

11-5308

To Be Argued By:
JOSEPH VIZCARRONDO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-5308

—
UNITED STATES OF AMERICA,

Appellee,

-vs-

MOHAMED KASSORY BANGOURA,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID B. FEIN
*United States Attorney
District of Connecticut*

JOSEPH VIZCARRONDO
Special Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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Statement of Jurisdiction

The district court (Robert N. Chatigny, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on December 20, 2011. Appellant's Appendix 14 ("MB_"). On December 21, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). MB15, MB24. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issue
Presented for Review**

Did the district court commit plain error in failing to give an instruction requiring jurors to find evidence of uncharged “other acts” evidence proven beyond a reasonable doubt when such a charge does not accurately state the law?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-5308

UNITED STATES OF AMERICA,
Appellee,

-vs-

MOHAMED KASSORY BANGOURA,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Following a jury trial, the defendant, Mohamed Kassory Bangoura, was convicted on one count of making a false statement in an immigration document, in violation of 18 U.S.C. § 1546(a). Specifically, Bangoura was convicted of falsely stating, in a 2007 immigration application, that he had lived in Brooklyn, New York, since 2005 when in fact he had lived in Connecticut throughout that time.

The government established that Bangoura’s residency claim was the lynchpin of a plan to speed the immigration process and lessen scrutiny of his application by convincing immigration officials that he was then in a bona fide marriage and sharing a joint household (in Brooklyn) with a United States citizen. In proving that Bangoura lied to immigration officials with deliberation, intent, and knowledge, the government presented evidence that Bangoura sought both to bolster and conceal his lie by obtaining government identity cards, household utility bills, lease documents, and tax records all bearing his false Brooklyn address. In addition, the government presented evidence that Bangoura previously misrepresented his address in other immigration paperwork and in-person interviews.

Bangoura objected to the admission of much of this evidence, claiming that it was unfairly prejudicial evidence of prior bad acts. The district court allowed the evidence, but in an abundance of caution, instructed the jury that it could consider the uncharged conduct only for limited purposes. On appeal, Bangoura argues—for the first time—that the court should also have instructed the jury that it could not consider the “other acts” evidence unless it first found “beyond a reasonable doubt” that Bangoura committed the uncharged conduct.

As set forth below, the district court did not plainly err in failing to give such an instruction,

primarily because Bangoura's proposed instruction does not accurately reflect the law. Moreover, Bangoura can show no prejudice from the alleged error. Accordingly, the district court's judgment should be affirmed.

Statement of the Case

On August 24, 2010, a federal grand jury returned an indictment charging the defendant with one count of making a false statement in an immigration document, in violation of 18 U.S.C. § 1546(a). MB5, MB20-21. On October 3, 2011, after a four-day jury trial, the jury found Bangoura guilty. MB11.

On December 19, 2011, the district court (Robert N. Chatigny, J.) sentenced Bangoura to 6 months' imprisonment. MB14. Judgment entered December 20, 2011, MB14, MB22-23; the following day, Bangoura filed a timely notice of appeal, MB15, MB24.

Bangoura has served the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

On August 14, 2003, Bangoura entered into a sham marriage with Jeanna Watson, a United States citizen, for purposes of obtaining unconditional permanent residency. *See* Government

Appendix 423 (“GA__”), GA427, GA445. Bangoura and Watson filed the relevant immigration petitions within weeks of their marriage. *See* GA138-41, GA149. But, due to an administrative backlog, they were not scheduled for an interview with the Citizenship and Immigration Service (“CIS”) until June 2005. GA150-52. On June 6, 2005, following an interview with a CIS officer, Bangoura’s petition for permanent resident status was approved, *see* GA152; however, because his status as a permanent resident had been approved solely on the basis of marriage, that status was conditional, subjecting Bangoura to a two-year probationary period. GA152-53. Federal law required that at the end of that two-year period Bangoura file a Form I-751, Petition to Remove Conditions on Residence. 8 U.S.C. § 1186a(c)(1); GA132, GA152-53.

