

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal No. 22-cr-320 (JMC)
	:	
ANTONIO LAMOTTA,	:	
	:	
Defendant.	:	

**GOVERNMENT’S RESPONSE TO DEFENDANT’S OPPOSITION TO
GOVERNMENT’S NOTICE PURSUANT TO FRE 404(b)**

The United States, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits this response to Defendant Antonio Lamotta’s Motion *in Limine* to Exclude Evidence Pursuant to Federal Rule of Evidence 404(b). (Def. Opp., ECF No 26.) Defendant asks this Court to exclude pretrial certain evidence the government intends to introduce in its case-in-chief to prove the defendant’s intent to commit the crimes with which he is charged, arguing that the government’s notice pursuant to Federal Rule of Evidence 404(b) is insufficient. Defendant’s argument lacks merit, and his request to exclude evidence should be denied.

Background

I. The Riot on January 6, 2021

On January 6, 2021, a joint session of the United States Congress convened at the Capitol, where elected members of the United States House of Representatives and the United States Senate were meeting to certify the vote count of the Electoral College of the 2020 Presidential Election, which had taken place on Tuesday, November 3, 2020. As the proceedings continued in both the House and the Senate, and with Vice President Pence present and presiding over the Senate, a large crowd gathered outside the Capitol. Temporary and permanent barricades were in place around

the exterior of the Capitol, and United States Capitol Police (USCP) officers were present and attempting to keep the crowd away from the Capitol and the proceedings underway inside.

At approximately 2:00 p.m., certain individuals in the crowd forced their way through, up, and over the barricades. Officers of the USCP were forced to retreat and the crowd advanced to the exterior façade of the building. At such time, the certification proceedings were still underway, and the exterior doors and windows of the Capitol were locked or otherwise secured. Members of the USCP attempted to maintain order and keep the crowd from entering the Capitol; however, shortly after 2:00 p.m., individuals in the crowd forced entry into the Capitol, including by breaking windows and by assaulting members of law enforcement, as others in the crowd encouraged and assisted those acts.

Shortly thereafter, at approximately 2:20 p.m., members of the House of Representatives and of the Senate, including the President of the Senate, Vice President Pence, were instructed to—and did—evacuate the chambers. Accordingly, all proceedings of the United States Congress, including the joint session, were effectively suspended. In light of the dangerous circumstances caused by the unlawful entry to the Capitol—including the danger posed by individuals who had entered the Capitol without any security screening or weapons check—Congressional proceedings could not resume until after every unauthorized occupant had been removed from or left the Capitol, and USCP confirmed that the building was secured. The proceedings resumed at approximately 8:00 p.m. after the building had been secured.

II. The Defendant's Role in the Riot

The defendant, Antonio Lamotta, claimed that the 2020 Presidential Election was decided by fraud. He discussed the election, and the significance of January 6 in particular, with friends on social media. On December 19, 2020, he wrote to a friend, “Martial Law in [sic] Jan.6.” On

December 23, he posted to Facebook, “Simple, folks. The American-Patriots aren’t the criminals... it's those law makers that's been twisting the Constitution and Second-Amendment for a long-time now. The American-Patriots will not watch this without a fight.” On January 4, 2021, Defendant traveled from Chesapeake, VA to Washington, D.C., and told other “patriots” to “get in here asap” via Facebook.

On the morning of January 6, 2021, Defendant attended a rally in support of the former President, and later approached the U.S. Capitol from the East side, where rioters had seized control of the area, including the stairs leading to the Capitol Rotunda and the landing directly outside the doors. Defendant and other rioters forced their way into the building through the East Rotunda Door despite the blaring alarm and U.S. Capitol Police officers fighting to keep them out of the building.

Once inside, Defendant continued pushing forward, in the direction of the Rotunda. He observed law enforcement officers trying to clear the area, but nevertheless turned to the rioters behind him, put his arm up, and waved – eight times – motioning rioters onward towards the Rotunda. Defendant remained in the U.S. Capitol for about nine minutes, as the crowd around him continued to chant phrases including, “fight for Trump,” and some rioters violently resisted the officers. Officers ultimately forced Defendant back out through the East Rotunda Door at approximately 3:30 p.m., and he remained on Capitol grounds until approximately 5 p.m.

