

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION
 :
 MICHAEL A. SLADE, JR. : NO. 12-0367
 :

SURRICK, J.

NOVEMBER 1, 2013

MEMORANDUM

Presently before the Court is the Government’s Amended Motion *in Limine* and Memorandum of Law to Admit Evidence of Similar Crimes and Acts Pursuant to Rule 404(b) of the Federal Rules of Evidence (ECF No. 151), the Government’s Motion and Memorandum of Law to Allow Impeachment of the Defendant Pursuant to Rules 608(b) and 609 of the Federal Rules of Evidence (ECF No. 148), and Defendant Michael A. Slade, Jr.’s Motion *in Limine* and Memorandum of Law to Preclude Extrinsic Evidence and Rule 404(b) Prior Bad Acts (ECF No. 168). For the following reasons, the Government’s Motion to Admit Evidence of similar Crimes and Acts will be granted in part and denied in part, the Government’s Motion to Allow Impeachment of the Defendant will be granted, and Defendant’s Motion *in Limine* will be granted in part and denied in part.

I. BACKGROUND

On January 22, 2013, a federal grand jury returned a sixty-seven count Superseding Indictment against Dorothy June Brown, Joan Woods Chalker, Michael A. Slade, Jr., Courteney L. Knight, and Anthony Smoot. (Superseding Indictment (“Indictment”), ECF No. 47.)¹ These

¹ On March 15, 2013, Anthony Smoot entered a guilty plea to conspiracy to obstruct justice, in violation of 18 U.S.C. § 371 (Count 53), and obstruction of justice, in violation of 18

charges arise out of an alleged scheme perpetrated by Brown to defraud three separate charter schools out of over \$6.7 million.

Defendant Slade is charged with conspiracy to obstruct justice, in violation of 18 U.S.C. § 371 (Count 53), and with two substantive counts of obstruction of justice in violation of 18 U.S.C. §§ 1519 and 2 (Counts 59, 64). The Government intends to prove the conspiracy charge with evidence that Defendant created false documents in 2009 that made it appear as if a person had served on the Agora Board of Directors in 2005, 2006, and 2007, when this was not true. (Gov't's *Limine* Mot. 1.) The obstruction of justice charge in Count 59 alleges that on February 28, 2010, Defendant knowingly fabricated a document entitled "School Owned Vehicles" of Main Line Academy. (*Id.*; Indictment 61.) The document made it falsely appear as if the school had adopted a policy on July 1, 2005 that permitted Main Line Academy staff members to be provided with vehicles. (Indictment 61.) Finally, the obstruction of justice charge in Count 64 alleges that Defendant, in April 2010, knowingly created a false board resolution for the Laboratory Charter School that agreed to lend up to \$100,000 to the Agora Cyber Charter School. (Indictment 66.) The allegations supporting the two obstruction of justice charges are also alleged as overt acts in the conspiracy to obstruct justice charged in Count 59.

This Memorandum addresses three Motions. On October 10, 2013, the Government filed an Amended Motion and Memorandum of Law to Admit Evidence of Similar Crimes and Acts Pursuant to Rule 404(b) of the Federal Rules of Evidence. (Gov't's *Limine* Mot., ECF No. 151.) On October 21, 2013, Defendant filed a response to the Motion. (Def.'s *Limine* Resp., ECF No. 167.) On October 4, 2013, the Government filed a Motion and Memorandum of Law to Allow

U.S.C. §§ 1519 and 2 (Count 58). (Min. Entry, ECF No. 55.) On October 21, 2013, Joan Woods Chalker entered a guilty plea to obstruction of justice, in violation of 18 U.S.C. §§ 1519 and 2 (Counts 55, 57), and obstruction of justice, in violation of 18 U.S.C. §§ 1512(c)(2) and 2 (Count 57). (Min. Entry, ECF No. 169.)

Impeachment of the Defendant Pursuant to Rules 608(b) and 609 of the Federal Rules of Evidence. (Gov't's Impeach Mot., ECF No. 148.) On October 21, 2013, Defendant filed a response to the Motion. (Def.'s Impeach Resp., ECF No. 166.) Finally, on October 21, 2013, Defendant filed a Motion *in Limine* and Memorandum of Law to Preclude Extrinsic Evidence and Rule 404(b) Prior Bad Acts. (Def.'s *Limine* Mot., ECF No. 168.) The Government filed a reply on October 30, 2013. (Gov't's Reply, ECF No. 191.)