The Form I-751 was designed to probe into and confirm the continuing validity of the underlying marriage—a purpose expressly stated on the form, which required the immigrant and his spouse to certify, under penalty of perjury, that the marriage was valid. *See* GA155-56. At trial, a CIS supervisor further explained that the questions on the I-751 form were intended to help root out and expose sham marriages. GA132 (“In 1986 Congress passed the Marriage Fraud Amendment . . . to make sure that individuals weren’t entering into marriages fraudulently just to obtain permanent residence. So to

prevent fraud in marriages they added this two-year condition. . . . Eventually when [the aliens] file the I-751 petition, they have to provide evidence of a bona fide ongoing marital relationship.”), GA156-57. To do so, the CIS Form I-751 asked, among other things, whether or not the petitioner and the citizen-spouse had resided together continuously since the petitioner had obtained his permanent resident card, the so-called “green card.”¹ GA156. Specifically, that form asked: “Have you resided at any other address since you became a permanent resident?” GA156.

¹ As explained at trial, in addition to questions concerning residence, federal law (8 C.F.R. § 1216.4(a)(5)) further requires that the I-751 petition be accompanied by corroborating evidence that the marriage was not entered into for the purpose of evading the immigration laws of the United States. This type of evidence could include, among other things: “(i) Documentation showing joint ownership of property; (ii) Lease showing joint tenancy of a common residence; (iii) Documentation showing commingling of financial resources; (iv) Birth certificates of children born to the marriage; (v) Affidavits of third parties having knowledge of the bona fides of the marital relationship; or (vi) Other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.” 8 C.F.R. § 1216.4(a)(5); *see* GA160-62.

In May 2007, at the end of the two-year waiting period, Bangoura filed his Form I-751 with CIS. GA155. On the question about whether he had changed addresses since becoming a permanent resident, Bangoura answered “no,” indicating that since obtaining his permanent resident card in June 2005, he had not resided anywhere but with Watson at her home at 518 Pennsylvania Avenue, Apt. 3A, Brooklyn, New York. GA156. As the jury learned, however, that statement was false.

The trial evidence demonstrated that Bangoura did not live in Brooklyn, but rather had lived continuously in West Haven, Connecticut. For example, Richard Schneider, a real-estate property manager in West Haven testified that in 2001, Bangoura leased an apartment at 54 Glade Street in West Haven, Connecticut, and had resided there ever since. GA243. At trial Schneider authenticated the 2001 Glade Street lease bearing Bangoura’s signature and testified that in the course of his duties he interacted with Bangoura regularly. GA243-48. Also admitted into evidence were utility records and witness testimony from the United Illuminating Company, the electric utility supplier for Bangoura’s West Haven apartment, showing that Bangoura had been a utility customer since 2002. GA305-12.

Next, witnesses testified that from 2001 through August 2010, Bangoura was employed

at a “Sam’s Club” in Orange, Connecticut. GA544. Finally, records and witness testimony from the Connecticut Department of Motor Vehicles (“DMV”) showed that Bangoura obtained a Connecticut non-driver identification card in 1999, GA323-24, and a driver’s license in 2004, GA327-28. Those records further showed that Bangoura renewed his driver’s license in 2010, GA329, and that he registered several Connecticut-based vehicles with the state between 2001 and 2009. GA330-33.

To prove that Bangoura’s I-751 response on the residency question was a deliberate and knowing deception and not the result of mistake, confusion, or an ambiguity in the question, the government introduced Bangoura’s own documentary submissions to CIS. *See, e.g.*, GA186-93, GA198-205, GA446. Because Bangoura had submitted those documents as proof that he was—and had been—residing in Brooklyn, the government sought to prove that those submissions were obtained by fraudulent means or were otherwise unreliable:

- Bangoura submitted a lease purporting to show that he was a long-standing tenant at 518 Pennsylvania Avenue, Brooklyn, New York. GA203-04, GA452-53. The property manager for Watson’s Brooklyn apartment testified, however, that Bangoura was not a resident at 518 Pennsylvania Avenue, GA268, GA276; that he was

not the tenant of record, GA272-73; and that the lease submitted to CIS was not the genuine lease for that property, GA268-69, GA284-85. Similarly, Richard Schneider, Bangoura's West Haven landlord, testified that he had never managed property in Brooklyn, New York, and that the Brooklyn lease document bearing his signature was a forgery. GA249-50.