III. Related Conduct Immediately Following the 2020 Presidential Election

On November 4, 2020—immediately after the 2020 Presidential Election, and two months before Defendant traveled to Washington, D.C., and stormed the United States Capitol—he discussed a trip to Philadelphia, PA with a friend, J.M.:

Defendant: What’s going on in Pa.? You need me there?

J.M.: on standby

Defendant: Is it a problem... What kind?

Defendant: We need arms?

J.M.: For each of us

Defendant had also sent several messages via text and Facebook messenger explaining the reason for his trip to Philadelphia. He sent a text to one contact saying, "Can't be there today... Going to PA... have a truckload of fake ballots we're going to raid." The defendant messaged someone on Facebook to say, "we're ambushing a truckload of fake ballots tomorrow in PA. On our way." He messaged a second Facebook associate with, "I'll be back soon... We're going to PA to raid a truck-load of fakr [sic] ballots."

The following morning, Defendant drove himself and J.M. from Chesapeake, Virginia to Philadelphia, Pennsylvania. Once there, he openly carried a loaded handgun outside of a Philadelphia vote-counting location, leaving an AR-15 assault rifle and several rounds of ammunition in his vehicle. Defendant and J.M. were subsequently arrested.

The government provided notice of its intent to introduce at trial the fact of Defendant's travel – with firearms – to a Philadelphia ballot-counting location on November 5, 2020, and his related statements.¹ On May 12, 2023, pursuant to the Court's scheduling order, the Government provided Defendant with a letter indicating its intent to introduce this evidence pursuant to Rule 404(b). The Government made clear that it was providing notice out of an abundance of caution, and "[did] not concede any of the evidence below necessarily falls within the ambit of Rule 404(b) as an "other crime, wrong, or act," rather than an act inextricably intertwined with or part of the

¹ In October 2022, the Commonwealth of Pennsylvania tried Defendant on five charges related to this conduct. At trial, a Judge convicted Defendant on the two firearms charges, and acquitted him on the three election interference charges. The government does not seek to introduce the charges or their ultimate outcome (unless they become relevant for a different purpose, such as impeachment). Rather, it is the underlying statements Defendant made, and the actions he took, that the government seeks to introduce as direct evidence of his intent on January 6, 2021.

offense.” In its notice, the Government explained that the evidence was relevant for the purposes of “establishing Lamotta’s motive and intent when he entered the U.S. Capitol on January 6, 2021 – it demonstrates Lamotta’s political motive for disrupting Congress on January 6, 2021, and suggests an absence of mistake or accident.”

Argument

I. Rule 404(b) Does Not Apply Because the Evidence the Government Seeks to Introduce is Intrinsic to the Charged Crimes

Federal Rule of Evidence 404(b) concerns the admissibility of evidence of a defendant’s “other crimes, wrongs, or acts” to prove something beyond a defendant’s character. Fed. R. Evid. 404(b); *United States v. Bowie*, 232 F.3d 923, 930 (D.C. Cir. 2000). Rule 404(b) only applies, however, when the evidence that the government seeks to introduce is “extrinsic” to the charged crime. *Id.* at 928. That is, Rule 404(b) only concerns admission of propensity evidence that is, in fact, of “other” crimes, wrongs, or acts as opposed to “intrinsic” evidence of the crimes charged. *See id.* at 928-29; *United States v. Badru*, 97 F.3d 1471, 1474-75 (D.C. Cir. 1995). Evidence “offered as direct evidence of [a] fact in issue” is not evidence of an “other” crime. *Badru*, 97 F.3d at 1475 (internal quotation marks omitted). “In other words, if the evidence is of an act that is part of the charged offense, it is properly considered intrinsic.” *Bowie*, 232 F.3d at 929.

