UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7532
Summary Calendar

GARY STEVE WILLIAMS,

Plaintiff-Appellant,

VERSUS

PEARL RIVER COUNTY SHERIFF'S DEPARTMENT, ET AL.,

Defendants,

JOHN HYATT, Individually and
JAMES HENRY, Individually,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA S90-284-R)

(July 6, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Following an adverse judgment in his § 1983 action, Gary Steve Williams challenges two evidentiary rulings. We **AFFIRM**.

I.

Williams sued the Pearl River County Sheriff's Department, the Sheriff, and Deputies Hyatt and Henry under 42 U.S.C. § 1983, alleging, *inter alia*, that Hyatt used excessive force against

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Williams when Hyatt intervened in a domestic dispute between Williams and his wife in August 1987.[2] The case went to trial against Hyatt and Henry, and the jury found in their favor.[3]

II.

Williams challenges two evidentiary rulings, which excluded evidence of Hyatt's other alleged civil rights violations, and prevented Williams from cross-examining Hyatt about the facts underlying his prior conviction. We review evidentiary rulings "only for an abuse of discretion". *E.g.*, ***Davis v. Odeco***, 18 F.3d 1237, 1247 (5th Cir.1994) (citing cases); Fed R. Evid. 103 ("[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected"); ***United States v. Quintero***, 872 F.2d 107, 113 (5th Cir. 1983) (trial court has broad discretion to determine admissibility of evidence), *cert. denied*, 496 U.S. 905, 110 S. Ct. 2586 (1990). "The balancing of probative value against prejudicial effect is committed to the sound discretion of the trial judge ...." ***United States v. Dula***, 989 F.2d 772, 778 (5th Cir. 1993), *cited and quoted in* ***United States v. Willis***, 6 F.3d 257, 268 (5th Cir. 1993).

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[2] Williams alleged, *inter alia*, that Hyatt struck his face and other parts of his body with a flashlight.

[3] Williams sued the Sheriff, Hyatt, and Henry in their official and individual capacities. Before trial, the Sheriff's Department and the Sheriff, and the claims against Hyatt and Henry in their official capacities, were dismissed.

A.

Williams sought to introduce evidence of Hyatt's conduct on two other occasions. One incident occurred in 1987 (before Williams incident), when Hyatt allegedly discharged his firearm several times in pursuit of a misdemeanor suspect. The other (approximately six weeks after Williams incident) involved Hyatt's allegedly shooting two unarmed misdemeanor suspects. The defendants moved in limine to exclude this evidence, pursuant to Fed. R. Evid. 403, because of its highly prejudicial nature and because it was "irrelevant [and] immaterial" to the Williams incident.[4] Williams responded that the incidents were probative, *inter alia*, of Hyatt's "reckless and lawless nature".

In excluding the incidents, the district court inferred that Williams had offered them to show "a habit of a person pursuant to [Fed. R. Evid.] 406", *i.e.*, Hyatt's "habit" of using his firearm in dealing with suspects.[5]

The district court concluded that the incidents were not evidence of Hyatt's or Henry's "habit", because the incidents -- both involving Hyatt's alleged use of firearms against suspects --

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[4] Rule 403 provides:

> 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.

[5] Fed. R. Evid. 406 provides that "[e]vidence of the habit of a person ... is relevant to prove that the conduct of the person ... on a particular occasion was in conformity with the habit...."

could not show that Hyatt or Henry "had a regular response to a repeated specific situation since the other situations are not specifically the same as the one before the Court", which did not involve use of firearms. *Compare* Fed. R. Evid. 406, Advisory Committee Notes ("A habit ... is the person's regular practice of meeting a particular kind of situation with a specific type of conduct...."). Williams's testimony supported this conclusion.[6]

To the extent that the firearms incidents were offered as character evidence, pursuant to Fed. R. Evid. 404 (that is, to prove Hyatt's "propensity to commit" civil rights violations), they were "other crimes, wrongs, or acts," and thus were inadmissible "to prove [Hyatt's] character ... in order to show action in conformity therewith". Fed. R. Evid. 404(b).[7] Further, even if not offered to prove Hyatt's character in order to show that he acted in conformity in the Williams incident, evidence of "bad acts" must "possess probative value that is not substantially

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[6] Williams testified that he fled from Hyatt and Henry, but, unlike his alleged action in the other incidents, Hyatt did not draw his firearm to subdue Williams, although he was armed, had the opportunity to do so, and would have been acting in accordance with proper arrest procedure had he done so.

