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

ALLEN TONY DAVIS,

ORDER

Plaintiff,

01-C-265-C

v.

RICHARD LOFTHOUSE,

Defendant.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

In an order dated August 28, 2002, I directed the clerk of court to issue writs of habeas corpus ad testificandum for inmates Dennis Jones, Michael Johnson and Robert Sallie after I concluded that their testimony could be relevant and noncumulative in the trial scheduled for September 9, 2002. Defendant Richard Lofthouse has filed a motion in limine to preclude the inmates' testimony on the grounds that it is inadmissible under Fed. R. Evid. 404(b) and 403. In addition, defendant argues that the testimony should be barred because he will be unable to effectively cross-examine the witnesses. For the reasons discussed below, defendant's motion will be granted in part and stayed in part.

Defendant argues first that Jones, Johnson and Sallie should be precluded from testifying because defendant will not have a sufficient opportunity to depose them or obtain

their dental records before trial so that he can cross-examine them effectively. However, defendant acknowledges that he received notice that plaintiff Allen Tony Davis would be calling Jones, Johnson and Sallie as witnesses on August 6. This is in compliance with the order dated April 16, 2002, and Fed. R. Civ. P 26(a)(3). Defendant does not argue that plaintiff's disclosures were otherwise untimely. Instead, he states that he did not attempt to depose those witnesses because "[i]n its Order of August 16, 2002, the Court denied plaintiff's request to have Messrs. Sallie, Johnson and Jones testify, thus apparently mooting the issue." This is a mischaracterization of the August 16 order. The court did not deny plaintiff's request; rather, it instructed plaintiff to inform the court whether "each witness is in a position to testify personally about defendant Lofthouse's knowledge of and response to that witness's own serious dental health care needs." I will not preclude plaintiff's witnesses from testifying because defendant decided prematurely that those witnesses would not be allowed to testify.

However, defendant also states that although he requested authorization from both plaintiff and the witnesses to obtain the witnesses' dental records immediately after he received plaintiff's pretrial report, he has not yet received those records. With respect to Sallie and Johnson, defendant states that he has received authorization to obtain their records, but he does not believe that they will be provided in time for trial. Although this is a concern, it does not warrant barring Sallie and Johnson from testifying. To the extent

that defendant will be unfairly prejudiced by being unable to review Sallie's and Johnson's records, this can be minimized by precluding Sallie and Johnson from testifying about their records or otherwise relying on them. This issue will not have to be addressed if defendant does obtain the records before trial. If necessary, it can be reexamined at the final pretrial conference.

With respect to Jones, defendant states that he has not received authorization to obtain Jones's records. As I stated in the opinion and order dated July 15, 2002, although the court cannot force plaintiff to produce medical records, it also cannot prevent defendant from defending the lawsuit. Therefore, I agree with defendant that Jones should not be permitted to testify. Accordingly, the writ of habeas corpus ad testificandum that I directed the clerk of court to issue will be quashed with respect to Jones.

Defendant argues next that the witnesses' testimony is prohibited under the Rules of Evidence. In his affidavit supporting his request for issuance of writs of habeas corpus ad testificandum, plaintiff averred that inmates Jones, Johnson and Sallie would offer testimony at trial that defendant was personally aware of their serious dental needs, was personally responsible for scheduling their dental treatment, and deliberately chose to ignore their requests for treatment. Defendant objects to this testimony under Rules 404(b) and 403 on the grounds that it is evidence of prior bad acts and will be unfairly prejudicial.

I agree with defendant that Rule 404(b) prohibits the admission of prior bad acts for

the purpose of proving character. However, the rule permits using other acts evidence "for other purposes, such as prove of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). The test for admitting other acts evidence was set forth recently in Okai v. Verfuth, 275 F.3d 606, 610-11 (7th Cir. 2001):

> First, proof of the other act must be directed towards establishing a matter in issue other than the defendant's propensity to commit like conduct. Second, the other act must be of recent vintage and sufficiently similar to be relevant to the matter in issue. Third, there must be a sufficient amount of evidence for the factfinder to conclude that the similar act was committed. And fourth, the probative value of the evidence must not be outweighed by the danger of unfair prejudice.

With respect to the first part of the test, to succeed at trial, plaintiff will have to prove that defendant was both "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [that] he . . . also [drew] the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). Showing negligence or even malpractice will be insufficient. Vance v. Peters, 97 F.3d 987, 992 (7th Cir. 1996). Rather, the question will be whether defendant's actions were "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate [plaintiff]'s condition." Snipes v. Detella, 95 F.3d 586, 592 (7th Cir. 1996).

