

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

UNITED STATES OF AMERICA

v.

ARTAVIUS HORNE

CRIMINAL ACTION
NO. 18-00392

PAPPERT, J.

June 24, 2019

MEMORANDUM

Artavius Horne was charged by indictment on September 13, 2018, with three counts of sex trafficking in violation of 18 U.S.C. § 1591. He is alleged, among other things, to have recruited three minor females to work as prostitutes for him. (Indictment, ECF No. 1.) The Government filed two Motions *in Limine* seeking to admit at trial three of Horne's prior criminal convictions.¹ ECF No. 62 seeks to admit, pursuant to Federal Rule of Evidence 609(a), Horne's November 28, 2006 convictions for possession of controlled substances and receiving stolen property and a January 25, 2007 conviction for possession with intent to deliver controlled substances (the "drug convictions") as well as a March 6, 2017 conviction for promoting prostitution of minors and owning or controlling a house of prostitution (the "prostitution conviction"). ECF No. 63 seeks admission of the prostitution conviction pursuant to Federal Rule of Evidence 404(b).

¹ The Government also filed a Motion *in Limine* to preclude reference to the victims' other sexual behavior pursuant to Federal Rule of Evidence 412. *See* (ECF No. 61). Horne did not oppose the Motion and the Court granted it. *See* (Order, ECF No. 82).

Neither motion nor their supporting memoranda mentioned *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014), controlling precedent in this Circuit on the admission of prior convictions under Rules 609(a) and 404(b). Horne responded to both Motions, *see* (ECF Nos. 70 and 73), relying heavily on *Caldwell*. The Government did not reply to either response, so the Court ordered the Government to submit a letter explaining why the motions should be granted in light of *Caldwell*. *See* (ECF No. 78). The Government has now submitted its letter and withdraws its request to use the prostitution conviction for impeachment purposes under Rule 609 but maintains its position that the prostitution conviction is admissible in its case in chief under Rule 404(b). (Letter at 1–2, ECF No. 86.) The Government not only continues to argue that the drug convictions are admissible to impeach Horne under Rule 609, it now “add[s] to [their] request” that the Court allow it to impeach Horne with three additional convictions: possession with intent to deliver a controlled substance in November of 2003, resisting arrest in January of 2007 and resisting arrest and simple assault in January of 2013.

As an initial matter, the Court summarily denies the Government’s Motions with respect to these latter three convictions. The Court, as a courtesy, allowed the Government to supplement its filings solely and expressly to address *Caldwell* with respect to the drug and prostitution convictions. The Court did not grant the Government leave to amend its Motions, or in essence file new ones, seeking the admission of three additional convictions, each of which the Government should have known about all along. For the reasons stated below the Court also denies what remains of ECF No. 62 as well as ECF No. 63.

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." *Caldwell*, 760 F.3d at 286 (citation omitted). If, however, more than ten years have passed since the witness's conviction or release from confinement, whichever is later, the conviction must be analyzed under Rule 609(b). Such a conviction is only admissible if the "probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." *See* Fed. R. Evid. 609(b)(1); *United States v. Slade*, 2013 WL 5873576, at *3 (E.D. Pa. 2013). "The Advisory Committee Notes for Rule 609(b) emphasize that 'convictions over 10 years old will be admitted very rarely and only in exceptional circumstances.'" *United States v. Shannon*, 766 F.3d 346, 352 n.9 (3d Cir. 2014) (citing Fed. R. Evid. 609(b) advisory committee's note).

The Third Circuit Court of Appeals has recognized four factors that should be considered when weighing the probative value of a conviction against its prejudicial effect. These factors include: "(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; *Government*

of the Virgin Islands v. Bedford, 671 F.2d 758, 761 n.4 (3d Cir. 1982) (citations omitted).

These factors apply for convictions under both Rules 609(a) and 609(b).²

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.* To measure the extent to which a crime is probative of a witness’s character for truthfulness, courts examine the degree to which the crime involved dishonesty. The Third Circuit has emphasized that courts should consider whether the offense implies dishonesty by its nature, as in the case of theft. *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.*

² Evidence of a crime must be admitted under Rule 609(a)(2) if the Court can readily determine that establishing the elements of the crime required proving, or the witness’s admitting, a dishonest act or false statement. Fed. R. Evid. 609(a)(2).

