

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-20034-CR-ALTONAGA

UNITED STATES OF AMERICA,

v.

BILLY OLVERA,

Defendant.

RESPONSE TO DEFENDANT’S MOTIONS IN LIMINE NUMBER I-IV

In advance of the May 20, 2024, trial against the Defendant Billy Olvera (the “Defendant”), the Government responds to the Defendant’s Motion *in limine* filed on April 5, 2024 (DE 14). This Court should deny the Defendant’s Motion *in limine* as to Defendant’s Argument I: preventing the government from introducing evidence of other “crimes, wrongs or acts,” as to the Defendant’s conduct against flight attendant A.G. This Court should also deny the Defendant’s Motion *in limine* as to Defendant’s Argument II: preventing the government from introducing evidence of the Defendant’s occupation as a law enforcement officer. With regard to Defendant’s Arguments III and IV: the government does not intend to introduce evidence that the Defendant refused to provide law enforcement with consent to search his phone. Nor does the government intend to introduce evidence that the Defendant refused to make a post-*Miranda* statement.

I. Procedural History

On February 1, 2024, the Defendant was charged by way of Indictment with one count of Interference with Flight Crew Members and Attendants, in violation of Title 49 United States Code § 46504 (DE 1). This charge arises from the Defendant, a Deportation Officer with Immigration

and Customs Enforcement, allegedly filming underneath a flight attendant's skirt on a commercial flight from Dallas, Texas to Miami, Florida, on November 6, 2023. During this flight, the Defendant was on-duty and was actively transporting a detainee. Because he was on-duty, the Defendant was armed. Consistent with American Airlines policy, all flight attendants and flight crew members knew that the Defendant was armed, as that information is disclosed to them in advance of the flight, as is the location in which all armed officers are sitting in the aircraft, as a safety precaution.

II. Legal Standard

Under FRE 401, “[r]elevant direct evidence of a crime charged is always admissible unless it falls under a rule of exclusion.” *United States v. Troya*, 733 F.3d 1125, 1131 (11th Cir. 2013). Relevant evidence “has [a] tendency to make a fact more or less probable than it would be without the evidence.” *Id.* See also Fed. R. Evid. 401. “The evidence must be probative of the proposition it is offered to prove,” and the proposition “must be one that is of consequence to the determination of the action.” *Id.* FRE 402 explains that evidence is admissible unless there is authority to the contrary. Fed. R. Evid. 402.

FRE 404 generally prohibits the use of character evidence to show that a person possesses a particular character trait, or committed an act that shows that trait, “to prove that on a particular occasion the person acted in accordance with the character.” See *United States v. Ellisor*, 522 F.3d 1255, 1267 (11th Cir. 2008). Rule 404(b) in particular pertains only to “other acts,” limiting the Rule to acts outside the scope of the instant offense. See *Id.* As a result, a court must first determine whether FRE 404(b) applies at by deciding whether the evidence is “intrinsic,” or within the scope of this case and not subject to that analysis, or “extrinsic,” or outside the scope of this case and

thus subject to FRE 404(b). See *United States v. Church*, 955 F.2d 688, 700 (11th Cir. 1992) (“because the evidence is intrinsic, not extrinsic, we do not engage in a Rule 404(b) analysis”).

Evidence is “intrinsic”—and therefore outside the scope of FRE 404(b)—when it has any of three characteristics in relation to this case. First, evidence is intrinsic if it is “an uncharged offense which arose out of the same transaction or series of transactions as the charged offense.” *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007) (quotations omitted). This category includes offenses committed in furtherance of the charged conduct but not charged in the indictment. See, e.g., *United States v. Joseph*, 978 F.3d 1251, 1263 (11th Cir. 2020) (admitting evidence of identity theft that furthered securing a stash house). Second, evidence is intrinsic if it is “necessary to complete the story of the crime.” *Edouard*, 485 F.3d at 1344 (quotations omitted). To this end, evidence that is “not part of the crime charged but [that] pertain[s] to the chain of events explaining the context, motive, and set-up of the crime[] is properly admitted if linked in time and circumstances with the charged crime.” *Id.* (quotations omitted). Finally, evidence is intrinsic if it is “inextricably intertwined with the evidence regarding the charged offense.” *Edouard*, 485 F.3d at 1344 (quotations omitted). This type of intrinsic evidence includes acts that “form[] an integral and natural part of an account of the crime” or that “form[] an ‘integral and natural part of the witness’s accounts of the circumstances surrounding the offenses for which the defendant was indicted.’” *Id.* (quoting *United States v. Foster*, 889 F.2d 1049, 1053 (11th Cir. 1989)).

