

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

UNITED STATES

CRIMINAL ACTION

v.

TABREAL MARTIN

NO. 18-416

DuBois, J.

February 19, 2020

MEMORANDUM

I. INTRODUCTION

Presently before the Court are five motions: (1) Defendant's Motion for Bifurcated Trial ("Motion to Bifurcate"); (2) Government's Motion *in Limine* to Admit Evidence Showing the Defendant's Knowledge of His Felon Status Pursuant to *Rehaif v. United States* and Federal Rules of Evidence 401 and 402 ("Motion to Admit Evidence Showing Knowledge of Felon Status"); (3) Government's Motion *in Limine* to Admit Evidence of Other Crimes Pursuant to Federal Rule of Evidence 404(b) ("Motion to Admit Rule 404(b) Evidence"); (4) Government's Motion *in Limine* to Permit Impeachment with Prior Convictions Pursuant to Federal Rule of Evidence 609 ("Motion to Permit Rule 609 Evidence"); and (5) Government's Motion *in Limine* for a Determination that a Record Qualifies as a Business Record Under Federal Rule of Evidence 803(6) ("Motion for Determination as a Business Record").

For the reasons that follow, the Motion to Bifurcate is granted in part and denied in part; the Motion to Admit Evidence Showing Knowledge of Felon Status is granted; the Motion to Admit Rule 404(b) Evidence is denied; the Motion to Permit Rule 609 Evidence is granted in part and denied in part; and the Motion for Determination as a Business Record is granted.

## II. BACKGROUND<sup>1</sup>

On January 19, 2018, a confidential informant (“CI”) reported to the Chester Police Department that defendant Tabreal Martin was driving a small Ford SUV in Chester, Pennsylvania and that defendant possessed an illegal firearm. Gov’t Mot. Introduce R. 404(b) Evid. at 2. At that time, defendant was a suspect in multiple investigations by the Chester Police. *Id.*

The next day, on January 20, 2018, the CI saw defendant again and informed the Chester Police that defendant was driving the same Ford SUV and was still in possession of an illegal firearm. *Id.* at 3. After this call, a Chester Police officer on patrol observed defendant’s car and proceeded to follow him. *Id.* At one point, defendant illegally pulled over to the side of the road without signaling, after which the officer conducted a traffic stop of defendant for the illegal turn. *Id.* The officer then radioed for support, and two other officers arrived on the scene. *Id.* at 3–4. While the first officer approached defendant’s car to perform the traffic stop, defendant drove off, leading the officers on a high-speed chase until he crashed into multiple parked cars. *Id.* at 4.

Defendant fled on foot from the scene of the crash. While fleeing, defendant dropped a bag containing 18 bundles of suspected heroin with the word “JACK” stamped on them. *Id.* At the scene of the crash, officers later discovered, *inter alia*, a black .40 caliber Glock 27 handgun on the dashboard of the SUV and, in the center console of the vehicle, additional bags marked with the word “JACK” that also contained suspected heroin. *Id.*

Defendant was later charged in a Second Superseding Indictment with (1) Possession

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<sup>1</sup> As defendant has not contested any of the factual material in the Government’s motions, the facts are presented in this Memorandum as stated by the Government. This does not, of course, preclude defendant from contesting any of these facts in future motions or at trial.

with Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(c) (Count I); (2) Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A) (Count II); and (3) Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. § 922(g)(1) (Count III).

On September 9, 2019, the Government filed the following motions: (1) Motion to Admit Evidence Showing Knowledge of Felon Status (Document No. 75); (2) Motion to Admit Rule 404(b) Evidence (Document No. 73); (3) Motion to Permit Rule 609 Evidence (Document No. 74); and (4) Motion for Determination as a Business Record (Document No. 72). On September 19, 2019, defendant filed his Motion to Bifurcate (Document No. 83). Each of these motions is fully briefed and ripe for decision.

### **III. LEGAL STANDARD**

#### **A. Bifurcation**

Federal Rule of Criminal Procedure 14 provides that a district court may bifurcate a criminal trial “[i]f the joinder of offenses . . . in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government.” Fed. R. Crim. P. 14(a). Such decisions “require the district court to weigh the potential for prejudice to the defendant from joinder against the conservation of judicial resources that joinder will occasion.” *United States v. Joshua*, 976 F.2d 844, 847 (3d Cir. 1992).