Under the third *Bedford* factor, the Court considers the importance of the defendant's testimony to his defense at trial. If a defendant's testimony is important to his defense, this factor weighs against admitting a prior conviction. *See id.* at 287–88. Under the fourth *Bedford* factor, the Court considers the significance of the defendant's credibility to the case. “When the defendant's credibility is a central issue, this weighs in favor of admitting a prior conviction.” *Id.* at 288 (citation omitted).

A

The Government fails to meet its burden to show that Horne's 2006 convictions for possession of a controlled substance and receiving stolen property are admissible for impeachment purposes. As an initial matter, because Horne was convicted on November 28, 2006 and received a sentence of four years probation, the convictions must be analyzed under Rule 609(b).³ Evidence of this conviction is therefore admissible only if “probative value, supported by specific facts and circumstances, *substantially outweighs* its prejudicial effect.” *See* Fed. R. Evid. 609(b)(1) (emphasis added).

The first *Bedford* factor weighs in favor of exclusion. While the convictions are not similar to the charges here, the convictions' probative value for establishing Horne'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

³ In calculating the ten-year period under 609(b), the term “release from confinement” does “not include any period of probation or parole.” *Wink v. Ott*, No. 1:11-CV-00596, 2012 WL 1979461, at *2 (M.D. Pa. June 1, 2012) (citing *United States v. Butch*, 48 F. Supp. 2d 453, 465 (D.N.J. 1999)).

offenses are generally more covert or deceptive” than others and referring to a “spectrum” of crimes with differing impeachment value)). The same is true for a conviction of receiving stolen property. In Pennsylvania, a defendant “can be convicted of receiving stolen property on the basis that he received property believing it was probably stolen, despite not having engaged in any deceitful act himself.” *Piazza v. Kramer*, No. 3:12-CV-194, 2016 WL 5173405, at *4 (W.D. Pa. Sept. 21, 2016) (citing 18 Pa. Cons. Stat. § 3925(a)).

The Government represents that police found Horne in a stolen vehicle in possession of 96 packets of heroin and five packets of crack cocaine. (Letter at 5–6 n.1.) Again, Horne received a four-year probationary sentence. The Government, which “bears the burden of persuading the court that the evidence should be admitted,” 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). Without more, the Court cannot say that either conviction has any probative value for establishing Horne’s character for truthfulness.

The second *Bedford* factor weighs slightly in favor of inclusion. While the age of the conviction reduces its probative value because it occurred more than twelve years ago, Horne’s convictions for resisting arrest and possession with intent to deliver a controlled substance in 2007, resisting arrest and simple assault in 2013 and promoting prostitution of minors and owning or controlling a house of prostitution in 2017 indicate that his character has not improved. *See Caldwell*, 760 F.3d at 287 (citations omitted). While these intervening convictions certainly do not diminish the probative value of the drug and receiving stolen property convictions, the Court has already

determined that the convictions' probative value for establishing Horne's character for truthfulness is low.

The final two *Bedford* factors do not tilt the balance toward inclusion. Horne contends that "[t]his trial is all about [his] intent and whether he knew, or recklessly disregarded the fact that the three witnesses were minors . . . [and the only] witness who can provide testimony related to Mr. Horne's intent and knowledge [is] Mr. Horne." (Resp. Opp'n Mot. at 8, ECF No. 73.) Horne's testimony, if he chooses to testify, seems critical to his defense that he did not know the victims were minors. *See United States v. Wilson*, No. 15-CR-94, 2016 WL 2996900, at *4 (D.N.J. May 23, 2016) (addressing the third and fourth *Bedford* factors in the context of knowingly possessing a firearm). This consideration weighs against admitting the prior conviction under the third *Bedford* factor because of the importance of Horne's testimony. However, the importance of Horne's credibility on the stand weighs in favor of admitting them under the fourth.

