

08-5506-cr

To Be Argued By:
TRACY LEE DAYTON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-5506-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

JOHN W. BELL, JR.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

=====

REPLY BRIEF
FOR THE UNITED STATES OF AMERICA

=====

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States of America respectfully submits this brief in reply to several points raised by the defendant as alternative grounds to affirm the district court's grant of a new trial motion. In choosing to limit its discussion to these issues, the government does not abandon any of the arguments set forth in its principal brief.

As set forth below, the defendant's assertions reflect a misreading of the trial record and a misunderstanding of the manner in which a jury verdict should be reviewed post trial. This Court has held that a district court's authority to grant a new trial should be a rarely used power. *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). The district court must not usurp the role of the jury and generally "must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses." *Id.*

Reply Statement of Facts

The facts pertinent to this appeal are contained in the government's principal brief. However, in his response, the defendant has failed to accord due deference to the jury's verdict, distorted the trial evidence, ignored crucial evidence and cited an in-court demonstration that never occurred to defend the district court's decision to grant him a new trial.

For example, the defendant claims that Detective Murray crossed the threshold of the office with a "drawn Glock, boots, baseball gloves, sleeveless shirt, jeans, and hat emblazoned with 'What's Up Dog,'" and immediately opened fire on the defendant. Def. Br. 19, 35-36, 42. The defendant omits the uncontroverted facts that Detective Murray was wearing a ballistic vest that stated POLICE in bright yellow letters and had a police badge clipped to the top of the vest. JA 12, 161-166, 210, 258-259; GX 10. He also omits that Detective Murray repeatedly announced

“police with a search warrant” as he entered the office. JA 179-184.

Further, the defendant’s claim that Detective Murray started shooting as he crossed the threshold into the office is contradicted by the defendant’s own testimony and that of Detectives Murray and Reilly. Specifically, the defendant and Detective Murray both testified that they stood squared off to one another in the middle of the office at the time the shooting occurred. JA 241, 243, 706, 709, 711. Detective Reilly also testified that the casings from Detective Murray’s gun would have expelled to the right approximately five to seven feet thus explaining their placement in and around the doorway. JA 495, 525-527. Such testimony corroborates that the shooting occurred within the office, as the witnesses described, and not as Detective Murray first entered the office as the defendant now claims.

Defense counsel also seriously distorts the testimony concerning the sequencing of shots claiming, without citing the record, that “[t]he evidence of all the other officers is uncharacteristically consistent that they saw Detective Murray dive to the left before they saw the muzzle flash come from the defendant’s position.” Def. Br. 34. The defense, completely ignoring Detective Murray’s testimony that he fired as he dove out of the defendant’s line of fire, JA 191-92, thus concludes *without support* that Detective Murray must have fired first. Def. Br. 34. However, the *record* shows that Agent Grimm did not know who fired first, JA 437; Sergeant Gonzalez was too far from the office to see muzzle flashes and only

heard gunshots, JA 603, and thus could not possibly know who fired first; Lieutenant Kohloff did not know how many shots he heard before he saw muzzle fire and “[w]hether or not the [defendant] was responding to fire by [Detective Murray],” JA 377-78; Detective Ayr said that “it would be hard for me to tell you the sequence [of shots], JA 314; and Detective Hammel said that while he saw Detective Murray dive to the left before he saw muzzle flashes, JA 650, that he “[did] not know for sure” who fired first because he heard gunshots and saw muzzle flashes simultaneously. JA 633-35.

In any event, the sequence of shots was relevant only to the defendant’s claim of self-defense. Since the defendant testified that *he* did not know who fired first, his decision to shoot clearly was not prompted by a belief that Detective Murray shot at him. Therefore, it makes no difference who actually fired first. What matters is whether the defendant knew Detective Murray was a law enforcement officer. If so, the defendant was not entitled to point a gun at Detective Murray, much less to shoot at him, regardless of who fired first.

The defendant also attempts to bolster his claim that he did not recognize Detective Murray as a police officer by relying upon a fabricated “demonstration.” Without citing the trial record, the defendant states:

what the government fails to accord proper weight is the fact that Judge Covello had the opportunity to witness Detective Murray’s courtroom demonstration of his manner of entry, and the

positioning of his body with respect to Hamel [sic]
as he entered the office.