#### **B. Motions *in Limine***

The Court has discretion to rule on evidentiary issues *in limine* to ensure that the jury is not exposed to confusing, irrelevant, or unfairly prejudicial evidence. *Frintner v. TruePosition*, 892 F. Supp. 2d 699, 707 (E.D. Pa. 2012) (citing *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 260 (3d Cir.1983), *rev'd on other grounds sub nom.*, *Matsushita Elec. Indus. Co. v.*

*Zenith Radio Corp.*, 475 U.S. 574 (1986)). Ruling *in limine* can serve the interests of efficiency. Nevertheless, where the “context of trial would provide clarity, the Court may defer the issues until trial.” *Id.* at 707.

#### **IV. DISCUSSION**

##### **A. Defendant’s Motion to Bifurcate**

In his Motion to Bifurcate, defendant requests that the trial of Count III—the felon in possession charge under 18 U.S.C. § 922(g)(1)—be bifurcated from trial of Counts I and II. The Government does not oppose this motion.

In cases such as this, in which a defendant faces a § 922(g)(1) charge accompanied by other criminal counts, the Third Circuit has held that permitting evidence of the defendant’s criminal history as proof of the felon in possession charge would unfairly prejudice the decision of the jury on the other counts. *See Joshua*, 976 F.2d at 848. For this reason, courts have bifurcated such trials to ensure that “a defendant’s criminal past is not made known to the jury until have they have reached a verdict with respect to the other charges.” *Id.*; *see also United States v. Johnson*, No. CRIM. A. 05-440, 2007 WL 2916155, at \*2 (E.D. Pa. Oct. 5, 2007) (bifurcating felon in possession charge from remaining counts).

The Court concludes that bifurcation is proper in this case. In his motion, defendant has specifically requested that “all evidence on Counts One and Two and evidence regarding the possession of a firearm be presented to the jury prior to the presentation of evidence on Count Three,” and that “[a]fter a verdict is returned as to Counts One and Two, the jury would return to deliberate on the felon element of Count Three.” Def. Mot. Bifurcate at 2–3. The Court agrees that Count III should be bifurcated from Counts I and II, but rejects defendant’s position that one element of Count III—possession of a firearm—should be included in the trial of Counts I and II.

The jury will first hear evidence regarding Counts I and II and return a verdict on those counts, after which the jury will hear evidence with respect to Count III and return a verdict on that count. *See* 3d Cir. Model Crim. Jury Instr. § 6.18.922G-1 (Alternative 2). Defendant’s Motion to Bifurcate is thus granted in part and denied in part.

**B. Government’s Motion to Admit Evidence Showing Knowledge of Felon Status**

The Government seeks to admit evidence demonstrating that defendant knew of his status as a felon when he allegedly possessed a firearm in violation of § 922(g)(1). In light of the recent Supreme Court decision in *Rehaif v. United States*, proof of such knowledge is necessary to establish a § 922(g) violation. 139 S. Ct. 2191, 2194 (2019) (holding that the Government “must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it”). Defendant has not filed a response to this motion but has stated that should the Court bifurcate the trial, he will likely stipulate to this knowledge element.

The Court grants the motion. Prior to his arrest in this case, defendant was convicted of the following crimes in Pennsylvania state court:

- June 15, 2009: Altering or Obliterating Marks of Identification of a Firearm (18 Pa. Cons. Stat. § 6117(b)) (Felony 2)
- June 15, 2009: Possessing a Firearm Without a License (18 Pa. Cons. Stat. § 6106(a)(1)) (Felony 3)
- May 19, 2011: False Identification to Law Enforcement Officer (18 Pa. Cons. Stat. § 4914(a)) (Misdemeanor 3)
- June 4, 2012: Two counts of Delivery of a Controlled Substance (35 Pa. Cons. Stat. § 780-113(a)(30)) (Felony)

Gov’t Mot. Permit R. 609 Evid. at 4. Defendant pled guilty to each of the felony offenses.

Gov’t Mot. Admit Evid. Showing Knowledge Felon Status at 5. The Government intends to offer three types of evidence to satisfy the *Rehaif* knowledge element: evidence showing (1) the dates and jurisdictions of defendant’s prior felony convictions; (2) the maximum sentences punishable for those offenses; and (3) evidence—such as defendant’s guilty pleas, plea

colloquies, and the length of the sentences he served—demonstrating that defendant knew the maximum penalty for the felony offenses and that the offenses were felonies. This evidence is clearly relevant to defendant’s knowledge of his status as a convicted felon, Fed. R. Evid. 401, and the motion is therefore granted.