- Bangoura submitted bank records purporting to show that he and Watson lived together and had joined their finances. GA204, GA449-50. A custodian for the bank testified, however, that those accounts showed very little genuine joint-banking activity. GA356-64, GA370-72.
- Bangoura submitted a New York non-driver identification card, bearing the Brooklyn address. GA187-88. An official from the Connecticut DMV testified, however, that if Bangoura really had a New York identification card, he would not have been allowed to obtain a Connecticut license. GA336, GA348.
- Bangoura submitted additional documents purporting to show that he lived in Brooklyn. GA188-92, GA200-203, GA383-85, GA444, GA452, GA455-56. Jeanna Watson testified, however, that these documents, including Bangoura's joint, amended tax returns (GA444-45), Brook-

lyn utility bills (GA443-44), and photographs (GA490-99) were false or misleading. Both Watson and her daughter, Shameka Watson, testified that Bangoura had never resided at 518 Pennsylvania Avenue. GA387-88, GA432, GA453, GA541.

B. Bangoura's objection to the introduction of certain pieces of evidence, and the resolution of that objection by the court.

Prior to trial, the government notified Bangoura that it intended to introduce evidence of Bangoura's sham marriage and his submission of fraudulent supporting documents to CIS. *See* GA49, GA62. The government argued that such evidence was intrinsic to the charged crime or otherwise admissible for proper purposes as set forth in Federal Rule of Evidence 404(b). GA65-69, GA71-76, GA79-91.

Bangoura moved to preclude admission of this evidence, *see* GA49-53, and at a pre-trial hearing, argued that the evidence of uncharged conduct improperly expanded the scope of the charged offense. GA69-71. In response, the government argued that Bangoura's ancillary frauds underlay the false façade of a single, shared household. GA65-69, GA71-76, GA79-91. As such, according to the government, the sham marriage, as well as the fraudulent documents submitted to CIS as proof of joint residence, were acts intrinsic to his ultimate misrepresen-

tation on the Form I-751. GA65-69, GA71-76, GA79-91.

Alternatively, the government argued that even if Bangoura's historical misconduct was extrinsic to his 2007 misrepresentation, such evidence was critical to demonstrate beyond reasonable doubt essential elements of the charged crime, namely Bangoura's knowledge and absence of mistake in concealing the fact that he had been making a separate home in Connecticut, not New York. GA74-75, GA84-86. Accordingly, as an alternative, the government sought admission of the evidence for the limited purposes set forth in Rule 404(b). GA74-75, GA84-86.

The following day, September 28, 2011, the court ruled for the government, finding that Bangoura's sham marriage and his fraudulent submissions to CIS were intrinsic to and inextricably intertwined with the charged offense and thus not subject to the limitations of Rule 404(b). GA90. Alternatively, the court found that inquiry into that conduct was also warranted under Rule 404(b), and that in either case, the probative value of such evidence outweighed its potential prejudice. GA90-91. The court stated in relevant part as follows:

With regard to Rule 404(b) and the admissibility of evidence of a sham marriage and other acts, I've considered the issue overnight and I'm satisfied that the other acts evidence we discussed yesterday af-

ternoon is not extrinsic within the meaning of Rule 404(b) but is instead intrinsic.

I also think that if it can be deemed extrinsic, the evidence is nevertheless admissible, generally speaking, because it is not offered solely to prove character. It is offered to prove certain consequential facts, including knowledge, and the prejudicial effect counsel cites is possibly a concern, but the prejudicial effect does not substantially outweigh the probative value of the evidence under Rule 403. As a result, I think that this body of other acts evidence is generally admissible.

GA90-91. Although the court ruled generally in favor of the government, it noted that it would consider giving a limiting instruction. GA91.

[I]f you want me to give the jury an instruction that will help guard against misuse of this evidence, I'll be happy to consider that too. But I frankly don't see a great risk of undue prejudice. I don't think that this evidence is likely to inflame the jury or cause them to decide the case on some improper basis.

GA91.

In response to this invitation, defense counsel drew the court's attention to the proposed limiting instruction he had included in his motion in

limine. GA91-92, This proposed instruction read as follows:

- (1) You have heard testimony that the defendant committed some acts other than the ones charged in the indictment.
- (2) You cannot consider this testimony as evidence that the defendant committed the crime that he is on trial for now. Instead, you can only consider it in deciding whether [insert purpose]. Do not consider it for any other purpose.
- (3) Remember that the defendant is on trial here only for making a false statement on an immigration document, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged beyond a reasonable doubt.

GA51-52. Defense counsel noted that he wanted to “massage[]” the language a bit, GA91-92, and the court agreed to allow an additional, revised submission. GA92.