Def. Br. 38. Notably, the district court did not rely upon this alleged demonstration or even suggest that it occurred. This is readily explained by the fact that the “demonstration” never actually transpired. While defense counsel asked Detective Murray to demonstrate how he held his gun at the time of the shooting, JA 243, Detective Murray was neither asked to nor did he *at any point* demonstrate how he entered the office.

The facile nature of the defendant’s argument is best illustrated by the fact that it is couched in the theoretical:

According to Murray, he squeezed past Hammel at the doorway, *suggesting* a sideways orientation, and then Murray had turned to face the defendant, again *implying* a preceding sideways view.

Def. Br. 37-38 (emphasis added). There is no evidence to “suggest” that the defendant ever viewed Detective Murray from the side. Rather, it was the defendant who turned away from Detective Murray in an effort to pull his gun from his waistband undetected. JA 188, 240, 707-711. Detective Murray thus realigned his position so he could again stand face-to-face with the defendant and see both of the defendant’s hands. JA 190.

Having to confront the reality that the defendant testified that he and Detective Murray directly faced one

another when the shooting occurred, JA 709-711, counsel next argues that:

Detective Murray's weapon, *presumably* [] held with his arms at chest level, *potentially* obscur[ed] his identification.

Def. Br. 38 (emphasis added). Such factual gymnastics are necessary because the record is devoid of evidence to support the defendant's specious claims that he saw neither the word POLICE written in bright yellow lettering nor the gold police badge upon Detective Murray's bulletproof vest. In the final analysis, the defendant depends on facts not in the record to seek affirmance of the district court's ruling. Thus, the defense's attempt to justify Judge Covello's ruling, which was similarly based on clearly erroneous factual findings, is unavailing.

REPLY ARGUMENT

I. The district court properly instructed the jury on self-defense

The defendant seeks a new trial claiming, incorrectly, that the district court failed to charge the jury on the subjective component of self-defense and because the court declined to utilize the defendant's proposed jury instruction. Def. Br. 50-51. The defendant's claims are without merit.

Contrary to the defendant's claim, the district court clearly focused the jury on the subjective component of

self-defense when it instructed the jury to consider the defendant's actual beliefs:

A person acting in self-defense is justified in using the force that person reasonably believes is necessary in the defense of himself against the immediate use of unlawful force by another against him. *If you find that the Defendant knew that Scott Murray and Kevin Hammel were law enforcement officers or that their purpose was to serve a search warrant, then the Defendant has no valid claim of self-defense.*

JA 873. The court then instructed that if the jury concluded that the defendant subjectively believed he was the victim of an assault, it should determine whether the defendant's belief was objectively reasonable:

If, however, you find the Defendant did not know of the official identity or purpose of Mr. Murray and Mr. Hammel and that he reasonably believed that he was the subject of a hostile and imminent attack against his person, then he was entitled to use reasonable force to defend himself.

* * *

A reasonable belief is one which a reasonably prudent person would have in the same circumstances.

JA 873-874. As is evident, the district court instructed the jury on both the objective and subjective aspects of self-defense. Nonetheless, the defendant still complains that a new trial is warranted because the court did not use his proposed jury instruction.

Although a defendant is “entitled to a jury charge that accurately reflects the applicable law,” he “does not have the right to dictate the precise language of a jury instruction.” *United States v. Imran*, 964 F.2d 1313, 1317 (2d Cir. 1992); *see also United States v. Alkins*, 925 F.2d 541, 550 (2d Cir. 1991) (“A court has discretion to determine what language to use in instructing the jury as long as it adequately states the law.”). No particular form of words is required, so long as “taken as a whole” the instructions correctly convey the required legal principles. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Holland v. United States*, 348 U.S. 121, 140 (1954).

“The propriety of a jury instruction is a question of law that we review *de novo*.” *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) (quoting *United States v. George*, 266 F.3d 52, 58 (2d Cir. 2001)). “A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.” *Id.* (quoting *United States v. Walsh*, 194 F.3d 37, 52 (2d Cir. 1999)). This Court, therefore, will vacate a conviction only if the instruction that was sought “accurately represented the law in every respect” and only if “viewing as a whole the charge actually given, [the defendant] was prejudiced.” *United States v. Dove*, 916

F.2d 41, 45 (2d Cir. 1990) (internal quotation marks omitted).