Because plaintiff will have to show that defendant was deliberately indifferent to his serious dental needs, the proposed testimony of inmates Johnson and Sallie is highly relevant

to show intent. Where intent to do harm is an element of a plaintiff's cause of action, evidence that the defendant had mistreated others similarly shows that it is more likely that the defendant had the same intent toward the plaintiff. Wilson v. City of Chicago, 6 F.3d 1233, 1238 (7th Cir. 1993) (evidence that defendants had previously subjected others to same mistreatment that plaintiff complained of was relevant to show intent when plaintiff's claim was that defendant tortured him in violation of due process); see also Molnar v. Booth, 229 F.3d 593, 603-04 (7th Cir. 2000) (in discrimination case, evidence that defendant sexually harassed others previously was relevant to show discriminatory motive). Because the witnesses' testimony is relevant for a purpose other than to show character, the first part of the test is satisfied.

However, I note that because the witnesses have not been deposed and they have not filed their own affidavits, it is not yet clear whether they will testify as plaintiff avers they will. Therefore, before I can conclude that the witnesses will offer relevant testimony, it will be necessary for the parties to first examine Johnson and Sallie outside the presence of the jury to prevent potentially irrelevant testimony from being heard by the jury.

With respect to the second part of the test, plaintiff avers that Johnson and Sallie will testify that defendant was deliberately indifferent to their serious dental needs from late 1999 to 2001, which is the same period of time that plaintiff contends defendant violated his Eighth Amendment rights. Therefore, the second part of the test is also satisfied.

Third, if plaintiff's witnesses testify as he avers they will, their testimony will be sufficient to support a jury finding that defendant denied the witnesses dental care treatment.

Finally, I conclude that defendant will not be unfairly prejudiced by the testimony. The court of appeals has noted repeatedly that *all* relevant evidence is prejudicial to at least one party. Young v. Rabideau, 821 F.3d 373, 377 (7th Cir. 2000). It is only *unfair* prejudice that substantially outweighs the probative value of the evidence that permits exclusion under Rule 403. Id. There is nothing unfair in permitting plaintiff to present evidence that may show that defendant was deliberately indifferent to his serious dental needs. Rule 403 does not exist to prevent plaintiffs from proving their case.

Defendant contends that Jones v. Hamelman, 869 F.2d 1023 (7th Cir. 1989), requires this court to conclude that plaintiff's witnesses may not testify. In Jones, a prisoner brought a civil rights claim against prison officials for failing to protect him from an assault. The magistrate judge prohibited a witness from testifying that one of the defendants' prior acts (the opinion does not indicate what those acts were) demonstrated he had a modus operandi to aid and abet criminal acts. The court of appeals affirmed.

I disagree that Jones requires a different result. In affirming the magistrate judge, the court of appeals did not hold that prior acts of prison officials are never admissible in an Eighth Amendment claim. Rather, it held only that the appellant had not met its "heavy

burden" to show that the magistrate had clearly abused its discretion because the testimony could have necessitated "a trial within a trial" and would have had slight probative value. Id.

Unlike the plaintiff in Jones, plaintiff has averred that his witnesses will provide testimony that bears directly on defendant's intentions in failing to treat plaintiff. The additional time required for plaintiff to present this testimony does not substantially outweigh the potential probative value of the evidence. However, because I cannot conclude that Johnson's and Sallie's testimony will be relevant without their own statements, I will stay a decision on defendant's motion as it pertains to Johnson and Sallie until defendant has had the opportunity to cross-examine them outside the presence of the jury.

ORDER

IT IS ORDERED THAT

1. Defendant Richard Lofthouse's motion in limine to preclude the testimony of plaintiff Allen Tony Davis's witnesses is GRANTED with respect to Dennis Jones.

2. The August 28, 2002 order directing the clerk of court to issue writs of habeas corpus ad testificandum is QUASHED with respect to Dennis Jones; it remains unchanged with respect to Michael Johnson and Robert Sallie.

3. Defendant's motion in limine to preclude the testimony of plaintiff's witnesses is

STAYED with respect to Michael Johnson and Robert Sallie until defendant has the opportunity to cross-examine those witnesses outside the presence of the jury.

Entered this 5th day of September, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge