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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. EDWARD NOLAN NORWOOD, aka "Polo," Defendant.	No. CR 13-388-JVS-2 Government's Opposition to Defendant Motion In Limine No. 1 to Exclude Evidence of Prior Convictions and Other Bad Acts To Impeach Defendant Under Federal Rules of Evidence 403, 404, and 609 Hearing Date: November 30, 2015 Hearing Time: 9:00 a.m. Location: Courtroom of the Hon. James V. Selna

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorney Scott D. Tenley, hereby files its opposition to defendant first motion in limine to exclude evidence and prior convictions and other bad acts to impeach defendant under Federal Rules of Evidence 403, 404, and 609.

This opposition is based upon the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: November 8, 2015

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

DESCRIPTION PAGE

FEDERAL CASES

TABLE OF AUTHORITIES (CONTINUED)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Edward Nolan Norwood, also known as "Polo" ("defendant") is charged in a two-count indictment with conspiracy to distribute and possess with intent to distribute cocaine base in the form of crack cocaine ("crack cocaine"), in violation of 21 U.S.C. § 846, and distribution of crack cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B)(iii). Defendant now moves in limine to preclude the government from impeaching his credibility, should he choose to testify at trial, with his prior felony convictions, all of which are directly relevant to a testifying defendant's veracity. Defendant further seeks to preclude the government from offering evidence of defendant's 2007 conviction for possessing crack cocaine under Rule 404(b). For the reason discussed below, the Court should deny defendant's motion regarding these felony convictions.

II. STATEMENT OF FACTS

A. The Charged Transaction

The government expects the evidence at trial will show the following: On or around January 31, 2012, defendant Emerie Nelson Tims ("Tims")[1] agreed to sell 1.25 ounces of crack cocaine to a CI of the Federal Bureau of Investigation ("FBI") in exchange for $1,100. Tims and the CI agreed to meet later that afternoon at TIMS's sister's residence on Browning Boulevard in Los Angeles ("Browning residence") to complete the sale.

[1] Tims pleaded guilty to conspiracy to distribute and possess with intent to distribute crack cocaine on July 16, 2015, and is scheduled to be sentenced by this Court on January 4, 2016. (CR 92)

That afternoon, the CI waited for Tims at the Browning residence for several hours. Throughout the afternoon, Tims communicated to the CI and/or Tims's sister that: (1) the entire 1.25 ounce quantity of crack cocaine was not yet ready, and additional powder cocaine would need to be "cooked" into crack cocaine; and (2) Tims was waiting for defendant to pick him up so that they could drive to the Browning residence. At one point, Tims suggested that defendant could meet the CI at the Browning residence to drive the CI to Tims's location. Finally, after waiting several hours for Tims and/or defendant, the CI left the Browning residence.

Later that afternoon, Tims spoke to the CI by telephone and informed the CI that Tims had arrived at the Browning residence. The CI returned to the Browning residence shortly after 6:00 p.m., where defendant and Tims were waiting inside of a white Mercedes Benz. Defendant was sitting in the driver's seat. When Tims informed the CI that the entire quantity of crack cocaine was still not ready, the CI elected to complete the sale the following day.

The next day, on February 1, 2012 at approximately 12:45 p.m., the CI met defendant and Tims near the Browning residence. Tims informed the CI that additional crack cocaine still needed to be "cooked," and that it would be cooked at a different location. While traveling to that location (with defendant driving), the vehicle was stopped by the Los Angeles Police Department ("LAPD") for a moving violation. After the traffic stop was completed, defendant stated, in substance, "we would have been done by now if the police hadn't fucked up the timing."

Defendant, Tims, and the CI arrived at an apartment on West Street in Los Angeles (the "West residence"), believed to be occupied

by defendant's girlfriend. Once inside, Tims discovered that a jar needed in order to cook the powder cocaine into crack cocaine was broken. Defendant then placed a telephone call (presumably to defendant's girlfriend) to inquire as to whether there was a "beaker" in the kitchen. As defendant spoke on the telephone, he searched through the kitchen cupboards.

Later, defendant left the West residence to meet his and Tims's powder cocaine supplier in or around an alleyway near the West residence. When defendant returned with the powder cocaine, Tims and the CI then drove to a grocery store to purchase a glass measuring cup that could be used to cook up the remaining quantity of powder cocaine obtained by defendant. Upon returning to the West residence, Tims cooked the crack cocaine while defendant and the CI observed.

B. Prior Convictions

According to the presentence report, and as reflected in certified convictions documents obtained by the government, defendant has suffered the following prior criminal convictions which the government may seek to admit or use for impeachment purposes at trial:

First, on October 25, 2004, defendant was convicted and sentenced to two years imprisonment after being convicted of robbery in the second degree, in violation of California Penal Code Section 211, in Los Angeles Superior Court, in case number BA264543.