[7] We will assume that Williams sufficiently raised Rule 404 as a basis for admission. Fed. R. Evid. 404(b) provides, in relevant part:

> **(b) Other crimes, wrongs, or acts.** 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....

outweighed by its undue prejudice", pursuant to Rule 403. ***U.S. v. Elwood***, 999 F.2d 814, 816 (1993) (internal quotations and citations omitted). "In determining the probative value of extrinsic evidence, the court should consider the overall similarity between the extrinsic and charged offenses"; the more similar the two offenses, the more likely the extrinsic evidence is probative. ***Id.*** (internal quotations and citation omitted); *accord*, ***Lamar v. Steele***, 693 F.2d 559, 561 (5th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983).

As stated, the district court concluded properly that the firearms incidents were not particularly similar to the Williams incident. In any event, the record does not indicate that the firearms incidents were offered for any purpose permissible under Rule 404(b), *e.g.*, "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). We see no abuse of discretion in excluding the firearms incidents.[8]

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[8] In his brief, Williams also makes the bare assertion, unsupported by any citation to authority, that the firearms incidents were admissible for impeachment purposes, because Hyatt testified that he had never violated anyone's civil rights. At trial, however, Williams did not attempt to impeach Hyatt's testimony by referring to the firearms incidents; impeachment centered only on his prior conviction, discussed *infra*. Accordingly, this issue was not before the district court; and, ordinarily, we do not consider arguments raised for the first time on appeal. *E.g.*, ***Randolph v. Resolution Trust Corp.***, 995 F.2d 611, 620 n.9 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1294; *see also* ***United States v. Graves***, 5 F.3d 1546, 1551-52 (5th Cir. 1993) (where party moves successfully to exclude evidence via motion in limine over opposing party's objection, opposing party must renew objection at trial in order to preserve issue for appeal), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1829 (1994); ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 627 n.50 (court will not

B.

Williams also sought to cross-examine Hyatt about his prior conviction for grand larceny, because, Williams contends, it was "very similar" to Williams' incident, in that it involved a "misuse of his authority as a law enforcement officer" (the conviction involved Hyatt's theft of money from suspects during a search). In its memorandum order on defendants' second motion in limine, the district court ruled that evidence of the prior conviction was admissible for impeachment purposes. At trial, however, the district court did not allow Williams to question Hyatt about the underlying facts.

Prior felony convictions may be used as impeachment evidence if the court determines that the evidence is more probative than prejudicial. *See* Fed. R. Evid. 609(a); ***U.S. v. Estes***, 994 F.2d 147, 148 (5th Cir. 1993). As Williams concedes, the witness generally may be impeached only with the basic facts regarding the conviction -- *e.g.*, the number and dates of the convictions and the nature of the crimes. ***U.S. v. Gordon***, 780 F.2d 1165, 1176 (5th Cir. 1986) (citing cases, and citing Rule 609 (Impeachment by Evidence of Conviction of Crime)). The examination should not include an inquiry into facts underlying the previous offenses. *See* ***id.*** (trial court properly limited counsel's attempt to question witness regarding particular facts of his previous offenses).

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consider arguments not raised in district court or not properly briefed), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1219 (1994).

The district court determined that Hyatt could be cross-examined about whether, and when, he had been convicted of a felony and about the fact that the felony was grand larceny; it refused, however, to allow Williams to seek further details. On cross-examination, Hyatt stated that he had resigned from the Sheriff's Department after being arrested for grand larceny, that he had stolen $3000, and that his misconduct involved actions taken during the course of his employment as a deputy. It was not an abuse of discretion to prevent Williams from introducing further details.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.