In *State v. Clark*, 264 Conn. 723 (2003), precedent relied upon by the defendant, the Connecticut Supreme Court outlined a two-tiered inquiry for determining whether a defendant justifiably utilized deadly force to repel his victim's alleged attack. *Id.* at 731. The *Clark* court instructed:

the subjective-objective inquiry into the defendant's belief regarding the necessary degree of force requires that the jury make two separate affirmative determinations in order for the defendant's claim of self-defense to succeed. First, the jury must determine whether, on the basis of all of the evidence presented, the defendant *in fact had believed* that he had needed to use deadly physical force, as opposed to some lesser degree of force, in order to repel the victim's alleged attack. . . . If the jury determines that the defendant had not believed that he had needed to employ deadly physical force to repel the victim's attack, the jury's inquiry ends, and the defendant's self-defense claim must fail. If, however, the jury determines that the defendant in fact had believed that the use of deadly force was necessary, the jury must make a further determination as to whether *that belief was reasonable*, from the perspective of a reasonable person in the defendant's circumstances. . . . Thus, if a jury determines that the defendant's honest belief that he had needed to use deadly force,

instead of some lesser degree of force, was not a reasonable belief, the defendant is not entitled to the protection of [Conn. Gen. Stat.] § 53a-19.

Id. at 732 (emphasis in original; internal quotation marks omitted).

Here, Judge Covello aptly oriented the jury to the two-tiered self-defense inquiry, telling them to first determine what the defendant personally believed – whether he knew he was firing at law enforcement or, conversely, thought he was under hostile attack – and, if the latter, whether that belief was reasonable when viewed from the perspective of a reasonably prudent person. This is the law; the defendant was not prejudiced.

II. The district court gave the defendant wide latitude to cross-examine witnesses regarding alleged motive, bias and interest

The defendant next argues that he was precluded from cross-examining government witnesses regarding motive, bias and interest allegedly arising from concern about the potential for civil or criminal liability in the wake of the shooting at the gas station. The defendant’s claim is wholly without merit.

The Supreme Court has recognized that the “main and essential purpose of confrontation is to *secure for the opponent the opportunity of cross-examination.*” *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (quoting 5 J. Wigmore, § 1395, at 123 (3d ed. 1940)) (emphasis in

original; internal quotation marks omitted), and that the “exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Id.* at 316-17. However,

it does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel’s inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant. . . . [T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986) (emphasis in original; internal quotation marks omitted).

This Court has emphasized that the scope and extent of cross-examination lies within the sound discretion of the trial judge. *United States v. Concepcion*, 983 F.2d 369, 391-92 (2d Cir. 1992). “Only when this broad discretion is abused will we reverse a trial court’s decision to restrict cross-examination.” *United States v. Crowley*, 318 F.3d 401, 417-18 (2d Cir. 2003) (internal quotation marks

omitted). “So long as the jury has before it sufficient information to make a discriminating appraisal of the witness’s possible motives for testifying falsely in favor of the government, we will uphold the trial court’s exercise of its discretion.” *United States v. Scotti*, 47 F.3d 1237, 1248 (2d Cir.1995) (internal quotation marks omitted).

The defendant complains that he was precluded from questioning FBI Special Agent Mark Lauer about whether the officer-involved shooting at Buzz’s Mobil was likely to become the subject of an investigation. Defense counsel’s cross-examination of Agent Lauer belies that claim:

Q: At least as you, correct me if I’m wrong, your understanding, *you’ve just entered onto a potentially serious investigative site*, correct?

A: *Yes*.

Q: I mean a civilian has been shot twice, or more times, because you’re not sure how many times, by police officers, right?

A: That did occur, yes.

Q: And did it occur to you that the person you were talking to, [Sergeant] Gonzalez, who you learned fired shots, might in fact become the subject of an investigation himself, sir?

A: Yes, I knew the Connecticut State Police was going to take over the crime scene, correct.

Q: Just as a police officer, a shooting of a civilian, it would be your, prior to that day, October 1st, 2007, your general understanding, that would likely provoke an investigation of the appropriateness of the police officer's actions, correct, sir?

G: Objection, Your Honor. Asked and answered.

The district court sustained the objection. JA 127-128. As is clear, defense counsel was not precluded from asking Agent Lauer about the initiation of a criminal investigation. Rather, he was precluded from asking the same question twice, a proper exercise of the district court's discretion to avoid needless repetition.

Counsel also was permitted to utilize the cross-examination of Agent Lauer to establish that a criminal investigation had, in fact, been initiated and to clarify for the jury that the State Police investigation of the shooting differed from the original gambling investigation. *See* JA 131-132. It is evident that the defendant was neither precluded from cross-examining Agent Lauer about the likely initiation of an investigation into the appropriateness of the police officers' actions, nor from establishing that such an investigation had begun.