On October 1, 2011, prior to the charge conference, Bangoura filed a second proposed 404(b) limiting instruction:

You have heard evidence of uncharged conduct that the defendant previously committed acts similar to those charged in this indictment. You may not use this evidence to infer that, because of his charac-

ter, the defendant carried out the acts charged in this indictment. You may consider this evidence only for the limited purpose of deciding:

(1) Whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment;

Remember, this is the only purpose for which you may consider evidence of the defendant's uncharged conduct. Even if you find that the defendant may have committed similar acts in the past, this is not to be considered as evidence of character to support an inference that the defendant committed the acts charged in the indictment.

GA54-55.² The government did not object to the inclusion of the pattern instruction. GA581, GA593.

The court reiterated its determination that Rule 404(b) did not apply, GA595, and characterized the inclusion of Bangoura's proposed limiting instruction as "generous," stating:

In fact, I ruled that the evidence is intrinsic, not extrinsic and, thus 404(b) does not apply.

² This proposed instruction appears to have been based on the First Circuit's pattern jury instruction for Rule 404(b) evidence. *See* GA806.

* * *

So what I propose to do is amend this charge, which again I think is a generous charge, to state that you may consider this evidence only for the limited purpose of deciding whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment; whether he acted knowingly; and whether there was an absence of mistake or accident.

GA595-96. Defense counsel then noted that with the inclusion of this instruction, he had no objection to the jury charge. GA601.

C. The jury charge

As agreed upon, the district court ultimately delivered a modified version of Bangoura's proposed limiting instruction. Prior to doing so, however, the court identified the charged conduct:

Count One of the indictment alleges, quote: On or about May 30, 2007 in the District of Connecticut and elsewhere, the defendant, Mohamed Kassory Bangoura, did knowingly make under penalties of perjury, a false statement with respect to a material fact in an application, that is, in a form I-751 petition to remove conditions on residence. The defendant stated that since

becoming a legal permanent resident he had not resided at any address other than an address in Brooklyn, New York, which statement the defendant then and there knew was false in that he had been residing and was residing at an address in West Haven, Connecticut.

GA610. As the court defined each of the elements of the charged offense, it instructed repeatedly that the jury should convict the defendant only if the government proved each element beyond a reasonable doubt. GA610, GA611-14; *see also* GA615.

The court then delivered the requested limiting instruction as follows:

You have heard evidence of uncharged conduct, that is evidence that the defendant previously committed acts similar to those charged in the indictment. You may not use this evidence to infer that because of his character the defendant carried out the acts charged in the indictment. You may consider this evidence only for the limited purposes of deciding: One, whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment; two, whether he acted knowingly; and three, whether there was an absence of mistake or accident.

Remember, these are the only purposes for which you may consider evidence of the defendant's uncharged conduct. Even if you find that the defendant may have committed similar acts in the past, this is not to be considered as evidence of character to support an inference that the defendant committed the acts charged in the indictment.

GA615-16.

D. Post-trial challenges to the admission of evidence

On October 3, 2011, the jury convicted Bangoura on the single charge in the indictment. MB11. One month later, on November 4, 2011, Bangoura filed post-trial motions seeking arrest of judgment, judgment of acquittal, and a new trial under Federal Rules of Criminal Procedure 34, 29, and 33, respectively. MB13. Each motion essentially argued that the admission of evidence concerning Bangoura's sham marriage and his submission of false documents to CIS constituted a variance from the indictment and resulted in unfair prejudice. GA773-87. The district court denied those motions at sentencing on December 19, 2011:

I'm denying these motions for substantially the reasons stated by the government in its papers, specifically its memorandum dated November 22 which sets forth the

relevant evidence and analyzes the applicable law.

Evidence that the government used to prove that Mr. Bangoura did not live in Brooklyn, New York, was properly admitted. The evidence establishes the defendant's guilt beyond a reasonable doubt. In fact, I think the evidence is overwhelming the defendant engaged in a scheme to obtain a green card through a sham marriage and the false statement at issue in the case was clearly material. There's no doubt that Mr. Bangoura knew what he was doing at the time. It's clear from the evidence that he wanted the officials to believe that he had not resided anywhere except Brooklyn. To my mind it's not a close question.

GA747-48.

Summary of Argument

In instructing the jury on its consideration of Rule 404(b) "other acts" evidence, the district court did not plainly err in failing to instruct the jury that it had to find the defendant committed those acts beyond a reasonable doubt. There was no error because facts underlying Rule 404(b) evidence need only be proved by a preponderance of the evidence.

But even if Bangoura's argument were understood to challenge the failure to instruct the jury *at all* on its obligation to find the Rule 404(b) acts, it would still fail. In this Circuit, it is within the trial court's discretion to give such an instruction.