Second, on February 14, 2007, defendant was convicted and sentenced to five years' imprisonment for possession of crack cocaine, in violation of California Health and Safety Code Section 11350, in the Superior Court for the State of California, in case

number BA311513. That conviction was subsequently reduced to a misdemeanor pursuant to Proposition 47.

Third, on December 17, 2014, defendant was convicted and sentenced to 32 months' imprisonment for possession of a firearm by a felon, in violation of California Penal Code Section 29800(a), in the Superior court for the State of California, in case number BA423813.

The government does not seek to use for impeachment purposes defendant's 1999, 2000, and 2003 misdemeanor convictions.

III. ARGUMENT

A. Defendant's Prior Convictions are Admissible for Impeachment Purposes Under Rule 609

Rule 609(a)(1) allows a defendant to be impeached by evidence of a prior conviction if (1) the crime was punishable by death or imprisonment in excess of one year, and (2) the probative value of the evidence outweighs its prejudicial effect to the defendant. Fed. R. Evid. 609(a)(1). Under this rule, the government may seek to use for impeachment purposes the convictions described above, all of which were punishable by a term of imprisonment exceeding one year.[2] The convictions meet the first requirement and therefore should be

[2] Defendant's 2007 drug possession conviction, even though subsequently redesignated as a misdemeanor pursuant to Proposition 47, should be considered a crime punishable by a term of imprisonment in excess of one year. While the statute enacting Proposition 47 states that a redesignated conviction is a misdemeanor "for all purposes," Cal. Penal Code § 1170.18(k), that language is not retroactive. People v. Rivera, 183 Cal. Rptr. 3d 362, 372 (2015) (citing People v. Feyrer, 48 Cal.4th 426, 438-39 (2010) (finding with respect to similar language in wobbler statute, Cal. Penal Code § 17(b), that offense is deemed a felony unless subsequently reduced to a misdemeanor by sentencing court, and that "[i]f ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively")).

admitted so long as the probative value outweighs the prejudicial effect.

The Ninth Circuit has held that trial courts should employ the following five-factor test in performing the balancing test between the probative value of a prior conviction and its prejudicial effect: "(1) the impeachment value of the prior crime; (2) the temporal relationship between the conviction and the defendant's subsequent criminal history; (3) the similarity between the past and the charged crime; (4) the importance of defendant's testimony; and (5) the centrality of the credibility issue." United States v. Martinez-Martinez, 369 F.3d 1076, 1088 (9th Cir. 2004). The Ninth Circuit further held that although "a trial court need not analyze each of the five factors explicitly, the record should reveal . . . that the trial judge was aware of the requirements of Rule 609(a)(1)." Id. (internal quotation omitted). Here, each of the five factors weighs in favor of admitting defendant's prior convictions for impeachment purposes.

1. Impeachment Value of the Prior Convictions

Each of defendant's convictions are probative of veracity. The Ninth Circuit has repeatedly stated that "prior convictions for robbery are probative of veracity." United States v. Givens, 767 F.2d 574, 580 (9th Cir. 1985), cert. denied, 474 U.S. 953; accord United States v. Alexander, 48 F.3d 1477, 1488 (9th Cir. 1995). Likewise, prior convictions for drug offense are also probative of veracity. United States v. Cordoba, 104 F.3d 225, 229 (9th Cir. 1997) (citing Alexander, 48 F.3d at 1488); Martinez-Martinez, 369 F.3d at 1088 (affirming use of seven year-old drug sales conviction in § 1326 prosecution to impeach defendant). See also United States

v. Hernandez, 106 F.3d 737, 739-40 (7th Cir. 1997). And, while defendant's felony for illegal possession of a firearm may bear on veracity to a lesser degree than robbery or drug possession, it nonetheless involves the deliberate defiance of legal requirements, rather than an impulsive or careless act, and is therefore highly probative of defendant's history of engaging in calculated law-breaking like perjury. See United States v. Estrada, 430 F.3d 606, 618 (2d Cir. 2005) (discussing credibility considerations underlying various types of offenses).

2. Temporal Relationship

Defendant's convictions are sufficiently recent to satisfy the second factor. "By its terms, Rule 609 allows for admissibility of such . . . prior conviction[s] even where the defendant has been released for up to ten years." United States v. Browne, 829 F.2d 760, 763 (9th Cir. 1987), cert. denied, 485 U.S. 991 (1988); Fed. R. Evid. 609(b). While the 2007 and 2014 convictions are indisputably within the ten year window, so too is the 2004 robbery. According to the presentence report, defendant was released from his prison sentence on that conviction on January 16, 2006 (and released again on July 27, 2006 after serving additional time for a parole violation). Thus, the robbery conviction is also within the ten year time frame based on defendant's release date from prison.

