UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-7759
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY D. WILLIAMS,
a/k/a "Gaybird",

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Mississippi
92 CR 73 S D

(June 4, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Gary "Gaybird" Williams (Williams) was convicted of one count of aiding and abetting in retaliation against a witness in violation of 18 U.S.C. § 1513(a), and one count of aiding and abetting in intimidation of a witness in

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

violation of 18 U.S.C. § 1512(a). The district court sentenced Williams to a term of imprisonment of twenty-four months, a three-year term of supervised release, and a $100 special assessment. Williams now appeals his conviction.

Facts and Proceedings Below

Williams and Jerome Grant (Grant) were indicted by a grand jury on June 19, 1992, for aiding and abetting each other in threatening in retaliation against Diane Lowe (Lowe) for her grand jury testimony against Donald "Pug" Sanders (Sanders), 18 U.S.C. §§ 2, 1513(a), and also threatening her in an attempt to prevent her testifying against Sanders at his upcoming trial, 18 U.S.C. §§ 2, 1512(b). Because Williams allegedly brandished a pistol while threatening Sanders, he was also indicted for possession of a firearm by a convicted felon, 18 U.S.C. §§ 922(g)(1), 924.

In July of 1992, Williams and Grant were jointly tried on the indictment. During trial, evidence was presented that showed that Lowe, a drug user, had testified before a grand jury on May 23, 1991, about how she had made a controlled purchase of cocaine from Sanders. Her testimony contributed to the return in July 1991 of a multi-count indictment against Sanders charging him with a federal drug conspiracy and several substantive drug and firearm offenses committed in 1989, 1990, and 1991, and with obstructing justice by assaulting and intimidating grand jury witnesses in June and July 1991. The herein charged threatening of Lowe by Williams and Grant occurred on June 7, 1992, approximately a month before Sanders was to go to trial on the referenced indictment against him, and during which Lowe was scheduled to testify as a government

witness concerning the controlled buy.

Lowe testified that on June 7, she and her roommate, Carolyn Wyckoff (Wyckoff), went to Club 9, a bar in Columbus, Mississippi, where Lowe was accosted by Williams and his associates who were members of the Vice Lords gang. Williams referred to Lowe by a number of epithets, so Lowe and Wyckoff decided to leave the establishment in the company of Wyckoff's boyfriend, John "Cong" Easley (Easley). However, Lowe forgot her purse so she went back into the club and retrieved it. When she came out she proceeded towards her car, but upon reaching her vehicle she was again confronted by Williams. According to Lowe, Williams threatened her with a pistol and said that she was a "snitch" and that "somebody should have did something to you" because "[y]ou the one causing Pug going to jail," and "[t]hat's why Pug want to get rid of her." Williams also informed Lowe, "You ain't nothing but the police. That's why Pug said somebody ought to kill you anyway." This incident drew the attention of the club's guard and Easley, and their intervention allowed Lowe to drive off. The next day, Wyckoff was in the front yard of Lowe's house when Williams drove slowly by and yelled out, "We ought to kill that police bitch," and "[t]ell that police bitch that I'm going to kill her. That I have been hired by Pug to kill her."

Also at trial, the government introduced evidence of the close association between Williams and Sanders in order to show Williams' motive in threatening Lowe. This evidence consisted of the testimony of Hattiesburg, Mississippi, police officer Ken Richey, who stated that on September 8, 1990, he and other Hattiesburg

officers executed a search warrant on a local motel room where they found Williams and Sanders. They also discovered two pistols under a bed and approximately $13,000 in cash in a bag in the bathtub. Williams and Sanders told Richey that the money was proceeds they had received from drug sales before being sent to prison. Williams contended that he made the money before being sent to the penitentiary, and since he had done his time the money was now his. The police confiscated the money and weapons.[1] Williams' attorney objected to the admission of this evidence under FED. R. EVID. 404(b), and the district court held a hearing on the matter outside the presence of the jury. The district court then determined not to exclude the evidence, and admitted it.[2]

The jury found Williams guilty of aiding and abetting in retaliating against a witness and in intimidation of a witness. He was acquitted of the firearms offense and Grant was acquitted of all charges. Williams was subsequently sentenced to a twenty-four month term of imprisonment to be followed by a three-year term of supervised release, and a $100 special assessment. Williams now appeals his conviction.