Moreover, Bangoura can show no prejudice from the failure to give a Rule 404(b) "burden of proof" instruction. The court's instructions adequately informed the jury that it needed to find the "other acts" occurred, and the failure to instruct the jury that this only required a finding at the low preponderance-of-the-evidence standard did not prejudice the defendant. This is especially true here where the evidence easily established each of the "other acts" by a preponderance of the evidence.

Finally, because the evidence of Bangoura's guilt on the charged offense was overwhelming, he cannot show that any error from the missing instruction seriously affected the fairness or integrity of judicial proceedings.

Argument

I. The district court did not plainly err in failing to give an instruction that would have told the jury that it had to find uncharged conduct “beyond a reasonable doubt.”

Bangoura claims that the district court plainly erred in failing to instruct jurors that they could not consider prior “bad act” evidence without first finding, beyond a reasonable doubt, that the defendant committed those acts. Bangoura’s claim is premised on a misunderstanding of the law governing Federal Rule of Evidence 404(b) and is therefore without merit.

A. Governing law and standard of review

1. Jury instructions

This Court “review[s] a claim of error in jury instruction *de novo*, reversing only where, viewing the charge as a whole, there was a prejudicial error.” *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003). “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.” *United States v. Pimentel*, 346 F.3d 285, 301 (2d Cir. 2003) (citation and internal quotation marks omitted). 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).

2. Rule 404(b)

Rule 404(b) of the Federal Rules of Evidence limits the admissibility of evidence of other crimes, wrongs, or acts. At the time of Bangoura’s trial,³ it provided, 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 short, this rule prohibits the admission of “other act” evidence if it “prove[s] the character of a person” to show his propensity to commit the charged act, but permits its admission for other purposes. *United States v. Scott*, 677 F.3d 72, 77-79 (2d Cir. 2012).

³ Rule 404(b) was subsequently amended as part of a general restyling of the Rules of Evidence. The Advisory Committee notes indicate that the changes were stylistic only. See *United States v. Scott*, 677 F.3d 72, 77 n.4 (2d Cir. 2012) (noting that the changes were stylistic only).

Rule 404(b), however, does not apply to evidence that is intertwined with the charged offense:

[E]vidence of uncharged criminal activity is not considered other crimes evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial.

United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000) (internal quotation marks omitted); *Scott*, 677 F.3d at 77. Such “intrinsic evidence” falls outside the scope of Rule 404(b) and is admissible at trial where it tends to prove the existence of an element of the charged offense. See *United States v. Birbal*, 62 F.3d 456, 464 (2d Cir. 1995).

With respect the admission of evidence under Rule 404(b), this Circuit follows the “inclusionary” approach, which allows evidence of other acts “to be admitted for any purpose other than to demonstrate criminal propensity.” *Scott*, 677 F.3d at 79. Because the relevance of Rule 404(b) evidence often depends on the existence of another fact, the admissibility of that evidence turns on the requirements of Federal Rule of Ev-

idence 104(b), which, at the time of Bangoura’s trial,⁴ provided as follows:

When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

See Huddleston v. United States, 485 U.S. 681, 689 (1988). In *Huddleston*, the Supreme Court explained how this rule applies in the context of evidence admitted under Rule 404(b):

In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.

Id. at 690. This Court has held that district judges, in the exercise of their discretion, may,

⁴ As with Rule 404(b), Rule 104(b) was subsequently amended as part of the stylistic restyling of the Rules of Evidence. The Advisory Committee notes make clear that no substantive changes were intended by the restyling.

but need not, instruct jurors on the requirements of Rule 104(b). *United States v. Sliker*, 751 F.2d 477, 500 (2d Cir. 1984). In other words, the trial judge is not required to instruct the jury that it must find by a preponderance of the evidence that the defendant committed the similar act. *Id.*; *United States v. Hudson*, 884 F.2d 1016, 1021 (7th Cir. 1989).

To the extent that there is any potential for unfair prejudice from the admission of other act evidence, that risk is protected against by the four requirements for the admission of such evidence under Rule 404(b). *See Huddleston*, 485 U.S. at 691 (noting that “protection against . . . unfair prejudice emanates” from four requirements of Rule 404(b)). First, the evidence must be introduced for a proper purpose, such as proof of knowledge or identity. *Id.* Second, the offered evidence must be relevant to an issue in the case pursuant to Rule 402, “as enforced through Rule 104(b).” *Id.* Third, the evidence must satisfy the probative-prejudice balancing test of Rule 403. *Id.* Fourth, if the evidence of other acts is admitted, the district court must, if requested, provide a limiting instruction for the jury. *Id.* at 691-92.