The Government requests that the Court permit it to introduce evidence at trial “[t]o establish the defendant’s knowledge, intent, and lack of mistake” with regard to the allegations in the Indictment. (Gov't's *Limine* Mot. 2.) Specifically, the Government seeks to introduce evidence demonstrating that, in 2005, Defendant obtained a false criminal history report in conjunction with applying for a teacher position at the Laboratory Charter School. (*Id.*) Defendant submitted the social security number and date of birth of his father, who has the same name as Defendant, to obtain a criminal background check. (*Id.*) It is alleged that Defendant did this to conceal a 2003 criminal conviction. (*Id.*) On June 23, 2003, Defendant entered a plea of guilty to access device fraud, a felony, and possession of a controlled substance, a misdemeanor. (*Id.*; *see also id.* at Ex. 1.)² He was sentenced to nine months probation. Defendant’s use of his father’s information resulted in the return of a criminal background check issued by Pennsylvania State Police on August 30, 2005 that revealed no prior criminal record. (Gov't's *Limine* Mot. 3.)

² Defendant was arrested on February 20, 2003, and charged with access device fraud, unlawful use of a computer, identity theft, theft by deception, receiving stolen property and possession of a controlled substance. (Gov't's *Limine* Mot. 2.) The charges arose out of allegations that Defendant stole another person’s credit card and used it on multiple occasions to make online purchases totaling thousands of dollars. (*Id.*)

The Government also seeks to admit evidence that, in 2012, Defendant provided auditors from Laboratory Charter School with a photocopy of the August 30, 2005 criminal background check. However, Defendant altered the document to reflect his own social security number and date of birth instead of his father's identifying information. (Gov't's *Limine* Mot. 3.) Defendant was at that time the CEO of the Laboratory Charter School. The auditors questioned the validity of the criminal background check, noting that the social security number and birthdate had been altered. (*Id.* at Ex. 2.) In their report, the auditors stated that on July 12, 2012, when Defendant was interviewed by the District's Office of Inspector General, he stated that the criminal background check that was provided to the auditors was accurate and not altered. (*Id.*)

Finally, the Government seeks to admit evidence that Defendant falsely represented his educational background in email communications, on a social networking site, and in a school-related document. (Gov't's *Limine* Mot. 3.) Specifically, from at least 2011 through October 2013, Defendant represented that he earned a doctorate in education when in fact he has not. His LinkedIn page states that he attended Widener University from 2006 through 2010 and earned his doctorate degree. (*Id.* & Ex. 3.) In addition, on August 1, 2011, he signed a certification as CEO of the Laboratory Charter School entitled "Assurance for Compliance with the Public Official & Employee Ethics Act," on which the signature line indicated that he was a Doctor of Education. (*Id.* at Ex. 4.) The Government also seeks to admit emails between Defendant and other individuals concerning the Laboratory Charter School, in which Defendant's signature block states "Michael A. Slade Ed. D." (*Id.* at Ex. 5.)

With regard to the 2003 felony conviction for access device fraud, the Government requests that the Court permit it to use the conviction for impeachment purposes to the extent that Defendant testifies at trial. The Government states that both the nature of the conviction, as

well as Defendant's attempts to hide the conviction in 2005 and 2012 are proper subjects for cross examination of Defendant.

II. GOVERNMENT'S MOTION TO IMPEACH

In its Motion to Impeach, the Government argues that it should be permitted to cross-examine Defendant about his prior conviction for access device fraud if Defendant chooses to testify at trial. The Government contends that the conviction is admissible under Rule 609 of the Federal Rules of Evidence. (Gov't's Impeach Mot. 2.)

A. Legal Standard

Rule 609, which governs the use of convictions for purposes of impeachment, provides that a prior criminal conviction may be used to attack a criminal defendant's character for truthfulness if: (1) the crime was punishable by death or by imprisonment for more than one year; and (2) the probative value of the evidence outweighs its prejudicial effect. Fed. R. Evid. 609(a)(1). The Third Circuit has stated that "Rule 609(a)(1) is absolutely clear and explicit in requiring the trial court, before admitting the evidence of a prior conviction, to make the determination that the probative value of the evidence outweighs its prejudicial effect to the defendant." *Virgin Islands v. Bedford*, 671 F.2d 758, 761 (3d Cir. 1982). Factors for the district court to consider when making this determination include: "(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness' testimony to the case; and (4) the importance of the credibility of the defendant." *United States v. Greenidge*, 495 F.3d 85, 97 (3d Cir. 2007). The Government bears the burden of persuading the court that the probative value of the evidence outweighs its prejudicial effect. *Bedford*, 671 F.2d at 761.