The defendant next alleges that he was denied the right to cross-examine Detective Murray about the State Police

investigation and that, as a consequence, he was denied the opportunity to prove motive, bias and interest. The trial transcript clearly undercuts the defendant's claim.

For example, counsel inquired if Detective Murray knew that the State Police would investigate the officer-involved shooting:

Q: And you also as of October 1st, 2007, correct me if I'm wrong, probably assumed that whatever happened at that gas station would become the subject of an extensive investigation, correct?

A: Yes.

Q: And as part of your training, getting back to your training at the police academy, one of the things that you're taught at the police academy was the possibility of you as a police officer facing criminal charges if you improperly used your firearm, is that correct?

A: Yes.

* * *

Q: In terms of your belief that whatever happened at the gas station would become the subject of an investigation, we're together here, right? In other words, you agree that was an understanding you had as of that point in time,

you're on scene, you've already discharged your weapon, and other people have now come in to investigate, correct?

A: Yes.

JA 216-217.

Counsel relies upon two properly sustained objections to bolster his claim of preclusion. First, counsel asked Detective Murray if he was aware of officers *in other cases* getting arrested following officer-involved shootings. JA 216. Such a question bore no relevance to the case at bar and could only serve to confuse or mislead the jury. Next, counsel again asked Detective Murray whether he received *training* on the potential for officer liability following an officer-involved shooting, a question that had already been asked and answered. JA 217. Therefore, it was a proper exercise of the district court's discretion to limit the presentation of irrelevant and/or cumulative evidence.

Finally, the district court permitted counsel to cross-examine Detective Murray as to whether he amended his incident report to comport with details provided to him by the Connecticut State Police and whether he submitted his incident report after having consulted with union counsel. JA 220-221, 223-225. Such questioning was unequivocally designed to attack Detective Murray's credibility in an effort to demonstrate his bias toward the prosecution.

Notably, with respect to the first issue, counsel's line of questioning failed to attain its objective because the evidence established that Detective Murray submitted his report on October 15, 2007, ten days *prior* to the October 25, 2007, meeting at the Connecticut State Police facility. JA 270. With respect to the second issue, Detective Murray readily admitted that both a union attorney and his deputy police chief reviewed his (Murray's) incident report prior to submission, but that he made no changes to the report based upon their review. JA 224-225.

Based on the foregoing, the defendant was clearly given the opportunity for effective cross-examination of the government witnesses regarding their credibility and possible motives for testifying falsely. The defense was given wide latitude to test their perceptions and memory, and to interrogate them about the State Police investigation in an attempt, albeit unsuccessful, to discredit the witnesses. *See Davis*, 415 U.S. at 308. The trial transcript demonstrates that the jury was given sufficient information to appraise each witness's possible motives. Therefore, the district court's exercise of its discretion to "limit" cross-examination served only to prevent repetitive interrogation that was of marginal relevance. *See Van Arsdall*, 475 U.S. at 679.

Finally, defense counsel unconvincingly seeks to link a strand of the government's closing argument to his unsupported claim that he was precluded from proper cross-examination. Def. Br. 52. Defense counsel protests the following snippet of the government's closing argument:

Or maybe [the defendant] wants your sympathy because he got shot. Look, this is not a case about an unarmed man getting shot. This is not the Diallo case. The Defendant didn't pull out a wallet, he pulled out a fully loaded handgun. He then shot at law enforcement officers who were there doing what the people of the United States ask them to do, investigate crime and protect society.

JA 849. Critically, defense counsel omits the latter portion of the government's argument:

You know, counsel says, oh, thankfully he pulled out his gun. *What?* If [the defendant] hadn't pulled out his gun we wouldn't be here today. He wouldn't have been shot.

JA 849. When the entirety of the argument is considered, it is clear that the government's statement was directed, in combination, at the defendant's display of emotion on the stand, defense counsel's audacious assertion during closing argument that, "thankfully [the defendant was] able to reach and ultimately get his gun," and in direct response to defense counsel's argument, "[b]ut I guess [the defendant] wasn't that good at getting out that gun, because . . . he got shot twice, *if you accept his testimony as credible*, before his gun was fired at all." JA 829 (emphasis added).

