

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

UNITED STATES OF AMERICA,

v.

JOHN LEROY GORDON,

Defendant.

CRIMINAL ACTION
NO. 18-361-1

PAPPERT, J.

June 21, 2019

MEMORANDUM

John Leroy Gordon was charged by indictment with one count of carjacking in violation of 18 U.S.C. § 2119 and one count of brandishing, using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (Indictment, ECF No. 1.) Trial begins on July 29. The Government filed a Motion *in Limine* seeking to admit two of Gordon's prior criminal convictions as evidence of his character for truthfulness under Federal Rule of Evidence 609(a)(1)(B): a June, 2011 conviction for possession with intent to distribute a controlled substance and a January, 2013 conviction for unlawful possession of a firearm by a prohibited person.¹ (ECF No. 36.) Gordon filed a response which contended that the convictions are not probative of his character for truthfulness and merely serve to raise the inference that Gordon has a

¹ The Government's Memorandum in Support of its Motion did not mention *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014), controlling precedent on the admission of prior convictions under Rule 609(a). At the Court's request (ECF No. 55), the Government supplemented its Motion with a letter explaining why the Motion should be granted in light of *Caldwell*. The Government argues in the letter that the facts of this case are "materially different" from those in *Caldwell* and maintains that Gordon's prior convictions are more probative of Gordon's credibility than prejudicial. See (Letter 1, 3, ECF No. 56).

propensity for criminal conduct. (ECF No. 41.) For the following reasons, the Court denies the Motion.

I

Federal Rule of Evidence 609 governs the admissibility of prior criminal convictions offered to impeach a witness's credibility. When the testifying witness is the defendant in a criminal case, evidence of the prior conviction must be admitted only "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1)(B). "This reflects a heightened balancing test and a reversal of the standard for admission under Rule 403," creating "a predisposition toward exclusion." *United States v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014) (citing Wright & Gold, *Federal Practice and Procedure* § 6132, at 216). The Government bears the burden of satisfying this heightened test. *Caldwell*, 760 F.3d at 289.

In *Government of the Virgin Islands v. Bedford*, the Third Circuit Court of Appeals set forth four factors for courts to consider when applying this test: "(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the defendant's testimony to the case; and (4) the importance of the credibility of the defendant." *Caldwell*, 760 F.3d at 286 (quoting *Gov't of Virgin Islands v. Bedford*, 671 F.2d 758, 761 n.4 (3d Cir. 1982)).

As for the first *Bedford* factor, the kind of crime involved, the Court "consider[s] both the impeachment value of the prior conviction as well as its similarity to the charged crime." *Caldwell*, 760 F.3d at 286. Impeachment value refers to the degree to which a conviction is probative of the defendant's character for truthfulness. *Id.* "Crimes of violence generally have lower probative value in weighing credibility In

contrast, crimes that by their nature imply some dishonesty, such as theft, have greater impeachment value and are significantly more likely to be admissible.” *Id.* “With respect to the similarity of the crime to the offense charged, the balance tilts further toward exclusion as the offered impeachment evidence becomes more similar to the crime for which the defendant is being tried.” *Id.*

When evaluating the second *Bedford* factor, the age of the prior conviction, the Court considers whether the passage of time has reduced the prior conviction’s probative value. Where the defendant “has maintained a spotless record since the earlier conviction or where the prior conviction was a mere youthful indiscretion,” his prior conviction may have less probative value. *Id.* at 287. On the other hand, the probative value of the prior conviction “may remain undiminished if the defendant was recently released from confinement or has multiple intervening convictions.” *Id.* In other words, the age of the prior conviction may weigh in favor of exclusion if circumstances suggest that the defendant’s character has since improved. *Id.* (citing Wright & Gold, *Federal Practice and Procedure* § 6132, at 258).

With respect to the third *Bedford* factor, “[i]f it is apparent to the trial court that the accused must testify to refute strong prosecution evidence, then the court should consider whether, by permitting conviction impeachment, the court in effect prevents the accused from testifying.” *Id.* (quoting Glenn Weissenberger & James J. Duane, *Weissenberger’s Federal Evidence* § 609.2 (4th ed. 2001)). The fourth *Bedford* factor concerns the significance of the defendant’s credibility to the case; “[w]hen the defendant’s credibility is a central issue, this weighs in favor of admitting a prior

conviction.” *Id.* (citing Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* § 609.05[3][f] (2d ed. 2011)).²

A

The Government fails to meet its burden to show that Gordon’s 2011 drug conviction is admissible for impeachment purposes. The first *Bedford* factor tilts the Rule 609(a)(1)(B) balance toward exclusion. While the drug offense is not similar to the crimes with which Gordon is now charged, its probative value for establishing Gordon’s character for truthfulness is low. “The degree to which drug convictions imply dishonesty varies” and “depends on the circumstances” of the conviction. *United States v. Mullins*, 2019 U.S. Dist. LEXIS 61318 at *6 (E.D. Pa. Apr. 5, 2019) (citing *United States v. Womack*, 1998 WL 24355 at *1 (D. Del. Jan. 12, 1998) (noting that “some drug offenses are generally more covert or deceptive” than others and referring to a “spectrum” of crimes with differing impeachment value)). Gordon was sentenced to 6–23 months of imprisonment, suggesting he committed a low-level offense. The Government, which “bears the burden of persuading the court that the evidence should be admitted, i.e., that its probative value outweighs its prejudicial effect,” provides no other details regarding the circumstances of the crime. *United States v. Ponder*, 2017 WL 2633467 at *2 (M.D. Pa. June 16, 2017) (quoting *Bedford*, 671 F.2d at 761). It does not, for instance, argue that Gordon was involved in the sort of large-scale drug conspiracy that might require deception. Thus, while a felony conviction has some