III. Argument

This case boils down to an armed, on-duty law enforcement officer who was actively transporting a detainee on a commercial flight using his cell phone to film underneath a flight attendant’s skirt and take other compromising pictures of that flight attendant without her

awareness or consent, for example, from behind. To show the jury how this all came about, the Government needs to be able to tell the story: namely, that the flight attendants (both A.G. and L.A.) became aware that the Defendant was acting unusual early on in the flight, by leaning against them, and that they were aware that the Defendant was an armed law enforcement officer, as that information is part of the standard pre-flight briefing.

From the outset of the flight, flight attendants, including both A.G. and L.A., personally noticed that the Defendant's behavior was atypical, including leaning far out of his seat to brush against flight attendants, including both A.G. and L.A. when they passed. Ultimately, A.G. became concerned that the Defendant was filming her as she walked by, and L.A. was able to confirm that this was happening in real-time. The fact that both L.A. and A.G. had previous unusual interactions with the Defendant during this flight is highly relevant, as their awareness of this specific passenger was heightened prior to him filming A.G. And, given the charge here, of which intimidation is an element, the Government should be able to introduce evidence that the Defendant was carrying a firearm pursuant to his official duties because not only is it intrinsic evidence, it is relevant, direct evidence of the crime charged.

A. The Defendant's Conduct as it Relates to Other Flight Attendants and Crew Members, Including L.A., is Inextricably Intertwined but Would Qualify as Permissible 404(b) Evidence Anyway

The Defendant first argues that the Government should be prevented from introducing flight attendant L.A.'s testimony of her interactions with the Defendant under FREs 402, 403, and 404(b) (DE 14:1). L.A. and A.G. were jointly responsible for servicing the rear of the aircraft, where the Defendant was seated. Immediately after takeoff, both flight attendants L.A. and A.G. noticed that the Defendant would lean up against them in the aisle touching them whenever they passed by his seat. Both L.A. and A.G. noted this behavior and found it unusual, commenting on it to one another

in real time. The Defendant's behavior caused both flight attendants to have heightened awareness towards the Defendant whom they knew was an armed, on-duty law enforcement officer.

This is intrinsic evidence because it “pertains to the chain of events and provides context” while also “serv[ing] as a part of the integral and natural account of the charged offense.” *United States v. Steven Melton Keivett*, No. 11-cr-20215-LENARD, 2011 U.S. Dist. LEXIS 165673, at *10 (S.D. Fla. Jun. 16, 2011); see also *Edouard*, 485 F.3d at 1344 (evidence intrinsic if “necessary to complete the story” or “inextricably intertwined with the evidence”). Telling the story of how L.A. and A.G. became aware that the Defendant was filming A.G. requires explaining how they interacted with the Defendant up until that point on the flight. Allowing L.A. to testify as to her interactions with the Defendant is necessary to complete the story and thus is inextricably intertwined with the instant case and not subject to FRE 404(b) to become admissible for the Government's case-in-chief.

Even if the Defendant's conduct as to flight attendant L.A. was subject to FRE 404(b), it would be admissible anyway. The Defendant leaning against another flight attendant before ultimately filming up A.G.'s skirt is relevant to non-propensity showings that are permissible under FRE 404(b)—in particular, motive, intent, knowledge, and absence of accident or mistake. This further shows that the Defendant did not somehow mistakenly take approximately 35 photographs and videos of A.G. in compromising positions during the flight.