The defendant never stated that he was shot before he fired his weapon and repeatedly testified¹ that he was unclear who fired first. Thus, counsel's argument essentially misstated the record in a way that could inflame the jury into inferring a ground for motive or bias that the jury clearly found did not exist. The government's response was therefore entirely appropriate.

III. The district court properly admitted evidence regarding the defendant's firearm ownership and knowledge of the gambling operation

The defendant next claims that the admission of evidence regarding firearm ownership and his affiliation with the gambling operation at Buzz's Mobil warrants a new trial. With respect to the firearm evidence, the defendant alleges that it was neither relevant nor probative. With respect to the gambling evidence, the defendant argues, in blatant contradiction to the evidence, that the government failed to "deliver on its proffer to the court" that the defendant was affiliated with the gambling operation. Def. Br. 55. The defendant's claims lack merit.

¹ The defendant testified: "I went for my weapon, and then shots were fired, I don't know who shot first, and I felt pain in my left wrist." JA 709. And later: "I pulled it up and I grabbed my gun, pulled it out and I pointed it, and fired. The gunshots went off, and I don't know who shot first." JA 711.

A. Impeachment by contradiction

“Central to the proper operation of the adversary system is the notion that ‘when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth.’” *United States v. Garcia*, 936 F.2d 648, 653 (2d Cir. 1991) (quoting *United States v. Havens*, 446 U.S. 620, 626-27 (1980)). Where a defendant testifies at trial and makes a false or misleading statement, the government may refute the testimony on cross-examination, or in its rebuttal case, by introducing evidence of the defendant’s involvement in other crimes and bad acts. Under the “impeachment by contradiction” doctrine, the government is entitled to introduce extrinsic evidence that proves the testimony is false. *See United States v. Castillo*, 181 F.3d 1129, 1132-33 (9th Cir. 1999); *United States v. Beverly*, 5 F.3d 633, 639-40 (2d Cir. 1993); *United States v. Garcia*, 900 F.2d 571, 575-76 (2d Cir. 1990). “Although Rule 608(b) generally prohibits extrinsic evidence of specific instances of conduct, an exception to that rule exists when evidence contradicts a witness’s testimony.” *United States v. Rodriguez*, 539 F. Supp. 2d 592, 595 (D. Conn. 2008); *see also Castillo*, 181 F.3d at 1132-33. “This approach has been justified on the grounds that the witness should not be permitted to engage in perjury, mislead the trier of fact, and then shield himself from impeachment by asserting the collateral-fact doctrine.” *Id.* at 1133 (quoting 2A Wright & Gold, *Federal Practice and Procedure*, § 6119 at 116-17 (1993)). Technically speaking, such collateral impeachment evidence is admissible under Rule 607, not

608(b). *Id.*; *United States v. Benedetto*, 571 F.2d 1246, 1250 (2d Cir. 1978).

Moreover, where a defendant testifies and “offers an innocent explanation [of events] he ‘opens the door’ to questioning into the truth of his testimony, and the government is entitled to attack his credibility on cross-examination.” *United States v. Payton*, 159 F.3d 49, 58 (2d Cir. 1998). “Once a defendant has put certain activity in issue by offering innocent explanations for or denying wrongdoing, the government is entitled to rebut by showing that the defendant has lied.” *Beverly*, 5 F.3d at 639. In doing so, the government may use in its cross-examination or rebuttal case evidence that would otherwise be barred from use. *See id.* at 640; *United States v. Atherton*, 936 F.2d 728, 734 (2d Cir. 1991); *Walder v. United States*, 347 U.S. 62, 65-66 (1954). While the government cannot manipulate its questions on cross-examination to entice a defendant into opening the door to extrinsic evidence, a defendant may open such a door when testifying on direct and cross-examination alike. *See Castillo*, 181 F.3d at 1133-34; *Atherton*, 936 F.2d at 734; *Havens*, 446 U.S. at 627.

In applying this doctrine, this Court has permitted the admission of otherwise objectionable evidence in the following circumstances: evidence of the defendant’s involvement in prior shootings, after the defendant falsely testified that he was a law-abiding citizen who had no familiarity with guns and never possessed one, *Beverly*, 5 F.3d at 639-40; evidence of the defendant’s involvement with organized crime members and drug traffickers, after

he claimed that he believed he was involved in a phony drug sale, *United States v. Gambino*, 951 F.2d 498, 503-04 (2d Cir. 1991); evidence of the defendant's association with organized crime and involvement in a prior extortion threat, after he testified that his association with crime figures was by chance, *United States v. Bufalino*, 683 F.2d 639, 647 (2d Cir. 1982); and evidence of the defendant's involvement in uncharged bribes, after he denied ever taking bribes from anyone, *Benedetto*, 571 F.2d at 1250.