If the prior conviction involves a "dishonest act or false statement," then Rule 609 provides that the evidence is automatically admissible and may be used to impeach the defendant

regardless of whether it is determined that the probative value of the evidence outweighs the prejudicial effect. Fed. R. Evid. 609(a)(2). *Crimen falsi* convictions are not subject to the general balancing test of Rule 403. *United States v. Wong*, 703 F.2d 65, 67 (3d Cir. 1983).

Finally, Rule 609(b) provides that evidence of a conviction is generally inadmissible if more than ten years have elapsed since the date of the defendant's conviction or release from confinement, whichever is later. Fed. R. Evid. 609(b). However, the district court has discretion to admit the prior conviction if it determines that "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." *Id.* at 609(b)(1). In making this determination, the district court applies the criteria used under Rule 609(a). *United States v. D'Agata*, 646 F. Supp. 390, 391 (E.D. Pa. 1986). These factors include: the kind of crime involved, when the conviction occurred, the importance of the witness's testimony to the case, and the importance of the credibility of the defendant. *Id.*

B. Analysis

Defendant concedes that his felony conviction for access device fraud satisfies Rule 609(a). (Def.'s Impeach Resp. 2.) The only remaining issue disputed by the parties is whether or not Rule 609(b) is applicable, and if it is, whether the conviction is admissible under that section of the Rule. Rule 609(b) excludes convictions if more than ten years has passed since the defendant's conviction or release from confinement, whichever is later, unless the Court concludes that, in light of the specific facts and circumstances surrounding the conviction, the probative value of the evidence substantially outweighs the prejudicial effect. Fed. R. Evid. 609(b). Defendant contends that his guilty plea is more than 10 years old and should therefore be barred because the prejudicial effect of this evidence substantially outweighs its probative value. (Def.'s Impeach Resp. 2) Defendant was convicted of access device fraud on June 23,

2003 and sentenced to nine months probation. Defendant argues that the ten-year time period in Rule 609(b) ran on June 23, 2013. The Government argues that the ten years did not begin to run until Defendant was released from probation, and that “[c]alculating the time period from the date of the expiration of [Defendant’s] 9-month term of probation would make the access device fraud conviction timely under Rule 609(b).” (Gov’t’s Impeach Mot. 4.)³

The Third Circuit has not yet had occasion to decide whether the ten-year period in Rule 609(b) is calculated from the conclusion of a defendant’s probationary period, or from some other time. Other circuit courts that have looked at this issue have concluded that “release of confinement” for purposes of the ten-year time limit does not include periods of probation. *See United States v. Stoltz*, 683 F.3d 934, 939 (8th Cir. 2012); *United States v. Rogers*, 542 F.3d 197, 201 (7th Cir. 2008); *United States v. Daniel*, 957 F.2d 162, 168 n.3 (5th Cir. 1992). District courts within the Third Circuit have similarly concluded that a defendant’s term of probation is not included in calculating the ten-year time period. *See Prater v. City of Phila.*, No. 11-667, 2012 U.S. Dist. LEXIS 128224, at *10 n.2 (E.D. Pa. Sept. 7, 2012); *Wink v. Ott*, No. 11-596, 2012 U.S. Dist. LEXIS 76261, at *4-5 (M.D. Pa. Jun 1, 2012); *United States v. Butch*, 48 F. Supp. 2d 453, 465 (D.N.J. 1999). *But see Trindle v. Sonat Marine Inc.*, 697 F. Supp. 879, 881 n.4 (E.D. Pa. 1988) (noting that the ten-year period referenced in Rule 609(b) does not begin to run until the conclusion of probation).⁴ In addition, the Third Circuit has, in dicta, indicated that the time period for Rule 609 begins to run from the time the defendant is “released from prison.” *See Hans*, 738 F.2d at 93 (“Normally such evidence [under Rule 609] is admissible only if either

³ The ten-year time period concludes when the trial begins. *United States v. Hans*, 738 F.2d 88, 93 (3d Cir. 1984).

⁴ The Government relies on the *Trindle* case in arguing that the ten-year time period does not begin until after Defendant’s confinement has concluded.

the conviction or the witness' release from prison occurred within 10 years of the trial.”). Based upon the language of the Rule, the Court's observation in *Hans*, and the trend of other courts that have ruled on the issue, we are satisfied that the Third Circuit will join the other circuit courts in holding that the ten-year time period contained in Rule 609(b) does not include periods of probation. Accordingly, we conclude that Defendant's felony conviction for access device fraud is more than 10 years old, and therefore, Rule 609(b) applies.

Our inquiry does not end there. The conviction may nevertheless be admissible for purposes of impeachment if we determine that the probative value of this evidence substantially outweighs the prejudicial effect. Fed. R. Evid. 609(b)(1). In making this determination, we consider the kind of crime involved, when the conviction occurred, the importance of Defendant's testimony, and the importance of Defendant's credibility. *D'Agata*, 646 F. Supp. at 391.