**C. Government’s Motion to Admit Rule 404(b) Evidence**

In this motion, the Government asks the Court to permit evidence of defendant’s June 4, 2012, drug conviction under Rule 404(b). Rule 404(b), which governs character evidence, provides in relevant part 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. 404(b)(1). Nevertheless, evidence of past crimes “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. 404(b)(2).

The Government contends that the June 4, 2012, conviction is admissible as evidence of defendant’s familiarity with drugs and drug distribution and his intent to distribute drugs. The conviction relates to three instances in which defendant sold cocaine to an undercover officer between December 2011 and January 2012. Gov’t Mot. Admit R. 404(b) Evid. at 6. In response, defendant argues that the prior drug conviction is instead offered impermissibly to show defendant’s criminal propensity and will unfairly prejudice defendant under Rule 403. The Court agrees with defendant.

In the Third Circuit, courts employ the following four-part test to evaluate the admissibility of evidence under Rule 404(b): “(1) [T]he evidence must have a proper purpose under Rule 404(b); (2) it must be relevant under Rule 402; (3) its probative value must outweigh its prejudicial effect under Rule 403; and (4) the court must charge the jury to consider the

evidence only for the limited purpose for which it is admitted.” *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992) (citing *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988)).

In this case, the Government has articulated a proper, non-propensity purpose for the June 4, 2012, conviction to be introduced and has demonstrated that such evidence would be relevant. *See Huddleston*, 485 U.S. at 686. Defendant’s familiarity with drug distribution makes it less likely that he possessed the drugs unknowingly or with innocent intent. *See United States v. Givan*, 320 F.3d 452, 461 (3d Cir. 2003) (“Knowledge, intent, and lack of mistake or accident are well-established non-propensity purposes.”). Such evidence is relevant with respect to Counts I and II.

Nevertheless, the probative value of the June 4, 2012, conviction is substantially outweighed by the danger of unfairly prejudicing defendant, in violation of Rule 403. In performing the balancing test under Rule 403, the Court considers the following factors: (1) the need for the evidence in light of the contested issues and the other evidence available to the prosecution; (2) the strength of the evidence; and (3) the danger that the evidence will inflame the jury and lead to a decision on an improper basis. *United States v. Sriyuth*, 98 F.3d 739, 748 (3d Cir. 1996) (citation omitted). First, the Government has minimal need for the June 4, 2012, conviction as evidence of defendant’s intent and knowledge given the Government’s access to law enforcement witnesses and physical evidence. Second, because of its age, the June 4, 2012, conviction—which predated defendant’s arrest in this case by approximately five and a half years—is not particularly strong evidence of defendant’s knowledge and intent to distribute drugs on the day he was arrested. Third, the fact that the June 4, 2012, conviction is similar to the charges in Counts I and II creates a significant danger that the jury will use the prior drug conviction for an improper propensity purpose. In such cases, there is “inevitable pressure on

lay jurors to believe that ‘if he did it before he probably did so this time.’” *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967). The motion is therefore denied.

**D. Government’s Motion to Permit Rule 609 Evidence**

The Government seeks to admit evidence of all four of defendant’s prior convictions to impeach defendant if he testifies at trial. The Court grants the motion with respect to the defendant’s May 19, 2011, conviction for giving a false identification to a law enforcement officer, but denies the motion with respect to the remaining convictions.

Rule 609 governs the admissibility of prior convictions for the purpose of impeachment. Rule 609(a)(1)(B) provides that evidence of a felony conviction offered for the purpose of attacking a witness’s character for truthfulness “must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant.” In contrast, Rule 609(a)(2) mandates the admission of all prior convictions involving the element of a “dishonest act or false statement” for impeachment purposes, without a balancing test. *See Walden v. Georgia-Pacific, Inc.* 126 F.3d 506, 523 (3d Cir. 1997).

The Court first addresses defendant’s May 19, 2011, conviction for giving a false identification to a law enforcement officer. Because this offense involves a false statement, it is admissible as impeachment evidence under Rule 609(a)(2) if defendant chooses to testify. *See Cordes v. United States*, No. 2:13CV547, 2015 WL 10986360, at \*3 (W.D. Pa. Nov. 20, 2015).