² The Third Circuit has acknowledged the tension between the third and fourth *Bedford* factors—as one tilts the 609(a)(1)(B) balance toward exclusion, the other tilts toward inclusion. See *Caldwell*, 760 F.3d at 288 n.15 (citing, *inter alia*, Roderick Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the ‘Balancing’ Provision of Rule 609(a)*, 31 Syracuse L. Rev. 907, 943, 945 (1980)).

inherent impeachment value, *see Mullins*, 2019 U.S. Dist. LEXIS 61318 at *6, the connection between this conviction and Gordon’s likelihood of testifying truthfully is rather attenuated. *See United States v. Church*, 2016 WL 613185 at *1 (E.D. Pa. Feb. 16, 2016).

The second *Bedford* factor does not weigh in favor of inclusion or exclusion. While the age of the drug conviction does not necessarily reduce its probative value—the offense was not a “mere youthful indiscretion” and Gordon did not maintain a spotless record afterwards—the Court has already determined that the conviction’s probative value for establishing Gordon’s character for truthfulness is low.

The third *Bedford* factor, the importance of the defendant’s testimony to his defense, does not tilt the balance toward exclusion. According to the Government, Gordon is able to defend the case without testifying at trial. *See* (Letter 4). Specifically, “[i]t is the government’s understanding that the defendant’s new trial strategy is to concede that he committed the carjacking but claim that he was so high as to have been unable to form the specific intent to seriously harm the victim as required.” (*Id.*) The Government argues that Gordon can establish this defense without testifying by introducing “expert medical evidence.” (*Id.*) Because it is not apparent to the Court that Gordon must testify to rebut the Government’s case, the importance of his testimony does not militate against the use of impeaching convictions under 609(a)(1)(B). For the same reasons, the fourth *Bedford* factor does not tilt the balance toward inclusion. The Government’s letter suggests that Gordon’s credibility will not be a central issue at trial.

Taken together, the *Bedford* factors tilt the 609(a)(1)(B) balance toward excluding evidence of Gordon's 2011 drug conviction. The Government has not shown that the conviction "makes a tangible contribution to the evaluation of credibility" that will outweigh "the usual high risk of unfair prejudice." *Caldwell*, 760 F.3d at 286.

B

The Government also fails to meet its burden to show that the 2013 firearm conviction is admissible for impeachment. The first *Bedford* factor weighs in favor of exclusion. The Government cites no support, and the Court finds none, for the argument that the conviction has greater impeachment value because it "involved possession of a firearm with an obliterated serial number." (Gov.'s Mem. Supp. Mot. 7; Letter 4.) The Third Circuit has stated that "unlawful firearm convictions do not, by their nature, imply a dishonest act." *Caldwell*, 760 F.3d at 289. Even assuming that the felony conviction has some inherent impeachment value, the similarity of the prior conviction—unlawful possession of a firearm—to the firearm offense with which Gordon is now charged clearly tilts the 609(a)(1)(B) balance toward exclusion. *See id.* at 287 ("[E]vidence of similar offenses for impeachment purposes under Rule 609 should be admitted sparingly if at all." (quoting *United States v. Sanders*, 964 F.2d 295, 297–98 (4th Cir. 1992)). While these firearm offenses are not identical, they are hardly "distinct," as the Government suggests, and the 609(a)(1)(B) balance "tilts further toward exclusion as the offered impeachment evidence becomes more similar to the crime for which the defendant is being tried." *Id.* at 286.

The second *Bedford* factor does not weigh in favor of inclusion or exclusion. While the age of the firearm conviction does not necessarily reduce its probative

value—Gordon was on parole for the 2013 firearm conviction at the time he was arrested for carjacking—the Court has already determined that the conviction’s probative value for establishing Gordon’s character for truthfulness is low. *See id.* at 287. For the same reasons stated above, the third and fourth *Bedford* factors cancel each other out.

The *Bedford* factors, taken together, tilt the 609(a)(1)(B) balance toward excluding evidence of Gordon’s 2013 firearm conviction. The probative value of the conviction does not outweigh its potential prejudice to Gordon. The conviction has limited impeachment value and is similar to one of the crimes with which Gordon is now charged.

An appropriate Order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.

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ORDER

AND NOW, this 21st day of June, 2019, upon consideration of the Government's Motion *in Limine* to Admit Evidence under Federal Rule of Civil Procedure 609 (ECF No. 36), Defendant's Response (ECF No. 41) and the Government's Letter in support of the Motion (ECF No. 56), it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.