The nature of the crime of access device fraud supports admissibility. Under Pennsylvania law, a defendant commits the crime of access device fraud if he or she “uses an access device to obtain or in an attempt to obtain property or services with knowledge that . . . use of the access device is unauthorized by the issuer or the device holder.” 18 Pa. Con. Stat. § 4106. Defendant was accused of stealing credit card information and using that information to purchase thousands of dollars of merchandise via the Internet. The facts surrounding Defendant's crime implicate dishonesty and deceit and certainly bear upon Defendant's credibility and veracity. *See United States v. Collier*, 527 F.3d 695, 699 (8th Cir. 2008) (concluding that credit card fraud is a crime of dishonesty containing an element of deceit, which relates to a witness's “propensity to testify truthfully”); *Foye v. Cameron*, No. 11-7913, 2012 U.S. Dist. LEXIS 185329, at *13 n.18 (E.D. Pa. May 21, 2012) (noting that the crime of

access device fraud is a crime of dishonesty). Moreover, any crime that requires proof of intent to defraud “by definition involves some element of deceit, which would bear upon one’s propensity to testify truthfully.” *Collier*, 527 F.3d at 699.

The date of Defendant’s conviction also supports its admissibility. The conviction is ten years and fourth months old, which is just past the ten-year time limit in Rule 609. Staleness is not as much of a concern when the conviction is just over ten years old, particularly when the conviction is probative of Defendant’s credibility. *See United States v. Pritchard*, 973 F.2d 905, 909 (11th Cir. 1992) (affirming admission of 13-year old burglary conviction under Rule 609(b)); *United States v. Gilbert*, 668 F.2d 94, 97 (2d Cir. 1981) (affirming admission of conviction greater than 10 years old where “the age of the prior conviction and the defendant’s subsequent history did not suggest that he had abandoned his earlier ways”). In addition, Defendant’s subsequent attempts in 2005 and 2012 to conceal this conviction are further evidence of dishonesty, and militate against the staleness of his conviction. The importance of Defendant’s testimony also demonstrates that the probative value substantially outweighs the prejudicial effect. If Defendant chooses to testify, he places his credibility directly at issue. *See United States v. Rosato*, No. 98-343, 1999 U.S. Dist. LEXIS 706, at *7 (E.D. Pa. Jan. 27, 1999) (“A defendant who testifies is invariably the centerpiece of any criminal defense, and the defendant’s credibility is always at issue.”). We anticipate that if Defendant testifies, he will testify about matters that are pivotal to the charges in his case. After balancing these factors, we find that the probative value of Defendant’s access device fraud conviction is very high and substantially outweighs any prejudicial effect. Accordingly, we will permit the Government to use Defendant’s conviction to impeach Defendant if Defendant chooses to testify at trial.

III. GOVERNMENT’S MOTION TO ADMIT EVIDENCE OF SIMILAR CRIMES AND ACTS UNDER RULE 404(b) AND DEFENDANT’S MOTION TO EXCLUDE EXTRINSIC EVIDENCE

The Government seeks to admit the following evidence under Rule 404(b): (1) Defendant’s attempt in 2005 to conceal his 2003 access device fraud conviction by submitting false information to obtain a criminal background check necessary for employment; (2) his attempt in 2012 to conceal his prior fraudulently obtained criminal background check by altering the background check and submitting it to auditors; and (3) his representations in email, on social media sites, and in a school-related document that he has earned a doctorate in education when he has not. Defendant seeks to preclude all of this evidence. In addition, Defendant seeks to preclude any evidence that he misused a credit card issued to him by the Laboratory Charter School.

A. Legal Standard

Evidence of a defendant’s conduct that is not charged in the indictment, including crimes, wrongs, or other acts, may be admissible if: (1) the evidence is intrinsic to the charged offense; or, (2) the evidence is extrinsic to the charged offense but is offered for a proper purpose under Rule 404(b) of the Federal Rules of Evidence. *See United States v. Green*, 617 F.3d 233, 248-49 (3d Cir. 2010).⁵ Under Rule 404(b), “[e]vidence of a crime, wrong or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. This evidence may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” Fed. R. Evid. 404(b); *see also Huddleston v. United States*, 485 U.S. 681,

⁵ The parties do not dispute that the evidence at issue in the Government’s Motion to Admit is extrinsic evidence.