The Court next addresses defendant’s prior convictions for (1) altering or obliterating marks of identification of a firearm; (2) possessing a firearm without a license; and (3) delivery of a controlled substance. “Rule 609(a)(1) is absolutely clear and explicit in requiring the trial court, before admitting evidence of a prior conviction [of the accused], to make a determination that the probative value of the evidence outweighs its prejudicial effect to the defendant.” *Gov’t*

of *Virgin Islands v. Bedford*, 671 F.2d 758, 761 (3d Cir. 1982). This “heightened balancing test” creates a “predisposition toward exclusion.” *United States v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014) (internal citation and quotation marks omitted).

In determining whether the probative value of a prior conviction outweighs its prejudicial effect, a trial court considers the following four factors: “(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.” *Bedford*, 671 F.2d at 761 n.4 (internal citation omitted). The Government bears the burden of demonstrating that the probative value of the prior conviction outweighs its prejudicial effect. *Id.* at 761. In evaluating these factors, the Court determines that the probative value of defendant’s prior convictions of firearms and drug offenses is outweighed by their prejudicial effect.

With respect to the first factor—the kind of crime involved—the Court considers “both the impeachment value of the prior conviction as well as its similarity to the charged crime.” *Caldwell*, 760 F.3d at 286. Although the Third Circuit has held that all felony convictions are probative of a witness’s truthfulness, convictions of firearms and drug offenses such as defendant’s convictions of June 15, 2009 and June 4, 2012 have limited impeachment value. *See id.* at 289 (“[T]he impeachment value of the prior convictions is low because unlawful firearms convictions do not, by their nature, imply a dishonest act.”); *United States v. Church*, No. CR 14-323-14, 2016 WL 613185, at \*1 (E.D. Pa. Feb. 16, 2016) (holding that “the connection between drug distribution and a defendant’s likelihood of testifying truthfully is still rather attenuated”). The minimal impeachment value of these prior convictions favors exclusion.

Furthermore, prior convictions of crimes that are the same or similar to the ones presently charged are “admitted sparingly” due to the risk that the jury will improperly treat the prior

convictions as propensity evidence. 4 Jack Weinstein & Margaret Berger, *Weinstein's Federal Evidence* § 609.05 (2019). In this case, defendant's prior firearms convictions and pending charges under Counts II and III are substantially similar because they involve the unlawful possession, handling, or use of a firearm. *See, e.g., United States v. Camacho*, No. CRIM.A. 10-170, 2010 WL 5069866, at \*2-3 (E.D. Pa. Dec. 6, 2010) (DuBois, J.) (finding past convictions of carrying a firearm in a public place and carrying a firearm without a license sufficiently similar to possession of a firearm in furtherance of a drug trafficking crime and being a felon in possession of a firearm). Defendant's prior conviction for delivery of a controlled substance is also effectively the same as the crime charged in Count I in this case. The first factor therefore weighs heavily in favor of exclusion.

Given the minimal impeachment value of defendant's prior convictions of firearms and drug offenses and the similarity of these prior crimes to the offenses charged in the pending case, any weight given to the remaining *Bedford* factors cannot counterbalance the danger of unfair prejudice defendant would suffer if the prior convictions were introduced. The Government's motion is therefore denied with respect to defendant's June 15, 2009, firearms convictions and June 4, 2012, drug conviction.

#### **E. Government's Motion for Determination as a Business Record**

In this unopposed motion, the Government seeks to admit a rental car agreement and receipt from Budget Rental Car as a business record under the hearsay exception in Federal Rule of Evidence 803(6). *See Gov't Mot. Determination Business R., Ex. A.* The Government intends to use the agreement and receipt to connect defendant to the SUV he was driving when he was apprehended by the Chester Police. In its motion, the Government provides a certificate of authenticity from a custodian of records in satisfaction of Rule 902(11). *See id., Ex. B.* The

Court concludes that the agreement and receipt satisfy the requirements of Rule 803(6) and therefore grants the Government's motion.