In the case at bar, the defense repeatedly “opened the door” to the admission of the gambling evidence. First, in his opening statement, counsel claimed that the defendant acted in self-defense thus offering an “innocent explanation” for the defendant's actions. JA 59, 62. Defense counsel stated that his client's motive for shooting at the police was based on a mistaken belief that he was being robbed and that his sole intent was to protect himself. JA 59, 109-110, 568-577. Defense counsel then sought to bolster the “robbery theory” by alleging in his opening that Buzz's Mobil was located in a high crime area, and then by questioning myriad witnesses, including Sergeant Gonzalez, at length about the neighborhood around Buzz's Mobil in an effort to prove that it was a high crime area. JA 572-574. Instead, his questioning succeeded only in establishing that Sergeant Gonzalez, a lifelong resident of Bridgeport with a 23-year career in the police department, did not consider Buzz's Mobil to be located in a high crime area. JA 572-574.² Finally, counsel

² The defendant himself undercut the dangerous
(continued...)

claimed in opening that the defendant was a hard-working man with two jobs, implying that the defendant would have no motivation to commit the crimes charged in the indictment. JA 59-60.

The first government witness, Agent Lauer, testified regarding the background of the gambling investigation that led to the service of the search warrant at Buzz's Mobil. JA 78-79. On cross-examination, the defense attempted to elicit from Agent Lauer that the defendant was not present at Buzz's Mobil when a confidential informant placed bets at the gas station. JA 140-141. Counsel then questioned Detective Hammel about surveillance conducted at the gas station prior to October 1, 2007, in an effort to highlight that the defendant was not the target of the gambling investigation. JA 657. Such questioning was clearly intended to demonstrate that the defendant was not present for, and therefore had no knowledge of or involvement in, the gambling activity. Further, the defense cross-examined Agent Lauer, Detective Murray and Lieutenant Kohloff about whether they conducted a search at Buzz's Mobil, but did not conduct such an inquiry of CSP Detective Matt Reilly, the only officer who could actually testify that gambling material was recovered from the location. JA 115, 229, 387-388, 497-524. As a result, the defense left the jury with the mistaken perception either that the search was

² (...continued)

neighborhood theory when he testified that he left the keys to his truck inside the vehicle, which he parked in the gas station lot. JA 747.

never conducted or that, if conducted, no gambling evidence was recovered.

The defendant then testified to a variety of statements intended to suggest that he was a law-abiding person, working in a high crime area, whose conduct, *i.e.*, shooting at the officers, had an innocent explanation. Specifically, the defendant testified that he had been employed for thirty years, and that on October 1, 2007, he was working at Buzz's Mobil when he was attacked by an "unknown assailant." JA 676-678, 682. In addition, the defendant testified that, in order to repel the alleged attack, "I pulled my gun out. I was wearing a gun, a *registered* gun" and "shots went off" and referenced the "gun permit" that was recovered from his pocket. JA 678, 682 (emphasis added). Finally, the defendant testified that he had never had "negative contact with the police" and that he had friends and customers who were police officers, presumably trying to bolster his law-abiding character by association with law enforcement officers and to demonstrate that he would not intentionally harm an officer. JA 689-690. The defendant failed to acknowledge during his direct examination that he had been drinking alcohol immediately before the incident, even while carrying his weapon.

On cross-examination, the government asked the defendant about his affiliation with the gambling operation to rebut the suggestion that he was a law-abiding citizen and the innocent explanation tendered for his actions. *See Rodriguez*, 539 F. Supp. 2d at 595. The defendant claimed that he was not a part of and had never seen evidence of

such an operation at the gas station. The defendant also denied his out-of-court admission to Agent Lauer that he had, in fact, assisted in the gambling operation. JA 721-722, 724-725.

Accordingly, the government was entitled to offer evidence that directly contradicted the defendant's testimony. Such evidence included the defendant's prior admissions that he assisted in the gambling operation and the gambling documentation recovered from the desk in Buzz's Mobil to which the defendant had access during his 16-year tenure at the gas station. As in *Beverly*, the court here did not abuse its discretion in admitting the evidence to discredit the defendant's self-depiction as a law-abiding citizen. *See Beverly*, 5 F.3d at 640.