686 (1988). Rule 404(b) is a Rule of inclusion rather than exclusion, *United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994), and thus favors admissibility so long as the evidence is “relevant for any other purpose than to show a mere propensity or disposition on the part of the defendant to commit the crime.” *United States v. Givan*, 320 F.3d 452, 460 (3d Cir. 2003) (internal quotation marks omitted).

Determining whether the prior act evidence is admissible under Rule 404(b) requires consideration of a four-part test. We must consider whether the evidence is: (1) offered for a proper purpose; (2) relevant to that purpose; (3) sufficiently probative under the Rule 403 balancing requirement; and (4) accompanied by a limiting instruction, if requested. *United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013).⁶ The Government has the burden of demonstrating that the evidence is admissible under Rule 404(b). While the Government’s burden is “not onerous,” it must still “clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed [the] offenses before, he therefore is more likely to have committed this one.” *United States v. Sampson*, 980 F.2d 883, 887, 888 (3d Cir. 1992).

This Rule 404(b) analysis need not be performed for evidence that is intrinsic to, or part of the charged offenses. *Green*, 617 F.3d at 245; *see also United States v. Haas*, 184 F. App’x 230, 234 (3d Cir. 2006) (noting that intrinsic evidence is exempt from a Rule 404(b) analysis).⁷ The rationale has been explained as follows:

⁶ Rule 403 provides that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

⁷ There are two primary differences between intrinsic and extrinsic evidence—intrinsic evidence does not require advanced notice of the acts to be admitted into evidence to be provided

In cases where the incident offered is a part of the conspiracy alleged in the indictment, the evidence is admissible under Rule 404(b) because it is not an “other” crime. The evidence is offered as direct evidence of the fact in issue, not as circumstantial evidence requiring an inference as to the character of the accused. Such proof . . . may be extremely prejudicial to the defendant but the court would have no discretion to exclude it because it is proof of the ultimate issue in the case.

United States v. Gibbs, 190 F.3d 188, 217-18 (3d Cir. 1999) (citing 22 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5239, at 450-51 (1978)).

Most Circuits define intrinsic evidence as evidence that is “inextricably intertwined” with the charged offense. *See, e.g., United States v. Clay*, 667 F.3d 689, 697 (6th Cir. 2012); *United States v. Basham*, 561 F.3d 302, 326 (4th Cir. 2009); *United States v. DeGeorge*, 380 F.3d 1203, 1219-20 (9th Cir. 2004); *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000). The Third Circuit Court of Appeals has renounced the “inextricably intertwined” standard, finding it “vague, overbroad, and prone to abuse” *Green*, 617 F.3d at 248.

In the Third Circuit, “intrinsic” evidence is evidence that falls into “two narrow categories.” *Green*, 617 F.3d at 248. The first category is evidence that “directly proves” the charged offense. *Id.* (citing *Gibbs*, 190 F.3d at 218; *Bowie*, 232 F.3d at 929). The second category is evidence of ““uncharged acts performed contemporaneously with the charged crime”” that ““facilitate the commission of the charged crime.”” *Id.* at 249 (quoting *Bowie*, 232 F.3d at 929). All other evidence must be analyzed under Rule 404(b). *Id.* The Third Circuit has observed that “[a]s a practical matter, it is unlikely that our holding will exclude much, if any,

to the defense and the court need not issue a limiting instruction to mitigate the possible prejudicial effect of the evidence. *Green*, 617 F.3d at 247-48. Intrinsic evidence still must, however, be relevant, to survive a Rule 403 balancing test, and be probative of something other than the defendant's criminal propensity. *Id.* (citing *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000)).

evidence that is currently admissible as background or ‘completes the story’ evidence under the inextricably intertwined test.” *Id.*

B. Analysis

1. The Falsely Obtained and Altered Criminal Background Check

The Government contends that evidence related to Defendant’s submitting false information to obtain a criminal background check and subsequent altering of the same criminal background check serves the proper purpose under Rule 404(b) to establish Defendant’s knowledge, intent, and lack of mistake. (Gov’t’s *Limine* Mot. 2.) Defendant argues that the evidence is offered solely to show his propensity to commit the crimes charged in the Indictment and is therefore impermissible character evidence. The evidence the Government seeks to admit shows that Defendant had previously submitted false or altered documents in order to obstruct or impede an investigation. This is similar to the acts charged against him in the Indictment.