**V. CONCLUSION**

For the foregoing reasons, Defendant's Motion to Bifurcate is granted in part and denied in part; Government's Motion to Admit Evidence Showing Knowledge of Felon Status is granted; Government's Motion to Admit Rule 404(b) Evidence is denied; Government's Motion to Permit Rule 609 Evidence is granted with respect to defendant's prior conviction for false identification to a law enforcement officer and denied with respect to his remaining prior convictions; and Government's Motion for Determination as a Business Record is granted. The evidentiary rulings are without prejudice to the right of the aggrieved parties to seek reconsideration at trial if warranted by the evidence and the law as stated in this Memorandum. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
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**UNITED STATES**

**CRIMINAL ACTION**

**v.**

**TABREAL MARTIN**

**NO. 18-416**

**ORDER**

**AND NOW**, this 19th day of February, 2020, upon consideration of Defendant's Motion for Bifurcated Trial (Document No. 83, filed September 19, 2019), Government's Response to Defendant's Pretrial Motions (Document No. 90, filed October 1, 2019), Government's Motion *in Limine* to Admit Evidence Showing the Defendant's Knowledge of His Felon Status Pursuant to *Rehaif v. United States* and Federal Rules of Evidence 401 and 402 (Document No. 75, filed September 9, 2019), Government's Motion *in Limine* to Admit Evidence of Other Crimes Pursuant to Federal Rule of Evidence 404(b) (Document No. 73, filed September 9, 2019), Defendant's Response to Government's Motion *in Limine* to Admit Evidence of Other Crimes Pursuant to Federal Rule of Evidence 404(b) (Document No. 87, filed September 25, 2019), Government's Motion *in Limine* to Permit Impeachment with Prior Convictions Pursuant to Federal Rule of Evidence 609 (Document No. 74, filed September 9, 2019), Defendant's Response to Government's Motion *in Limine* to Permit Impeachment with Prior Convictions Pursuant to Federal Rule of Evidence 609 (Document No. 88, filed September 25, 2019), and Government's Motion *in Limine* for a Determination that a Record Qualifies as a Business Record Under Federal Rule of Evidence 803(6) (Document No. 72, filed September 9, 2019), for the reasons stated in the accompanying Memorandum dated February 19, 2020, **IT IS ORDERED** as follows:

1. Defendant's Motion for Bifurcated Trial is **GRANTED IN PART AND**

**DENIED IN PART.** That part of defendant's motion seeking bifurcation of Counts I and II of the Second Superseding Indictment from Count III of the Second Superseding Indictment—

Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. § 922(g)(1)—is

**GRANTED.** That part of defendant's motion requesting that one element of Count III—possession of a firearm—be included in the trial of Counts I and II is **DENIED.** Trial of the charges against defendant in Counts I and II of the Second Superseding Indictment is

**BIFURCATED** from the charge against defendant in Count III of the Second Superseding Indictment. The trial of the charge against defendant in Count III of the Second Superseding Indictment will proceed before the same jury empaneled for the trial of Counts I and II immediately following trial on Counts I and II.

2. Government's Motion *in Limine* to Admit Evidence Showing the Defendant's Knowledge of His Felon Status Pursuant to *Rehaif v. United States* and Federal Rules of Evidence 401 and 402 is **GRANTED.**

3. Government's Motion *in Limine* to Admit Evidence of Other Crimes Pursuant to Federal Rule of Evidence 404(b) is **DENIED.**

4. Government's Motion *in Limine* to Permit Impeachment with Prior Convictions Pursuant to Federal Rule of Evidence 609 is **GRANTED IN PART AND DENIED IN PART,** as follows:

a. That part of the Government's motion seeking to permit impeachment under Federal Rule of Evidence 609 with defendant's May 19, 2011, conviction for False Identification to Law Enforcement Officer (18 Pa. Cons. Stat. § 4914(a)) is **GRANTED.**

b. That part of the Government's motion seeking to permit impeachment under Federal Rule of Evidence 609 with defendant's (1) June 15, 2009, conviction for

Altering or Obliterating Marks of Identification of a Firearm (18 Pa. Cons. Stat. § 6117(b)), (2) June 15, 2009, conviction for Possessing a Firearm Without a License (18 Pa. Cons. Stat. § 6106(a)(1)), and (3) June 4, 2012, conviction for Delivery of a Controlled Substance (35 Pa. Cons. Stat. § 780-113(a)(30)) is **DENIED**.

5. Government's Motion *in Limine* for a Determination that a Record Qualifies as a Business Record Under Federal Rule of Evidence 803(6) is **GRANTED**.

6. The evidentiary rulings in this Order are **WITHOUT PREJUDICE** to the right of the aggrieved parties to seek reconsideration at trial if warranted by the evidence and applicable law as stated in the attached Memorandum.

**BY THE COURT:**

/s/ **Hon. Jan E. DuBois**

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**DuBOIS, JAN E., J.**