3. Standard of review

Here, Bangoura argues that the district court erred in failing to give a jury instruction to guide the jury’s consideration of the Rule 404(b) evidence. He concedes, however, that he never

raised this objection below, and thus his current argument is limited to review for plain error. See Def. Br. at 12-13; Fed. R. Crim. P. 30(d) (“Failure to object [to a jury instruction or the court’s failure to give an instruction] in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).”).

Where a defendant has forfeited a legal claim, this Court engages in “plain error” review pursuant to Fed. R. Crim. P. 52(b). Under plain error review, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); see also *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Wagner-Dano*, 679 F.3d 83, 94 (2d Cir. 2012). “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it” *Wagner-Dano*, 679 F.3d at 94 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.*

This Court has made clear that “plain error” review “is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings.” *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, “[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant’s failure to object.” *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

B. Discussion

Bangoura cannot show that the district court committed plain error by failing to instruct the jury that it could not consider prior “bad act” evidence without first finding that the defendant committed those acts beyond a reasonable doubt. There was no error, much less plain error, in the court’s failure to give Bangoura’s requested in-

struction. Moreover, Bangoura can show no impact on his substantial rights from the failure to give an erroneous instruction.

- 1. There was no error, much less plain error, because the instruction now proposed by Bangoura mis-states the law.**

Bangoura contends that the jury should have been instructed that it could not consider “other acts” evidence without first concluding that the defendant committed those acts beyond a reasonable doubt. There was no error in the court’s failure to give such an instruction because it is not an accurate statement of the law.

To be sure, the evidence of other acts in this case was relevant only if the defendant committed those other acts. But the government was not required to prove the existence of these facts beyond a reasonable doubt. As the Supreme Court held in *Huddleston*, evidence of “other acts” is admissible once the trial court determines that the “jury could reasonably find the conditional fact . . . by a *preponderance of the evidence*.” 485 U.S. at 690 (emphasis added). In other words, under *Huddleston*, the jury need only find the existence of the “other acts” by a preponderance of the evidence, not by the more stringent beyond-a-reasonable-doubt standard. Thus, the district court did not err, much less

commit plain error, by failing to instruct the jury on a “beyond-a-reasonable-doubt” standard.

And even if Bangoura were to argue—which he has not—that the court should have instructed the jury on its duty to find the “other acts” using the correct the legal standard (*i.e.*, a preponderance of the evidence), that argument would be foreclosed by *Sliker*, 751 F.2d at 500. In that case, this Court held that a trial judge’s decision to instruct the jury on the conditional relevancy requirements of Rule 104(b) was a matter of judicial discretion. *Id.* In sum, it is the law of this Circuit that in assessing Rule 404(b) evidence, jurors need not be instructed to find by a preponderance of the evidence that the defendant committed the uncharged conduct. *Id.*

2. Bangoura can show no impact on his substantial rights from the failure to give his requested instruction.

Bangoura can show no prejudice from the court’s failure to give a legally erroneous instruction. Similarly, he can show no prejudice from the court’s failure to instruct the jury that it had to find the other act evidence by a preponderance of the evidence.

As a preliminary matter, the jury was told that any factfinding relevant to the “other act” evidence was squarely within its province as the ultimate factfinder. In its limiting instruction for the Rule 404(b) evidence, the court instructed

the jury that “[e]ven if you find that the defendant may have committed similar acts in the past,” this evidence could not be considered as evidence of the defendant’s bad character. GA616 (emphasis added). This conditional language made clear to the jury that it could consider other act evidence but *only after* it determined that the defendant had committed those acts.

The Supreme Court came to a similar conclusion in *Estelle v. McGuire*, 502 U.S. 62 (1991). There, the Supreme Court reviewed a similarly worded limiting instruction for “other acts” evidence, which contained the conditional phrasing: “if the Defendant committed other offenses.” *Id.* at 73. That wording, the Supreme Court reasoned, “unquestionably left it to the jury to determine whether [the defendant] [had] committed the prior acts[.]” *Id.* Here, as in *Estelle*, the conditional language in the instruction “unquestionably” left to the jury to decide whether Bangoura had committed the other acts. Accordingly, any claim that jurors were not aware of their obligation to resolve the matter is without merit.