3. Similarity

There can be no dispute that the robbery offense and the felon in possession offense are sufficiently dissimilar from the instant drug trafficking offense to render them admissible. While defendant's 2007 conviction for possession of a controlled substance is somewhat similar to the charged offense, the government seeks to

admit that conviction (as discussed below) and the facts underlying that conviction (as discussed in the government's motion in limine, (CR 102)) under Federal Rule of Evidence 404(b) as evidence of defendant's knowledge, intent, and absence of mistake or accident. Thus, because the drug conviction would otherwise be before the jury as direct evidence of defendant's guilt, it should also be permitted to be used to impeach defendant should he testify. Cf. United States v. McCollum, 732 F.2d 1419, 1424 (9th Cir. 1984) (finding that the district court did not commit error in admitting a prior conviction under Rule 609 where the conviction would have also been admissible under Rule 404(b)).

4. Importance of Defendant's Testimony and Centrality of His Credibility

The importance of defendant's testimony and centrality of the credibility issue both weigh heavily in favor of admission should defendant testify. "When a defendant takes the stand and denies having committed the charged offense, he places his credibility directly at issue." Alexander, 48 F.3d at 1489. Here, defendant claims that he will not be putting on a character defense, or deny that he was present during the drug transaction. (Def's Mtn. at 4.) Thus, the government expects defendant to present a mere presence defense: that although defendant was present during the drug transaction, he never agreed with Tims to distribute crack cocaine to the CI, and he played an innocent role in the events related to the drug transaction. If presented with such testimony, the jury should be permitted to assess the defendant's credibility with knowledge of defendant's prior felony convictions. See United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979) (en banc), cert denied, 444 U.S.

1034, overruled on other grounds by Luce v. United States, 469 U.S. 38 (1984) ("[I]t is not surprising that the court was unwilling to let a man with a substantial criminal history misrepresent himself to the jury, with the government forced to sit silently by, looking at a criminal record which, if made known, would give the jury a more comprehensive view of the trustworthiness of the defendant as a witness."). See also United States v. Perkins, 937 F.2d 1397, 1406 (9th Cir. 1991) (permitting prior bank robbery conviction in bank robbery case where defendant's testimony and credibility were "central to the case"); Alexander, 48 F.3d at 1489 (rejecting defendant's argument that his testimony was not important nor his credibility central to the case because defendant placed his credibility directly at issue by taking the stand and denying the charged offenses).

* * *

Because the probative value of each of defendant's prior convictions outweighs the danger of unfair prejudice, those convictions "must be admitted" should defendant choose to testify. Fed. R. Evid. 609(a)(1)(B). The jury should be informed of the nature of each conviction so that the jury may gauge how and to what degree that conviction impacts its assessment of defendant's credibility, not sanitized and limited to a single conviction as defendant suggests, (Def's Mtn. at 7). See Perkins, 937 F.2d at 1406 (in a bank robbery case, permitting the impeachment of defendant by his prior bank robbery conviction).

B. Defendant's 2007 Conviction for Possession of a Controlled Substance is Admissible Under Rule 404(b)

1. Legal Standard

Rule 404(b) provides that evidence of "other crimes, wrongs, or acts," while not admissible to prove bad character or propensity, may be admitted "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). Rule 404(b) is a "rule of inclusion." United States v. Blitz, 151 F.3d 1002, 1007 (9th Cir. 1998). "Once it has been established that the evidence offered serves one of [the 404(b)] purposes . . . the 'only' conditions justifying the exclusion of the evidence are those described in Rule 403." United States v. Curtin, 489 F.3d 935, 944 (9th Cir. 2007); accord United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982) ("We have uniformly recognized that the rule is one of inclusion and that other acts evidence is admissible whenever relevant to an issue other than the defendant's criminal propensity.")

Courts employ a four-part test to determine whether evidence is admissible under Rule 404(b). Evidence of the other act will be admitted if: (1) it tends to prove a material point; (2) the act is similar to the offense charged; (3) the other act is not too remote in time; and (4) the evidence is sufficient to support a finding that the defendant committed the other act. United States v. Corona, 34 F.3d 876, 881 (9th Cir. 1994).