Taken together, the *Bedford* factors tilt the 609(b) balance toward excluding evidence of Horne's 2006 convictions. The Government has not shown there to be any "exceptional circumstances" warranting the admission of these older convictions under Rule 609(b). Nor has the Government shown that the convictions "make[] a tangible contribution to the evaluation of credibility" that will substantially 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 Horne's 2007 conviction for possession with intent to deliver a controlled substance is admissible. While the 2007 conviction is also more than ten years old, the Government states that

Horne received a sentence of three to six years in prison and was released from confinement within the last ten years. *See* (Mot. at 8–9, ECF No. 62). Assuming this to be the case, thereby not triggering the heightened requirements of 609(b), the Government has failed to establish that the probative value of the conviction outweighs its potential prejudice.

The first *Bedford* factor weighs in favor of exclusion. Apart from Horne's purported three to six year sentence, the Government has provided no information regarding the offense's specific circumstances. The Court has no basis to conclude that Horne's conviction involved deception. Thus, while a felony conviction has some inherent impeachment value, *see Mullins*, 2019 U.S. Dist. LEXIS 61318 at *6, the connection between this conviction and Horne'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 weighs slightly in favor of inclusion. While the age of the conviction reduces its probative value because it occurred in 2007, Horne's subsequent convictions in 2013 and 2017 indicate that his character has not improved. *See Caldwell*, 760 F.3d at 287 (citations omitted). Again, however, the Court has already determined that this conviction's probative value for establishing Horne's character for truthfulness is low. For the same reasons stated above, the third and fourth *Bedford* factors offset each other.

The *Bedford* factors, taken together, tilt the 609(a)(1)(B) balance toward excluding evidence of Horne's 2007 conviction for possession with intent to distribute a

controlled substance. The Government has not shown that the probative value of Horne's 2007 drug conviction outweighs its potential prejudice to Horne.

II

Federal Rule of Evidence 404(b)(1) provides that “[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.” Fed. R. Evid. 404(b)(1). However, the 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)(2). The “permitted uses” of prior act evidence set forth in Rule 404(b)(2) are treated like exceptions to 404(b)(1)’s “prohibited uses,” and the party seeking to admit evidence under Rule 404(b)(2) bears the burden of demonstrating its applicability. *Caldwell*, 760 F.3d at 276. The evidence is admissible against the defendant even if the defendant chooses not to testify.

In *Caldwell*, the Third Circuit stated that “Rule 404(b) is a rule of general exclusion, and carries with it ‘no presumption of admissibility.’” *Id.* at 276 (citations omitted). The court explained that “Rule 404(b) must be applied with careful precision, and that evidence of a defendant’s prior bad acts is not to be admitted unless both the proponent and the District Court plainly identify a proper, non-propensity purpose for its admission.” *Id.* at 274 (citing *United States v. Davis*, 726 F.3d 434, 442 (3d Cir. 2013)). This rule reflects the longstanding concern that evidence of prior bad acts, when offered only to show the defendant’s propensity to commit the charged crime, “is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a

particular charge.” *Id.* at 275 (citing *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992)).

Determining whether the prior act evidence is admissible under Rule 404(b) thus requires consideration of a four-part test. Prior act evidence is inadmissible unless the evidence is (1) offered for a proper non-propensity purpose that is at issue in the case; (2) relevant to that identified purpose; (3) sufficiently probative under Rule 403 such that its probative value is not outweighed by any inherent danger of unfair prejudice and (4) accompanied by a limiting instruction, if requested. *Caldwell*, 760 F.3d at 278 (citing *Davis*, 726 F.3d at 441).

Here, the Government seeks to admit evidence of Horne’s 2017 conviction for promoting prostitution of minors for the non-propensity purpose of showing Horne’s “knowledge and lack of accident or mistake.” (Letter at 7.) The Government contends that “proof that Horne at the very same time as the events at issue here prostituted minors, and was prosecuted and convicted in state court for that conduct, is powerful evidence that he knew (or at the very least, was reckless in ignoring) that the victims in this case were minors as well, which is an essential element of the charged crime.” (*Id.* at 12.)

When evaluating whether a non-propensity purpose is at issue, courts “consider the ‘material issues and facts the government must prove to obtain a conviction.’” *Caldwell*, 760 F.3d at 276. The Government must prove, *inter alia*, that Horne knew, or recklessly disregarded the fact, that the victims “had not attained the age of 18 years and [would] be caused to engage in a commercial sex act.” *See* 18 U.S.C. § 1591. Horne’s knowledge is at issue in this case because his mental state is an element of the

charged offense. Indeed, Horne states in his response to the Motion *in Limine* that “[t]his trial is all about Mr. Horne’s intent and whether he knew, or recklessly disregarded the fact that the three witnesses were minors.” (Resp. Opp’n Mot. at 8, ECF No. 73.) Horne’s knowledge is therefore an appropriate non-propensity purpose under 404(b).