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[1] Although Williams was charged by the police, such charges were never pursued. The $13,000 was forfeited in a civil proceeding as being drug proceeds.

[2] No limiting instruction was requested by Williams, and none was given. On appeal Williams makes no complaint as to the lack of a limiting instruction (or as to any instructional matter). Consequently, any error the district court may have made in failing to give such an instruction is waived. Relief is not warranted under FED. R. CRIM. P. 52(b).

Discussion

The sole point of error that Williams raises on appeal is that the district court erred in admitting evidence concerning the Hattiesburg incident, because such evidence violated FED. R. EVID. 404(b).[3] The standard for admitting evidence pursuant to Rule 404(b) requires the district court to apply a two-step test. *United States v. Chagra*, 754 F.2d 1186, 1189 (5th Cir.), *cert. denied*, 106 S.Ct. 255 (1985); *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978), *cert. denied*, 99 S.Ct. 1244 (1979). First, the district court must determine that the evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403. *Id.*[4] The district court's decision will be reversed "'[r]arely and only after a clear showing of prejudicial abuse of discretion.'" *United States v. Shaw*, 701 F.2d 367, 386 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 1419 (1984)

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[3] This rule provides that:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." FED. R. EVID 404(b).

[4] This rule provides that:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

(quoting *United States v. Davis*, 546 F.2d 583, 592 (5th Cir.), *cert. denied*, 97 S.Ct. 1701 (1977)).

Before applying the two-step analysis, we point out that, "[e]vidence of extrinsic offenses may be admissible to show motive." *Beechum*, 582 F.2d at 912 n. 15. These extrinsic offenses need not be similar to the charged conduct when they are introduced to show motive. *Id.* In fact, evidence offered to prove motive could properly include evidence of "a wholly different prior bad act." *United States v. Drew*, 894 F.2d 965, 970 (8th Cir. 1990). Although for some purposesSQsuch as identitySQevidence of extrinsic offenses must be similar to the charged offense, but such is not the case when proving motive. *See United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977) (holding that "[a] much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind"). This is because in determining motive, one is not concerned with the similarity of the wrongful conduct but rather with the motivational circumstancesSQsuch as a relationship with a third partySQthat can be gleaned from the past extrinsic offense and how these circumstances bear on the reasons for committing the offense at issue. Of course, when such evidence should be admitted in a particular case, "must be decided in its own context, with the issue to which the [extrinsic] offense is directed firmly in mind." *Beechum*, 582 F.2d at 912 n. 15.

Turning to the first step, we note that evidence is relevant if it has "any tendency to make the existence of any fact that is

of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401; *Beechum*, 582 F.2d at 911. Under 18 U.S.C. §§ 1512 and 1513, both intent and motive are relevant facts. *See United States v. Maggitt*, 784 F.2d 590 (5th Cir. 1986) (involving the admissibility of evidence concerning extrinsic acts where the defendant is charged with intimidating and retaliating against a witness). Here, the government contends and the district court found that the Hattiesburg incident was relevant both to Williams' intent and motive. We agree. The challenged evidence is relevant to motive because it shows that Williams is a long time associate of Sanders, and that Williams and Sanders had a common interest in drug distribution. Where a defendant threatens or harasses a witness because of that witness's testimony against an associate, evidence connecting the defendant and his associate is not only admissible, but "[s]uch background information is frequently necessary to establish motive in obstruction of justice cases." *Id.* at 597; *see also United States v. Arnold*, 773 F.2d 823, 833 (7th Cir. 1985); *United States v. Johnson*, 525 F.2d 999, 1006 (2d Cir. 1975), *cert. denied*, 96 S.Ct. 1127 (1976). This evidence concerning motive was also probative of Williams' specific intent to threaten and intimidate Lowe.[5]

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[5] We would note that the Hattiesburg incident occurred on September 8, 1990. Sanders was charged with a cocaine and cocaine base distribution conspiracy and distributing cocaine base from April 1989 to July 1991. Since the Hattiesburg incident involved proceeds from drug transactions, and since Williams was never charged in relation to this incident, silencing Lowe might well benefit Williams personally.