Here, the evidence referenced in the government’s May 12, 2023, notice to the defense are statements that are intrinsic to the charged crimes. To prove violations of 18 U.S.C. § 1752(a)(2) at trial, the government will be required to prove beyond a reasonable doubt that:

- (1) the defendant engaged in disorderly or disruptive conduct in, or in proximity to, any restricted building;
- (2) the defendant did so knowingly, *and with the intent to impede or disrupt the orderly conduct of Government business or official functions*; and

(3) the defendant’s conduct occurred when, or so that, his conduct in fact impeded or disrupted the orderly conduct of Government business or official functions.”

United States v. Jesus Rivera, 21-cr-60-CKK, Verdict and Order (ECF 62) at p. 11 (D.D.C. June 17, 2022) (emphasis added).

To prove 40 U.S.C. § 5104(e)(2)(G), the government must show that:

- (1) the defendant paraded, *demonstrated*, or picketed in any of the United States Capitol Buildings; and
- (2) the defendant acted willfully and knowingly.

Id. at 14 (emphasis added).

As Judge Kollar-Kotelly explained in *United States v. Griffith* – another January 6 case where the government charged the defendant with the above-described crimes – “the Government must identify a cause for which Defendant demonstrated ... and must show that Defendant specifically intended to impede or disrupt Congressional proceedings[.]” 2023 U.S. Dist. LEXIS 26709 at *6 (D.D.C. Feb. 16, 2023). Defendant’s statements and actions on November 5, 2020, which demonstrate his claim that the election was influenced by fraud (a cause) and desire to act on that cause through interference with the election process (specific intent) are thus at issue in this case; the evidence is intrinsic.

Though the defense argues that there is “absolutely zero nexus between a vote counting location in the state of Pennsylvania and the U.S. Capitol building” (Def. Opp. at 4), the connection is obvious. In both instances, defendant traveled to these locations in response to the 2020 presidential election. It was the same election that the defendant opposed, the same votes that defendant claimed were fraudulent, and the same result the defendant defied. That the defendant

wanted to “raid” the “fake” ballots being counted in Philadelphia directly proves his desire to disrupt the 2020 presidential election, which he then did on January 6, 2021.²

II. To the Extent Rule 404(b) Applies, the Evidence that the Government Seeks to Introduce is Admissible for a Legitimate Nonpropensity Purposes

While Rule 404(b) prohibits the use of evidence of “other crimes, wrongs, or acts” to prove a defendant’s character, evidence of other crimes, wrongs or acts is admissible for any non-propensity purpose, including motive, intent, common scheme or plan, knowledge, and absence of mistake or accident. *See United States v. Bowie*, 232 F.3d 923, 926, 930 (D.C. Cir. 2000) (citing Fed. R. Evid. 404(b)). As the United States Court of Appeals for the D.C. Circuit has instructed, Rule 404(b) is a rule of “inclusion rather than exclusion.” *Bowie*, 232 F.3d at 929. Additionally, evidence of a defendant’s prior crimes may also be admissible where such evidence (1) is direct and substantial proof of the charged crime, (2) is closely intertwined with the evidence of the charged crime, or (3) is necessary to place the charged crime in an understandable context. *Jackson v. United States*, 856 A.2d 1111, 1115 (D.C. 2004). Specifically, “[a]lthough the first sentence of Rule 404(b) is ‘framed restrictively,’ the rule itself ‘is quite permissive,’ prohibiting the admission of ‘other crimes’ evidence ‘in but one circumstance’ — for the purpose of proving that a person’s actions conformed to his character.” *Id.* at 929-30 (quoting *United States v. Crowder*, 141 F.3d 1202, 1206 (D.C. Cir. 1998) (*en banc*) (“*Crowder II*”)); accord *United States v. Cassell*, 292 F.3d 788, 792 (D.C. Cir. 2002) (“[A]ny purpose for which bad-acts evidence is introduced is a proper

² Recognizing this clear nexus between defendants’ responses to the 2020 presidential election and the actions taken on January 6 to interfere with the certification of the very same election, the Magistrate Court has consistently authorized search warrants for defendants’ social media profiles dating back to November 2020. In fact, some of the statements the government seeks to admit regarding Defendant’s desire to “raid ... fake ballots” on November 5, 2020, were identified through such a search of his Facebook.

purpose so long as the evidence is not offered *solely* to prove character”) (quoting *United States v. Miller*, 895 F.2d 1431, 1436 (D.C. Cir. 1990) (emphasis in original)).