Similarly, because the defendant testified on direct examination that he was carrying a "registered gun," the government was entitled to rebut the false implication that he would possess only weapons he was legally entitled to own. The government accordingly cross-examined the defendant about whether he owned many weapons that were registered in other individuals' names.³ The defendant did not object to the government's questions regarding his possession of weapons. JA 696-697. Rather,

³ The defendant moved pre-trial to preclude the introduction of evidence in the government's case-in-chief regarding 17 weapons that were recovered from the defendant's house pursuant to a search warrant executed the day after the shooting. The defense *did not* move to preclude the admission of such evidence in the defense case or on rebuttal.

the defense objected only when the government specifically asked the defendant on cross-examination about the “power” of the Taurus that he used to shoot at the officers. JA 697. That objection was sustained.

Finally, the defendant incorrectly alleges that the government offered no evidence that he had been drinking alcohol before the shooting, and complains about the government’s argument that alcohol may have given him a false sense of bravado. In actuality, on cross-examination, the defendant admitted that he consumed a 16-ounce beer shortly before his gas station shift and that he then drank another beer at work. JA 702. Thus, the government’s argument was a reasonable inference from the evidence. Moreover, the defense failed to object either to the questions regarding the defendant’s consumption of alcohol or to the government’s argument. JA 702-703, 847. There was no legal error, let alone plain error.

B. Evidence regarding the defendant’s knowledge of and participation in the gambling operation was also properly admitted pursuant to Federal Rule of Evidence 404(b)

Rule 404(b) of the Federal Rules of Evidence provides, in pertinent part:

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. . . .

In *Huddleston v. United States*, 485 U.S. 681, 687 (1988), the Supreme Court outlined the test for admitting other act evidence under Rule 404(b). First, the evidence must be offered for one of the identified proper purposes, such as proof of knowledge, intent or absence of mistake or accident. Second, the offered evidence must be relevant to an issue in the case. Third, the probative value of the other act evidence must substantially outweigh the potential for unfair prejudice. Fourth, if requested to do so, the court must give an appropriate limiting instruction to the jury. *Id.*; see also *United States v. Ramirez*, 894 F.2d 565, 568 (2d Cir. 1990).

“The Second Circuit evaluates Rule 404(b) evidence under an ‘inclusionary approach’ and allows evidence ‘for any purpose other than to show a defendant’s criminal propensity.’” *United States v. Garcia*, 291 F.3d 127, 136 (2d Cir. 2002) (quoting *United States v. Pitre*, 960 F.2d 1112, 1118 (2d Cir. 1992); and citing *United States v. Tubol*, 191 F.3d 88, 95 (2d Cir. 1999)). The reason for the “inclusionary approach” is simple. Where Rule 404(b) evidence will help the jury determine the truth about events and the accuracy of the government’s evidence, the evidence should be admitted with the appropriate limiting instructions. See *Garcia*, 291 F.3d at 136.

For example, in *United States v. Inserra*, 34 F.3d 83 (2d Cir. 1994), a prosecution for false statements, the

defendant put his state of mind into issue when, as in the case at bar, defense counsel claimed during opening statement that there was an innocent explanation for the defendant's conduct. *Id.* at 89. The Court approved the admission of prior bad act evidence, explaining that it provided a reasonable basis for inferring criminal intent in contradiction to the defendant's "innocent explanation" for his conduct. *Id.*; *see also United States v. Aminy*, 15 F.3d 258, 260 (2d Cir. 1994). The *Inserra* Court explained that this type of evidence is appropriately admitted even during the government's case-in-chief when "it is apparent that the defendant will dispute" intent, as the defendant did here. *Id.* at 90; *see United States v. Zackson*, 12 F.3d 1178, 1183 (2d Cir. 1993).

Similarly, it has long been established that it is appropriate to admit proof of motive unless its probative value is substantially outweighed by the risk of prejudice from its admission. *See, e.g., Pointer v. United States*, 151 U.S. 396 (1894); *United States v. Birney*, 686 F.2d 102, 106 (2d Cir. 1982). A district court has broad discretion to admit evidence pursuant to Rule 404(b), and the district court's decision will not be overturned absent a clear showing of abuse of discretion. *Inserra*, 34 F.3d at 89; *see United States v. Rodriguez*, 925 F.2d 1049, 1053 (7th Cir. 1991) (evidence of defendant's gang membership admitted to show defendant's motive for committing a robbery; *see also United States v. Felix-Gutierrez*, 940 F.2d 1200, 1207 (9th Cir. 1991) (evidence of defendant's relationship to drug trafficking organization admissible because it tended to establish defendant's motive for being accessory-after-the-fact to murder).