Williams claims that notwithstanding the evidence's apparent relevance, the government admitted it merely to prove his bad character because the government had already presented evidence as to Williams' motive and intent. Williams' contends that Wyckoff's testimonySQwhich related Williams' statement that he was paid by Sanders to kill LowesQalready established motive and intent.[6] We would first note that this testimony presents a separate yet complementary motive for threatening Lowe. In general, as long as the evidence is not purely cumulative and wholly superfluous, the government may present as much evidence as it can muster to support a particular relevant fact. *See Maggitt*, 784 F.2d at 596 (upholding the admission of extrinsic evidence to show the "close relationship" between the defendant and a third party and his "strong motives" to help that third party even though other evidence showed that the two were brothers). Here, Wyckoff's testimony, standing alone, might not have convicted Williams because the jury might have found her testimony not sufficiently credible.[7] Evidence of the Hattiesburg incident presented a

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[6] Williams also makes the argument that if this association evidence was so important, the government should have presented such evidence against Grant. If the government had been able to present similar association evidence against Grant, it might have been able to procure his conviction. However, this inability on the government's part to present such evidence is not legal error because the lack of association evidence against Williams' co-defendant is not relevant to the admissibility of the evidence against Williams.

[7] On cross-examination Wyckoff's credibility and character were attacked based on her acceptance of government welfare and then her use of those funds "to go out and have a nightlife," and her living and associating with Lowe, a known felon. Lowe's credibility and character were vigorously assailed by revelations on cross-examination that she had been convicted of the felony of

separate basis for Williams' motive and intent. Under these circumstances, we reject Williams' contention that the evidence was presented merely to impugn his character or to convict him based on similar past events.

Williams next claims that the evidence of the Hattiesburg incident should not have been admitted because under Rule 403 its probative value was substantially outweighed by its prejudice. As explained above, the evidence of the Hattiesburg incident was highly probative since it supplied evidence of Williams' motive (and it thus also shored up Wyckoff's testimony). Furthermore, given the defense's attacks on Wyckoff's and Lowe's credibility, it provided important evidence of Williams' intent. *See United States v. Henthorn*, 815 F.2d 304, 308 (5th Cir. 1987) (noting that "[p]art of th[e Rule 403] analysis hinges upon the government's need for the testimony to prove intent"). Having reviewed the substantial probative value of the evidence, we now turn to Williams' claims of undue prejudice.

Williams argues that he was prejudiced because he was never convicted of any crime associated with the Hattiesburg incident and the jury may have chosen to punish him for this earlier conduct involving the drug proceeds and possession of firearms. In

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false pretenses, had been paid to be a police informant, and had been arrested on two separate occasions, once for grand larceny and once for disobeying a police officer. The first question asked of Lowe on cross-examination was "as to recap, you testified that you're a firearms expert and former drug user." The district court, in ruling to admit the evidence of the Hattiesburg incident, observed respecting Wyckoff and Lowe that "these witnesses . . . will be attacked as to credibility, truthfulness." Williams' own brief asserts that the government's case rested on "a parade of convicted felon fact witnesses."

retrospect, there exists no evidence of such an impulse by the jury. Both the indictment and other evidence revealed that Williams had been convicted for selling cocaine so there existed no unpunished conduct for the jury to seek to redress concerning the drug proceeds. As to possession of the firearms, it is true that at the time of the incident Williams was a convicted felon and he was found to be in possession of two firearmsSQthe exact same conduct that he was charged with in the present case. However, if the jury truly wanted to punish Williams for his past conduct, they would have convicted him for being a felon in possession of a firearm; yet the jury acquitted him of this offense. Under these circumstances, Williams' claims of prejudice simply do not substantially outweigh the evidence's probative value. Certainly, there was no abuse of discretion in the district court's ruling in this respect.

Conclusion

Williams' sole complaint on appeal fails to demonstrate any reversible error. Accordingly his conviction is

AFFIRMED.