2. Materiality

The government seeks to admit evidence of defendant's 2007 drug possession conviction[3] for permissible, non-propensity purposes: to establish defendant's knowledge, intent, and absence of mistake. The Ninth Circuit had routinely held that a defendant's other drug activity is relevant to establish intent, knowledge, and absence of mistake. See, e.g., United States v. Howell, 231 F.3d 615, 628 (9th Cir. 2000) (in a prosecution for possession of cocaine with intent to distribute, evidence of defendant's prior conviction for possession of cocaine and possession with intent to deliver cocaine were permissible, as they tended to show knowledge, a material element of the charged offense, were relevant to rebut defendant's claimed innocent motive for being present on a bus where drugs were found, were similar to the charged offense, and one was sustained only months before his arrest on the current charge); Mehrmanesh, 689 F.2d at 832 ("We have consistently held that evidence of a defendant's prior possession or sale of narcotics is relevant under Rule 404(b) to issues of intent, knowledge, motive, opportunity, and absence of mistake or accident in prosecutions for possession of, importation of, and intent to distribute narcotics").

Knowledge and intent are material elements of the charged crimes of conspiracy to possess with intent to distribute controlled substances, and distribution of controlled substances. See United States v. Arambula-Ruiz, 987 F.2d 599, 603 (9th Cir. 2011) (citing 21 U.S.C. § 841(a)(1); United States v. Schmidt, 947 F.2d 362, 367 (9th

[3] The defendant also seeks to admit evidence of the underlying facts of the conviction, as well as two other drug related events, under Rule 404(b). That evidence is addressed in the government's motion in limine filed on November 3, 2015 (CR 102).

Cir.1991) ("knowledge of the objective of the conspiracy is an essential element of any conspiracy conviction") (internal quotation and citation omitted))).

This evidence is particularly relevant here because the government expects defendant to present a defense that calls into question is knowledge of the existence of the drug transaction, and/or his intent to join or further the drug transaction. Indeed, in Arambula-Ruiz, the Ninth Circuit affirmed the admission of a prior drug conviction where the defendant argued that he was an innocent bystander who had no knowledge of the purpose of the conspiracy to distribute heroin. 987 F.2d at 603. The Court in Arambula-Ruiz found that the conviction evidence was "crucial" to a material element of the charged offense, and not offered to prove criminal propensity.

3. Similarity

"The degree of similarity required depends on the evidential hypothesis which is being employed." United States v. Ramirez-Jiminez, 967 F.2d 1321, 1326 (9th Cir. 1992). When offered to prove knowledge, the other act need not be similar so long as it would tend to make the existence of defendant's knowledge more probable. When offered to prove intent, the evidence is required to be similar. Id. Here, evidence regarding defendant's 2007 conviction involves crack cocaine, the same substance at issue here. Further, unlike the analysis under Rule 609 discussed above, similarity weighs in favor of admission, as it bears more closely on defendant's knowledge, intent, and absence of mistake or accident.

4. Remoteness in Time

Defendant's 2007 conviction is not too remote in time to be admissible under Rule 404(b). The Ninth Circuit has affirmed the admission of prior bad acts occurring ten or more years before the charged conduct. See United States v. Simtob, 901 F.2d 799, 807–08 (9th Cir. 1990) (12 year-old conviction); United States v. Ross, 886 F.2d 264, 267 (9th Cir. 1989) (13 year-old prior act); United States v. Spillone, 879 F.2d 514, 519 (9th Cir. 1989) (10 year-old prior conviction).

5. Proof

The threshold for sufficiency of proof of other bad acts under Rule 404(b) is a "low" one. United States v. Romero, 282 F.3d 683, 688 (9th Cir. 2002). Here, the government intends to prove the existence of defendant's 2007 conviction through the admission of certified conviction documents.

6. Rule 403 Balancing Test

Courts have routinely concluded that the probative value of a prior drug conviction -- particularly when offered to prove knowledge, and to rebut a defense of mere presence -- is not substantially outweighed by the danger of unfair prejudice under Rule 403. See, e.g., Ramirez–Jiminez, 967 F.2d at 1327. To the extent defendant is prejudiced to any extent by the admission of his 2007 conviction, the Court may provide a limiting instruction to the jury regarding the non-propensity purposes for which the evidence may be used. Huddleston v. United States, 485 U.S. 681, 691–92 (1988) ("[T]he trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted"); United States v. Rubio-Villareal, 927

F.2d 1495, 1503 (9th Cir. 1991) vacated in part and remanded on other grounds 967 F.2d 294 (9th Cir. 1992) (en banc) (holding probative value of prior drug conviction outweighed any prejudice because of high need for evidence coupled with judge's careful limiting instruction weighed in favor of admission).

IV. CONCLUSION

For the foregoing reasons, the government respectfully requests that this Court deny defendant's motion to exclude defendant's prior felony convictions (including the 2007 felony conviction reduced to a misdemeanor) for impeachment purposes and defendant's motion to exclude the admission of defendant's prior drug trafficking conviction under Rule 404(b).