Specifically, in 2005, when Defendant was applying for a teacher position at the Laboratory Charter School, he attempted to hide his 2003 criminal conviction for access device fraud by submitting his father’s social security number and date of birth in order to obtain a criminal background check. Prospective employees of Pennsylvania schools are required to obtain a criminal background check from the Commonwealth of Pennsylvania and submit a criminal clearance to the school prior to beginning employment. *See* 24 P.S. 1-111. Later, in 2012, when the Philadelphia School District conducted an audit of the Laboratory Charter School, Defendant submitted an altered and falsified criminal background check to the auditors. In an attempt to conceal both his prior access device fraud conviction, and the fact that he had previously submitted false information to obtain a criminal background check, Defendant used

the 2005 criminal background check, but altered the social security number and date of birth on that background check to reflect his own information instead of his father's.

With regard to the charges in this case, Defendant is alleged to have participated in a conspiracy to obstruct justice from at least 2008 until April 2012. During the course of, and in furtherance of that conspiracy, and in response to grand jury subpoenas that had been served on the charter schools, Defendant allegedly: (1) created false documents that made it falsely appear as though a person had served on the Agora Board of Directors in 2005, 2006, and 2007 when Defendant knew that the individual had actually not served on the Agora Board during those years; (2) fabricated a Main Line Academy document entitled "School Owned Vehicles" in February 2010, which made it falsely appear that the school had adopted a policy in July 2005 that permitted staff members to be provided with vehicles for transportation; and (3) created a false Laboratory Charter School board resolution in 2010, which made it appear as though the Laboratory approved a loan to Agora Cyber Charter school in 2005.

The Government contends that the evidence related to Defendant's criminal background check demonstrates that he committed similar acts in 2005 and 2012 to those charged in the Indictment. In other words, as the Government argues, by falsifying documents concerning his criminal history and submitting those documents to others knowing that the documents were false, he had the requisite knowledge that the falsified documents that are subject to the Indictment were in fact false at the time he created them, and that he acted with the intent to impede or influence an investigation. The Government also argues that the similarity between the prior acts and the acts charged in the Indictment demonstrate that Defendant did not act by mistake.

Defendant responds that the uncharged acts are not similar enough to survive the balancing test set forth in Rule 404(b). Defendant contends that the evidence that the Government seeks to admit relates to isolated actions by Defendant and does not support the theory that Defendant was engaged in a conspiracy to obstruct justice. In particular, Defendant argues that evidence related to the criminal background check involved the alteration of documents, that the documents were altered “for the sole purpose of an individual obtaining/maintaining gainful employment, and not [as] part of an alleged over-arching conspiracy involving many people.” (Def.’s *Limine* Mot. 6.) Finally, Defendant contends that the uncharged acts are inadmissible because they lack a temporal proximity to the acts charged in the Indictment.

In considering whether to admit the uncharged acts under Rule 404(b), we must consider whether they are “probative of a material issue other than character,” and if so, whether the prejudicial impact outweighs the probative value. *United States v. Scarfo*, 850 F.2d 1015, 1019 (3d Cir. 1988). We are satisfied that the evidence surrounding Defendant’s obtaining and later altering his criminal background check has significant evidentiary value. It goes directly to the issue of knowledge and intent. In particular, when Defendant used his father’s personal identification information to obtain a criminal background check, he did so with the knowledge and intent of concealing a prior criminal conviction, interfering with the School District of Philadelphia’s legitimate goal of investigating prospective employees to ensure that they have a clean criminal history, and advancing his objective of securing employment as a teacher at the Laboratory Charter School. Similarly, when Defendant later submitted an altered criminal history report to the auditors, he did so with the knowledge and intent of concealing his criminal history, interfering with the auditors’ objectives, and advancing his objective of maintaining

gainful employment at the charter school. With respect to the current charges, it is alleged that in response to subpoenas issued by the grand jury, Defendant created false documents, including board resolutions and school policies, with the knowledge and intent to impede the grand jury's investigation and to advance his objective in covering up certain actions taken by the school, presumably in order to maintain his position as CEO of the Laboratory Charter School.

We reject Defendant's argument with regard to the lack of similarity between the uncharged acts and the allegations charged in the Indictment. The similarity between the uncharged acts and charged acts is certainly probative of knowledge, intent, and lack of mistake. *See, e.g., United States v. Dwyer*, 493 F. App'x 313, 316 (3d Cir. 2012) (prior submission of false tax returns by the defendant was properly admitted under 404(b) in prosecution for bank and mail fraud to show that the defendant "knew how to orchestrate exactly the kind of crime with which he was charged" and lack of mistake); *United States v. Yielding*, 657 F.3d 688, 701-02 (11th Cir. 2011) (prior thefts admitted to show knowledge and intent in Medicare fraud prosecution); *United States v. Komalafe*, 246 F. App'x 806, 811-12 (3d Cir. 2007) (affirming admission of the defendant's prior fraudulent activities in prosecution for bank fraud where the prior act evidence was relevant to show knowledge and lack of mistake); *United States v. Daraio*, 445 F.3d 253, 263-66 (3d Cir. 2006) (affirming district court's admission of evidence related to the defendant's uncharged tax evasion because the evidence was relevant to show the defendant's intent to commit the charged crime of evading payment of payroll taxes); *United States v. Fumo*, No. 06-319, 2008 U.S. Dist. LEXIS 1803, at *9-10 (E.D. Pa. Jan 9, 2008) (evidence of prior frauds admissible to show intent in prosecution for fraud and obstruction of justice where the frauds were "part of a common plan to gain personal benefits and gratuities from others, including entities over which he had influence"). Indeed, the "past conduct need not