Moreover, there is no merit to the point that Bangoura suffered prejudice from the failure to tell the jury that it needed to find the other act evidence by a preponderance of the evidence. On this point, the Eighth Circuit’s decision in *United States v. Sparkman*, 500 F.3d 678 (8th Cir. 2007), is instructive. In *Sparkman*, the Court

ruled that the failure to expressly identify “preponderance” as the relevant standard did not amount to plain error, stating:

So long as the jury understands that it must actually find that the defendant did commit the other act before that evidence may be given weight, we see no reason why the jury must be told specifically to apply a preponderance of the evidence standard. *United States v. Hudson*, 884 F.2d 1016, 1021 (7th Cir. 1989); *United States v. Sliker*, 751 F.2d 477, 500 (2d Cir. 1984). The preponderance standard is the lowest standard of proof available in the law, so there is no likelihood that the defendant could be prejudiced by the application of an unduly lenient standard of proof. The jury was informed that it was the ultimate judge as to all factual issues, and it undoubtedly understood that there was a dispute concerning the credibility of [the witness’s] testimony. We see no reasonable likelihood that the instruction given by the court in this case led the jury to believe that it could consider Sparkman’s prior acts without finding that Sparkman actually committed the prior acts. Accordingly, we discern no error.

Sparkman, 500 F.3d at 685.

Here, as in *Sparkman*, the jury was instructed that it was the ultimate finder of fact. GA604,

GA605. And, as in *Sparkman*, there was no doubt at trial that Bangoura disputed much of the “other acts” evidence. *See* Def. Br. at 11 (“As a result of the trial court’s ruling, Mr. Bangoura was placed in the position of challenging most if not all of the uncharged ‘consequential facts.’”). Accordingly, as in *Sparkman*, the trial record in this case was more than sufficient to permit the court to dispense with the need for self-evident and axiomatic instructions.

In addition, there is no real doubt that even if the jury had been instructed on the preponderance standard that it would have found the underlying conditional facts under that standard. As set forth above, the government presented compelling and overwhelming evidence that Bangoura entered into a sham marriage and submitted false documents to CIS to obtain permanent residency. *See* Statement of Facts, Part A. Indeed, although Bangoura complains about the wealth of Rule 404(b) evidence against him, he identifies *no facts* that he believes the government failed to prove by a preponderance of the evidence, or even by the higher (and erroneous) standard of beyond a reasonable doubt. In short, Bangoura has identified no impact on the verdict from the court’s failure to give his requested instruction.

Bangoura appears to argue instead that he was prejudiced by the missing instruction because without such an instruction, it was possi-

ble that the jury convicted him based on evidence that did not rise to the level of “beyond a reasonable doubt.” The Supreme Court’s decision in *Huddleston* effectively forecloses this argument. In any trial involving Rule 404(b) evidence, the government must prove each element of the charged offense beyond a reasonable doubt, *Birbal*, 62 F.3d at 460, but must prove the “conditional facts” underlying the 404(b) evidence only by a preponderance of the evidence. *Huddleston*, 485 U.S. at 690. Here, consistent with these principles, the jury was repeatedly instructed that it had to find each element of the charged offense beyond a reasonable doubt. See GA610, GA611-14, GA615. The mere fact that there was a lower standard of proof for some conditional facts does not demonstrate that the jury could not follow its instructions with respect to the elements of the offense. See also *Brown v. Greene*, 577 F.3d 107, 111 (2d Cir. 2009) (noting that law does not require the government to prove each subsidiary fact beyond a reasonable doubt); *United States v. Viafara-Rodriguez*, 729 F.2d 912, 912 (2d Cir. 1984) (noting that the burden of proving facts “beyond a reasonable doubt” “does not operate upon each of the many subsidiary facts on which the prosecution may collectively rely to persuade the jury that a particular element has been established beyond a reasonable doubt”).

Bangoura also appears to argue that he was prejudiced by the admission of the Rule 404(b) evidence because it required him to defend the whole of his fraudulent scheme, rather than just the misrepresentation stated on the Form I-751. Def. Br. at 23-24. He further complains that the need to defend the “war on multiple fronts” “watered down” his single theory that the Form I-751 was ambiguous or confusing. Def. Br. at 24. In other words, according to Bangoura, his “confusion” defense was rendered less credible when viewed in the context of numerous instances of fraudulent conduct perpetrated over the course of several years.