Finally, admitting this evidence is not substantially outweighed by any prejudice because the Defendant's conduct, of leaning against both L.A. and A.G., is closely tied to the instant offense both substantively and temporally. See *Brown*, 587 F.3d 1082, 1091 (11th Cir. 2009); *Keivett*, 2011 U.S. Dist. LEXIS 165673, at *10. The Defendant leaned up against both flight attendants directly before beginning to film A.G. and all of these events happened during the course of one

approximately three-hour flight. And more broadly, there is nothing about leaning up against a flight attendant that is so prejudicial as warrant the “extraordinary remedy” of suppressing that information. *See Nerey*, 877 F.3d at 975. Because these considerations meet the three requirements under FRE 404(b), the Court should permit the Government to introduce them into its case-in-chief, whether as inextricably intertwined or admissible “other acts” evidence under FRE 404(b).

B. The Fact That Defendant Was Working as an On-Duty, Armed Law Enforcement While Filming up A.G.’s Skirt is Relevant, Direct Evidence of the Crime Charged and Is Inextricably Intertwined

The Defendant next argues that the Government should be prevented from admitting evidence that the Defendant was an armed law enforcement officer under FREs 401, 402, and 403. To prove Interference with Flight Crew Members and Attendants, in violation of Title 49 United States Code § 46504, the Government must prove three things: first, that the defendant was on an aircraft in flight in the United States; second, the defendant knowingly [intimidated] a flight-crew member or flight attendant; and third, the [intimidation] interfered with or lessened the ability of the crewmember to perform his or her duties. *See* 11th Circuit Pattern Jury Instructions No. 118 (2022).

Under FRE 401, “[r]elevant direct evidence of a crime charged is *always* admissible unless it falls under a rule of exclusion.” *Troya*, 733 F.3d at 1131 (emphasis added). Evidence that the Defendant was an armed on-duty law enforcement and that the flight attendants and flight crew knew this in advance of the flight is direct evidence that establishes how the armed Defendant intimidated a flight crew member or flight attendant.

The jury instructions provide that to intimidate is to “intentionally say or do something that would cause a person of ordinary sensibilities to fear bodily harm. It’s also to say or do something to make another person fearful or make that person refrain from doing something that the person

would otherwise do.” 11th Circuit Pattern Jury Instructions No. 118 (2022). While not in this circuit, courts have explained that, to prove intimidation, “it is sufficient that the conduct...of the accused would place an ordinary, reasonable person in fear.” *United States v. Meeker*, 527 F.2d 12, 15 (9th Cir. 1975) (interpreting the predecessor statute to § 46504).

The Defendant was not an ordinary passenger on this flight. He was an on-duty, armed deportation officer who was actively transporting a detainee. As per airline policy, the Defendant had to attend a briefing in advance of the flight and disclose the fact he was armed to flight attendants, including to A.G.: that the Defendant was armed goes **directly** to proving that a reasonable person in A.G.’s position would be afraid of the Defendant and tailor her responses to him to avoid potential escalation. It is highly relevant that A.G. was afraid of putting herself, the flight crew, and passengers at risk because the Defendant was armed. This is relevant, direct evidence of the crime charged under FRE 401.

Further, this evidence is intrinsically intertwined because it is both is “necessary to complete the story of the crime” and “inextricably intertwined with the evidence regarding the charged offense.” *Edouard*, 485 F.3d at 1344. It is impossible for A.G. and other flight attendants and members of the flight crew to provide their account of the crime without detailing “the circumstances surrounding the offenses for which the defendant was indicted,” including the fact that the Defendant was an armed law enforcement officer. *Id.* (internal quotations omitted).

Because of this, the probative value of the fact that the Defendant was an armed, on-duty law enforcement officer, is a critical fact to proving the crime charged, and the probative value of admitting this evidence is not outweighed by the prejudice it would cause to the Defendant.

IV. *The Government Does Not Oppose Defendant's Motion in Limine Arguments III and IV*

As communicated to counsel for the Defendant, the Government does not intend to introduce evidence that the Defendant did not give law enforcement consent to search his phone. Nor does the Government intend to introduce evidence that the Defendant failed to make statements post-*Miranda*. It is well-settled law that the Government cannot comment on the Defendant's right to remain silent. *Griffin v. California*, 280 U.S. 609 (1965).

V. Conclusion

For these reasons, the Government respectfully requests that the Court deny the Defendant's Motion *in Limine* with respect to Defendant's Argument I and II.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 19, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

Elizabeth Noonan-Pomada

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