be identical to the conduct charged, but instead need only be similar enough to be probative of intent.” *United States v. Johnson*, 132 F.3d 1279, 1283 (9th Cir. 1997).

We also reject Defendant’s argument that the temporal proximity between the uncharged acts and the charged acts precludes admission of the evidence under Rule 404(b). The criminal background check was obtained in 2005, approximately five years before the acts alleged in the Indictment. This fact does not make the uncharged acts inadmissible. The time in between the uncharged acts and the charged acts is a relevant fact in determining admissibility under 404(b). However, given the probative value of the evidence, a five year gap between the uncharged and charged acts is not unreasonable. *See, e.g., United States v. Chandler*, 368 F. App’x 495, 500 (5th Cir. 2010) (holding that a seventeen-year-old credit card conviction was not too remote under Rule 404(b) in prosecution for bank fraud and aggravated identity theft); *United States v. Ross*, 510 F.3d 702, 713 (7th Cir. 2007) (“Having occurred within five and six years of the charged robbery, the prior bad acts are not too remote in time.”); *United States v. Calderon*, 127 F.3d 1314, 1332 (11th Cir. 1997) (six-year span between prior convictions and the charged conduct was not temporally remote).

Defendant fails to offer any argument as to why the evidence would be unduly prejudicial, other than baldly stating that it tends to show that he committed the crimes charged in the Indictment. After performing the required balancing under Rule 404(b), we are satisfied that the Government has offered a proper purpose for admission of the evidence, and that the probative value of the uncharged acts related to Defendant’s criminal background check outweigh the danger of unfair prejudice. In any event, limiting instructions may be offered both at the time that the evidence is admitted and in the final jury instructions, thus reducing any risk of prejudice. *See Huddleston*, 485 U.S. at 691-92.

2. *Defendant's False Representations about his Education*

The Government claims that Defendant's misrepresentation about receiving a doctorate in education similarly establishes his intent, knowledge, and lack of mistake with regard to the charged conspiracies. Defendant represented on a social media website, LinkedIn, in school-related emails, and on a school-related affidavit, that he was a Doctor or that he received a doctorate in education, neither of which are true. The Government argues that this false representation is relevant to show that Defendant had the requisite knowledge and intent to commit the crimes charged in the Indictment. While it is true that the misrepresentations about his education are deceitful acts meant to mislead others, the connection to the charged crimes appears at this juncture to be too attenuated to be probative of his knowledge and intent. Unlike the evidence related to Defendant's submission and alteration of his criminal background check, there is no allegation that Defendant's misrepresentation about his educational background was intended to impede or interfere with any investigation. If the Government provides additional information that establishes a stronger link between the uncharged acts and the crimes in the Indictment, we will revisit the issue.

3. *Defendant's Misuse of Credit Cards*⁸

Defendant requests that the Court preclude the Government from offering any evidence about his alleged misuse of a Laboratory Charter School credit card. (Def.'s *Limine* Mot. 2.) Defendant contends that this evidence is extrinsic evidence that is only being offered to prove his

⁸ Defendant's Motion also requests the Court to preclude the Government from admitting evidence of similar crimes and acts under Rule 404(b). The evidence Defendant seeks to preclude is the same evidence addressed by the Government in their Motion *in Limine*. As set forth above, the evidence related to Defendant's use of his father's information to obtain a criminal background check in 2005 and submission of the altered criminal background check in 2012 will be admissible. Evidence related to Defendant's misrepresentations about his education will not be admissible at this juncture.

bad character. In addition, Defendant contends that the Government failed to provide notice as required by Rule 404(b). (*Id.*) The Government responds that information related to Defendant's misuse of the Laboratory Charter School credit card is intrinsic evidence that is specifically charged in the Indictment, and as such, is outside the scope of Rule 404(b). (Gov't's Reply 4.)