Horne’s previous conviction is obviously relevant to his knowledge. Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence.” *United States v. Bailey*, 840 F.3d 99, 128 (3d Cir. 2016) (citing Fed. R. Evid. 401). For evidence offered pursuant to 404(b) to be relevant, it must fit into an inferential chain “no link of which is a forbidden propensity inference.” *United States v. Repak*, 852 F.3d 230, 243 (3d Cir. 2017) (internal citations omitted). “[T]his chain [must] be articulated with careful precision because, even when a non-propensity purpose is ‘at issue’ in a case, the evidence offered may be completely irrelevant to that purpose, or relevant only in an impermissible way.” *Id.*

Horne’s 2017 conviction for promoting prostitution of minors makes it more likely that Horne knew that the victims in this case were minors. The fact that Horne was convicted of promoting prostitution of minors one year before he was charged in this case is relevant to whether Horne knew or recklessly disregarded the fact that he was trafficking minors here. *See, e.g., Langbord v. U.S. Dep’t of Treasury*, 832 F.3d 170, 193–94 (3d Cir. 2016) (holding that a man’s prior forfeiture of gold coins to the Government was relevant “to his knowledge that holding gold coins may be unlawful under certain circumstances”).

The third step of the 404(b) analysis requires that other-acts evidence must not give rise to a danger of unfair prejudice that substantially outweighs the probative value of the evidence under Rule 403 of the Federal Rules of Evidence. *See Repak*, 852 F.3d at 246 (citing *United States v. Brown*, 765 F.3d 278, 291 (3d Cir. 2014)). District courts are required to conduct a substantive analysis and provide “meaningful balancing” when applying Rule 403. *See id.* “As the Advisory Committee’s Note to Rule 404(a) explains, the prejudice associated with character evidence is quite real: Character evidence . . . tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.” *Caldwell*, 760 F.3d at 284 (citing Fed. R. Evid. 404(a) Advisory Committee’s Note).

Caldwell observed that the prejudicial impact is “only heightened when character evidence is admitted in the form of a prior criminal conviction, especially a prior conviction for the same crime as that being tried.” 760 F.3d at 284; *see also Repak*, 852 F.3d at 247 (distinguishing between other-acts evidence of prior criminal convictions and evidence of uncharged conduct); *United States v. Vaquiz*, 2018 WL 3388028, at *4 (M.D. Pa. July 12, 2018) (“Given the unfair prejudice inherent in the introduction of prior convictions so similar to the instant offense, I find that limited probative value substantially outweighed.”).

The probative value of Horne’s 2017 conviction for promoting prostitution of minors is substantially outweighed by the risk of unfair prejudice; it will have a heightened prejudicial impact on the jury as it is evidence of a prior criminal conviction

for a substantially similar crime as that being tried. Such evidence would “unfairly raise the spectre of propensity in the minds of the jury.” *United States v. Smukler*, No. CR 17-563-02, 2018 WL 5316350, at *5 (E.D. Pa. Oct. 26, 2018). The Government is accordingly prohibited from admitting the conviction into evidence at trial.

An appropriate Order follows.

BY THE COURT:

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

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v.

ARTAVIUS HORNE

CRIMINAL ACTION
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ORDER

AND NOW, this 24th day of June, 2019, upon consideration of the Government's Motions *in Limine* to Admit Evidence under Federal Rule of Evidence 609, (ECF No. 62), and under Federal Rule of Evidence 404(b), (ECF NO. 63), Defendant's Response (ECF Nos. 70 and 73) and the Government's Letter in support of the Motions (ECF No. 86), it is hereby **ORDERED** that the Motions are **DENIED**. Defendant's Motion to Direct the Government to Give Notice of Intent to Rely upon 404(b) Evidence, (ECF No. 26), is also **DENIED as moot**.

BY THE COURT:

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