There is a two-pronged test for determining whether evidence of prior crimes is admissible under Rule 404(b). First, the evidence must be “probative of a material issue other than character.” *Miller*, 895 F.2d at 1435. Second, the evidence is subject to the balancing test of Federal Rule of Evidence 403, which renders it inadmissible only if the prejudicial effect of admitting the evidence “substantially outweighs” its probative value. *Id.* Furthermore, it is not enough that the evidence is simply prejudicial; the prejudice must be “unfair.” *Cassell*, 292 F.3d at 796 (quoting *Dollar v. Long Mfg. N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977) for the proposition that “[v]irtually all evidence is prejudicial or it isn’t material. The prejudice must be ‘unfair.’”); *United States v. Pettiford*, 517 F.3d 584, 590 (D.C. Cir. 2008) (“[T]he Rule focuses on the danger of *unfair* prejudice, and gives the court discretion to exclude evidence only if that danger *substantially* outweigh[s] the evidence’s probative value.”) (citations and punctuation omitted) (emphasis in original).

Admission of Rule 404(b) evidence is permitted in the government’s case-in-chief. Specifically, the government is entitled to anticipate the defendant’s denial of intent and knowledge and to introduce similar-act evidence as part of its case-in-chief. *See United States v. Inserra*, 34 F.3d 83, 90 (2d Cir. 1994) (“[Rule 404(b) other crimes evidence] is admissible during the government’s case-in-chief if it is apparent that the defendant will dispute that issue”); *United States v. Lewis*, 759 F.2d 1316, 1349 n.14 (8th Cir. 1985) (“It was not necessary for the government to await defendant’s denial of intent or knowledge before introducing [Rule 404(b) other crimes] evidence; instead the government may anticipate the defense and introduce it in its case-in-chief”); *United States v. Bussey*, 432 F.2d 1330, 1333 n.13 (D.C. Cir. 1970) (noting that Rule 404(b) other

crimes evidence to prove identity and to prove that prior and subsequent offenses are so identical as to mark them as handiwork of the defendant should be introduced in the government's case-in-chief).

The defendant's actions and statements surrounding the 2020 Presidential Election have significant probative value beyond proving Defendant's bad character. Evidence admitted under Rule 404(b) need only to be relevant to a nonpropensity purpose; that is, the evidence must have a "tendency to make" a fact of consequence "more ... probable." *United States v. Smith*, No. 19-324 (BAH), 2020 WL 5995199, at *16 (D.D.C. Oct. 9, 2020) (quoting Fed. R. Evid. 401). As explained in Part I, *supra*, the Government must prove both Defendant's intent to interfere with Congress and the cause for which he demonstrated, paraded, or picketed at the U.S. Capitol. Defendant's statements that ballots counted towards the 2020 presidential election were "fake" suggests a clear motive for him to disrupt the certification of that election on January 6, 2021; they also illustrate a motivating cause for his demonstration at the U.S. Capitol. Moreover, the fact that the defendant was willing to drive all the way from Chesapeake, Virginia to Philadelphia, Pennsylvania with the stated aim of "raid[ing]" those ballots underscores the fervor behind that cause, which in turn makes it more likely that he would travel to Washington, D.C., and enter the United States Capitol with an intent to stop the very same votes from being certified. And conversely, this same evidence makes it far less likely that defendant forced his way into the U.S. Capitol as Congress certified the electoral vote on the mistaken belief that he was permitted to be there.³

³ Courts regularly admit evidence of the commission of similar crimes to prove absence of mistake. *See, e.g., United States v. Johnson*, 970 F.2d 907, 913-14 (D.C. Cir. 1992) (admission of two prior moneygram frauds to establish knowledge and participation in charged moneygram fraud scheme); *United States v. Faust*, 850 F.2d 575, 584-85 (9 Cir. 1988) (in a forgery and embezzlement prosecution evidence of other forgeries admitted to prove absence of mistake and knowledge);