Count 53, which charges conspiracy to obstruct justice, states that:

Defendant DOROTHY JUNE BROWN recruited others to join the conspiracy by rewarding them with high level administrative positions at the charter schools she controlled, by causing them to be paid six-figure salaries, and by enabling them to use school funds and resources for their own personal benefit. In one instance, BROWN permitted her great nephew, MICHAEL A. SLADE, Jr., who was an employee of Laboratory at the time, to spend over \$40,000 of Main Line Academy funds on a truck for SLADE's own personal use. BROWN also permitted SLADE to use school credit cards to charge tens of thousands of dollars for personal expenses, including meals, gas and car washes.

(Indictment 50.)

Evidence is considered intrinsic if it (1) "directly proves" the charged offense, or (2) it relates to uncharged acts "performed contemporaneously with the charged crime" that "facilitate the commission of the charged crime." *Green*, 617 F.3d at 249 (internal quotation marks omitted). In the context of a conspiracy charge, "acts are intrinsic when they directly prove the charged conspiracy." *United States v. Cross*, 308 F.3d 308, 320 (3d Cir. 2002); *see also Gibbs*, 190 F.3d at 218 (concluding that acts of violence were admissible as direct proof of the charged drug conspiracy); *United States v. Schurr*, 794 F.2d 903, 907 n.4 (3d Cir. 1986) (noting that the government may use evidence of uncharged overt acts to prove the charged conspiracy); *United States v. Mitani*, No. 08-760, 2009 U.S. Dist. LEXIS 87885, at *12 (E.D. Pa. Sept. 24, 2009) (admitting evidence of business transactions as intrinsic evidence because it was direct proof of the elements of the conspiracy to commit wire and mail fraud). *Cf. United States v. Holck*, 398

F. Supp. 2d 338, 373 (E.D. Pa. 2005) (“Moreover, the Government in proving overt acts in a conspiracy is not limited by the specific acts listed in the indictment.”).

Here, the evidence related to Defendant’s misuse of school credit cards falls under the first category of intrinsic evidence; it directly proves the charged offense. The allegation is an overt act charged as part of the conspiracy to obstruct justice. In fact, the challenged evidence is explicitly outlined in the Indictment. The Indictment states that Defendant was permitted to use school credit cards to charge tens of thousands of dollars for his own personal use, in part, as motivation to participate in the obstruction. We reject Defendant’s argument that the evidence does not facilitate the commission of the conspiracy, but merely provides context or completes the story. The evidence demonstrates not only the relationship between the co-conspirators, but also Defendant’s motivation to engage in the obstruction charges and the manner and means through which the conspiracy operated.

As direct proof of the charged conspiracy, the evidence is intrinsic to the conspiracy count, and not subject to the balancing test set forth in Rule 404(b). *See United States v. Miller*, No. 10-663, 2012 U.S. Dist. LEXIS 80457, at *8 (E.D. Pa. June 11, 2012) (concluding that two overt acts charged in the conspiracy count were intrinsic evidence and thus not subject to analysis under Rule 404(b)). Because the evidence is intrinsic, the Government need not provide notice under Rule 404(b)(2)(a). *Green*, 617 F.3d at 247 (“The only consequences of labeling evidence ‘intrinsic’ are to relieve the prosecution of Rule 404(b)’s notice requirement and the court of its obligation to give an appropriate limiting instruction.”).

Accordingly, Defendant’s request to preclude evidence of his misuse of school credit cards will be denied.

IV. CONCLUSION

For the foregoing reasons, the Government's Amended Motion *in Limine* and Memorandum of Law to Admit Evidence of Similar Crimes and Acts Pursuant to Rule 404(b) of the Federal Rules of Evidence will be granted in part and denied in part, the Government's Motion and Memorandum of Law to Allow Impeachment of the Defendant Pursuant to Rules 608(b) and 609 of the Federal Rules of Evidence will be granted, and Defendant Michael A. Slade, Jr.'s Motion *in Limine* and Memorandum of Law to Preclude Extrinsic Evidence and Rule 404(b) Prior Bad Acts will be granted in part and denied in part.

An appropriate Order follows.

BY THE COURT:



R. BARCLAY SURRICK, J.

3. Defendant's Motion *in Limine* is **GRANTED** in part and **DENIED** in part as follows:
- A. Defendant's request to preclude evidence concerning his misuse of a Laboratory Charter School credit card is **DENIED**.
 - B. Evidence concerning Defendant obtaining and later altering a criminal background check in 2005 and 2012 is admissible under Rule 404(b).
 - C. Evidence related to Defendant's misrepresentations about his education is not admissible at this juncture.

IT IS SO ORDERED.

BY THE COURT:



R. BARCLAY SURRICK, J.