Here, the government bore the burden of disproving the defendant's claim of self-defense. Therefore, the court permitted the government, in rebuttal, to introduce the defendant's admissions regarding his knowledge of and participation in the gambling operation, as well as the gambling evidence recovered from Buzz's Mobil, as evidence tending to establish the defendant's motive and intent when shooting at Detective Murray. JA 728. Under the *Huddleston* test, the court properly allowed the introduction of such evidence.

First, the evidence was relevant to a contested issue. As this Court has explained:

To be relevant, evidence need only tend to prove the government's case, and evidence that adds context and dimension to the government's proof of the charges can have that tendency. Relevant evidence is not confined to that which directly establishes an element of the crime.

United States v. Gonzalez, 110 F.3d 936, 941 (2d Cir. 1997). In *United States v. Coonan*, 938 F.2d 1553 (2d Cir. 1991), the Court explained that:

the trial court may admit evidence that does not directly establish an element of the offense charged, in order to provide background for the events alleged in the indictment. Background evidence may be admitted to show, for example, the circumstances surrounding the events or to

furnish an explanation of the understanding or intent with which certain acts were performed.

Id. at 1561 (quoting *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988)).

The defendant's admissions in this case were highly relevant to the crime with which he was charged. As in *Coonan* and *Gonzalez*, the defendant's awareness of the criminal activity afoot at the gas station elucidated his state of mind at the time the officers arrived on scene. As the government argued in summation, the defendant was aware of, and had participated in, the gambling operation. It was therefore reasonable to conclude that the defendant was aware that the police were likely to investigate the criminal activity. Thus, the evidence provided important background for the events charged in the indictment and tended to establish the defendant's motive for acting to prevent the discovery of evidence related to the gambling operation and resisting arrest.

Second, as in *Gonzalez*, the evidence added context and dimension to the government's proof of the charges. In particular, the government was required to prove that the defendant intended to kill the officers and that shooting at them was not an innocent act or one done "by mistake." Therefore, while motive was not an element of the crime, it was clearly relevant to establishing intent, a necessary element of the government's proof. *See United States v. Teague*, 93 F.3d 81, 84 (2d Cir. 1996) (where defendant claims his conduct has an innocent explanation, prior act evidence is admissible to prove that defendant acted with

state of mind necessary to commit offense charged, especially where prior conduct culminated in commission of crime that the defendant is charged with *intending* to commit). The defendant's knowledge of, and participation in, the gambling operation was therefore highly relevant to the jury's understanding of the defendant's intent when he shot at the officers. If the court had precluded the defendant's admissions, the jury would have been affirmatively misled by the defendant's claim that he was a hard-working family man with no motive to shoot the officers combined with his claim of self-defense.

Third, the highly probative value of the prior act evidence substantially outweighed the potential for unfair prejudice. In this regard, "the appellate court 'must look at the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.' To find abuse, the appellate court must find that the trial court acted arbitrarily or irrationally." *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983) (citations omitted). Where evidence is probative under Rule 404(b), that evidence may be excluded under Rule 403 only if the risk of undue prejudice *substantially outweighs* the probative value of the evidence. *See Garcia*, 291 F.3d at 136; *see also Tubol*, 191 F.3d at 95. The defendant here was charged with extremely serious and violent crimes, including attempted murder of two law enforcement officers. It cannot reasonably be argued that the defendant's admission that he assisted in a gambling operation was unduly prejudicial in the face of such charges. The Rule 403 balancing test clearly favored

admissibility of the evidence and, as such, the district court did not abuse its discretion.

Finally, to the extent that the jury might rely on the evidence for an improper basis, the court provided a limiting instruction that sufficiently cured any potential prejudice resulting from the admission of such evidence. JA 871-872.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, the verdict reinstated and the matter remanded for sentencing.

Dated: August 25, 2009

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 7,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 6,952 words, exclusive of the Table of Contents, Table of Authorities

A handwritten signature in black ink, appearing to read "Tracy Lee Dayton", with a long horizontal flourish extending to the right.

TRACY LEE DAYTON
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Case Name: U.S. v. Bell

Docket Number: 08-5506-cr

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