Evidence admissible under Rule 404(b) is, of course, subject to the restrictions of Rule 403. See *United States v. Moore*, 732 F.2d 983, 987 (D.C. Cir. 1984). In this case, the highly probative value of the government’s proffered 404(b) evidence is not substantially outweighed by potential prejudice to the defendant. Any potential prejudice is not unique to this case—where the government has shown a permissible non-propensity purpose—but is simply that endemic to all Rule 404(b) evidence. Such evidence “almost unavoidably raises the danger that the jury will improperly ‘conclude that because [the defendant] committed some other crime, he must have committed the one charged in the indictment.’” *United States v. Douglas*, 482 F.3d 591, 601 (D.C. Cir. 2007) (quoting *United States v. Crowder*, 141 F.3d 1202, 1210 (D.C. Cir. 1998) (*en banc*) (“*Crowder II*”). Prejudice in this attenuated sense cannot justify a *per se* rule of exclusion. See *Crowder II*, 141 F.3d at 1210. The defense must instead show “compelling or unique” evidence of prejudice, *United States v. Mitchell*, 49 F.3d 769, 777 (D.C. Cir. 1995), distinct from the probative value of the evidence and distinct from the intrinsic prejudicial potential of any Rule 404(b) evidence.

The defendant has not made such a showing. First, Defendant has not identified any potential prejudice besides the “attenuated” and “not unique” suggestion that he must have engaged in the crime at issue because he had previously acted in furtherance of a similar crime.

Perhaps more significantly, Defendant here faces a bench trial, not a jury trial. In another January 6 bench trial, Judge Kollar-Kotelly explained the significance of this difference in overruling a number of Rule 403-based objections: “the various Courts of Appeals are in relative

United States v. Leahy, 82 F.3d 624, 636 (5 Cir. 1996) (in prosecution a for conspiracy to defraud the United States, other instances of submitting false invoices admitted to prove intent and negate mistake); *United States v. Wonderly*, 70 F.3d 1020, 1023 (8 Cir. 1995) (in a wire fraud prosecution, admitting other crimes evidence to prove absence of mistake).

unanimity that prejudice objections ‘have no logical application in bench trials[;] ... excluding relevant evidence on the basis of unfair prejudice [in a bench trial] is a useless procedure.’ *Griffith*, 2023 LEXIS 26709 at *4 (quoting *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981)). Defendant’s suggestion that evidence of his prior statements and actions demonstrating a desire to interfere with the 2020 Presidential will “inflame the passions of the fact-finder” is thus unfounded and moot.⁴

Finally, the highly probative value of the government’s proffered evidence – as it relates directly to his motive, intent, and lack of mistake in demonstrating at the Capitol on January 6 and interfering with Congress’ certification of the electoral college vote on that day – is not *substantially* outweighed by potential prejudice to Defendant. Thus, there are no grounds to exclude the evidence under either Rules 404(b) or 403.⁵

Conclusion

The government has demonstrated a legitimate basis for introducing evidence of Defendant’s travel to Philadelphia on November 5, 2020 and his related statements, which is not

⁴ Even were this case before a jury, the appropriate remedy would be a limiting instruction, not exclusion. The D.C. Circuit has consistently upheld the use of limiting instructions as a way of minimizing the residual risk of prejudice. *See, e.g., United States v. Douglas*, 482 F.3d 591, 601 (D.C. Cir. 2007) (emphasizing the significance of the district court’s instructions to jury on the permissible and impermissible uses of the evidence); *Pettiford*, 517 F.3d at 590 (same); *Crowder II*, 141 F.3d at 1210 (stating that mitigating instructions to jury enter into the Rule 403 balancing analysis). Of course, as this is a bench trial, a limiting instruction would neither be necessary nor helpful.

⁵ Though Defendant cautions the Court against admitting evidence of acquitted conduct, that is not at issue here. First, Defendant *was* convicted on two counts of violating Pennsylvania’s firearms laws in connection with his actions in November 2020. Second, as stated above, the government does not intend to rehash Defendant’s charges and their ultimate outcomes, but rather, the statements he made and actions he took as they also relate to his conduct on January 6, 2021.

substantially outweighed by the danger of unfair prejudice. Therefore, such evidence should be admitted at trial.

Respectfully submitted,

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