As a preliminary matter, these claims of prejudice go more properly to the *admission* of the evidence, and not to the absence of a limiting instruction, but Bangoura does not purport to challenge the admission of the other act evidence on appeal. In any event, there is no doubt that the proper admission of the other act evidence made Bangoura’s case harder to defend. The reality that Bangoura was forced to confront the whole of his complex scheme at trial, however, does not establish prejudice to his substantial rights.

And moreover, the potential for unfair prejudice from the admission of the Rule 404(b) evidence was mitigated by the trial court’s strict compliance with Rule 404(b)’s requirements. As the Supreme Court explained in *Huddleston*, the

potential for unfair prejudice from the admission of Rule 404(b) evidence is reduced by the significant limits on the admissibility of that evidence. Before Rule 404(b) evidence may be admitted, the trial court must determine that it is admissible for a proper purpose, that it is relevant, and that it satisfies the prejudice-probative balancing test of Rule 403. *Huddleston*, 485 U.S. at 691. Further, if requested, the court must give a limiting instruction to the jury. *Id.* These protections were observed here. The court found that the evidence was admissible for a proper purpose and that it satisfied the Rule 403 balancing test. GA90-91. Moreover, at Bangoura's request, the court gave a limiting instruction to the jury. GA615-16. And although the court never expressly found that the evidence was relevant, there was no dispute on that point below. In sum, by strictly observing the limits on the admissibility of 404(b) evidence, the trial court effectively guarded against any unfair prejudice to the defendant from the admission of that evidence.

3. Bangoura cannot show that the fairness and integrity of the judicial proceedings were affected by the court's alleged error in light of the overwhelming evidence of his guilt on the charged offense.

As set forth in detail above, during the course of trial, the government introduced overwhelming evidence that Bangoura deliberately lied to immigration officers in an attempt to convince them that he and Jeanna Watson were sharing a life together in Brooklyn, New York. For example, Watson testified that she lived at 518 Pennsylvania Avenue with her family, but that Bangoura never lived there, GA431-32, and in fact, never even spent one night there or kept his possessions there, GA432. She further testified that throughout the relevant timeframe, Bangoura lived in Connecticut, and that when she needed to contact him, she would contact him at a Connecticut telephone number. GA432. Watson's testimony was corroborated by her apartment lease, which did not include Bangoura as a signatory. GA272-73.

Watson also provided evidence that Bangoura intended to deceive others that he was then residing with her at 518 Pennsylvania Avenue. In particular, Watson testified that Bangoura received occasional mail at her address, GA433-34, and that on two or three occasions prior to immigration interviews, Bangoura arrived at her

apartment to stage photographs depicting him together with Watson and her family, GA492. Similarly, Watson confirmed that she accompanied Bangoura to two separate in-person interviews with CIS, and that at both meetings the interviewer asked about their place of residence. GA528-29. Watson testified that on neither occasion did she object when Bangoura claimed to reside in her apartment, despite her knowledge that that representation was false. GA528-29.

Watson's testimony was further corroborated by the testimony of her daughter, Shameka Watson. Shameka Watson confirmed that Bangoura never resided at 518 Pennsylvania Avenue and that, to her knowledge, he had visited that apartment infrequently over the course of several years. GA383. Shameka further testified that Bangoura received mail addressed to him in Brooklyn, GA386, despite her understanding that Bangoura lived and worked in Connecticut, GA382.

Based solely on the testimony of Jeanna and Shameka Watson—the longstanding tenants of 518 Pennsylvania Avenue—the jury could have concluded beyond any reasonable doubt that Mohamed Bangoura never lived there. Accordingly, the jury's determination that Bangoura had, under penalty of perjury, made false representations to the contrary was well grounded. On this record, then, any error in failing to instruct the jury on the (low) burden of proof for

conditional facts did not undermine the integrity or fairness of judicial proceedings.

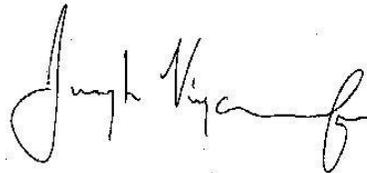
Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 13, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

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JOSEPH VIZCARRONDO
SPECIAL ASSISTANT
U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,153 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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JOSEPH VIZCARRONDO
SPECIAL ASSISTANT
U.S. ATTORNEY

ADDENDUM

Federal Rule of Evidence 104(b) (2011):

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Federal Rule of Evidence 404(b) (2011):

(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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.