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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GERALD THOMAS SCHRAM, Defendant-Appellant.	No. 17-30055 D.C. No. 1:14-cr-00457-MC-1 MEMORANDUM[*]

Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, District Judge, Presiding

Argued and Submitted July 11, 2018
Portland, Oregon

Before: WARDLAW and OWENS, Circuit Judges, and LEFKOW,[**] District Judge.

Gerald Schram appeals from his conviction for one count of Hobbs Act robbery in violation of 18 U.S.C. § 1951.[1] As the parties are familiar with the

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Joan H. Lefkow, United States District Judge for the Northern District of Illinois, sitting by designation.

[1] In a superseding indictment, Schram was also indicted for one count of bank robbery in violation of 18 U.S.C. § 2113(a). The events underlying the

facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

The district court committed plain error in allowing the government to introduce as identity evidence under Federal Rule of Evidence 404(b): (1) video clips of Schram with his hands handcuffed behind his back in the backseat of a police car, (2) audio clips of Schram being interviewed in an assault investigation, and (3) photographs of Schram at a police station. *See Puckett v. United States*, 556 U.S. 129, 135 (2009) (stating that plain error is demonstrated where the trial court's error has not been "affirmatively waived" by the appellant,[2] is "clear or obvious," has "affected the outcome of the district court proceedings," and "seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings") (alteration in original) (citation omitted)).

Under Rule 404(b), evidence of a defendant's prior crimes, wrongs, or other

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bank-robbery count were unrelated to the count indicting Schram for the Hobbs Act robbery. Schram entered a guilty plea on the bank-robbery count, conditioned on his right to appeal the district court's denial of his suppression motion filed in connection with that count. We dispose of Schram's appeal from the denial of his suppression motion in an opinion filed concurrently with this memorandum disposition.

[2] In the district court, Schram did not contend that the evidence was inadmissible under Rule 404(b) but argued that it was unfairly prejudicial under Rule 403. The government does not argue on appeal that Schram affirmatively waived, rather than forfeited, his Rule 404(b) argument, and so the government's waiver argument is forfeited. *See United States v. Doe*, 53 F.3d 1081, 1082–83 (9th Cir. 1995).

acts "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," Fed. R. Evid. 404(b)(1), but "may be admissible for another purpose, such as proving . . . identity," Fed. R. Evid. 404(b)(2). Because of the danger of admitting "propensity" evidence, this court requires the proponent to show that "(1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged." *United States v. Luna*, 21 F.3d 874, 878 (9th Cir. 1994). Where evidence revealing prior criminal conduct is introduced, as here, for the purpose of proving identity, we require that the evidence both (1) pertain to an act that is "similar[]" to the charged offense, and (2) be "sufficiently distinctive to warrant an inference that the person who committed the act also committed the offense at issue." *Id.* at 878–79 & n.1 (citation omitted).

Here, the video clips were taken from an unrelated traffic stop, and the audio clips came from an unrelated assault investigation. Neither a traffic stop nor an assault investigation is similar to the charged offense, robbery. *See id*. at 878 n.1. And while the photographs, taken when Schram was arrested for another robbery committed nearly nine months later, may pertain to a similar act, they were introduced to show that Schram, like the robber of the Minute Market he was

charged with robbing, had black shoes. This evidence was not "sufficiently distinctive" to warrant an inference that Schram also committed the Minute Market robbery. *See id.* at 881 (explaining that "common components" of a robbery, like "guns, masks, gloves, [and] bags," are too "generic" to "warrant an inference that the person who committed the uncharged acts also committed the offenses at issue" (alterations omitted)). The district court plainly erred in admitting all of this evidence.

Because the erroneously admitted evidence was prejudicial, and combined with the circumstantial nature of other evidence in the record, we conclude that the introduction of this evidence affected Schram's substantial rights. *Puckett*, 556 U.S. at 135. In *Michelson v. United States*, 335 U.S. 469 (1948), the Supreme Court explained that a "defendant's prior trouble with the law" is inadmissible as evidence "even though such facts might logically be persuasive that [the defendant] is by propensity a probable perpetrator of the crime." *Id.* at 475. That is because such evidence "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Id.* at 476. Here, the erroneously admitted evidence of Schram's prior encounters with law enforcement created a risk that the jury's verdict was based on inferences that the law does not allow. *See id.*; *Old Chief v. United States*, 519 U.S. 172, 182 (1997) (recognizing

that Rule 404(b) makes clear that there is "no question that propensity [is] an improper basis for conviction" (internal quotation marks omitted)). This risk was exacerbated by its multiplication: the district court permitted the prosecution to introduce evidence of three separate incidents in which Schram was in custody or under interrogation by the police. *Cf. United States v. Vera*, 770 F.3d 1232, 1246 (9th Cir. 2014) ("[O]ther errors in the record that might be individually harmless instead have a cumulative impact."). Moreover, the district court failed to give limiting instructions on either the audio clips or photographs, further increasing the risk that Schram's substantial rights were affected. *Cf. Luna*, 21 F.3d at 882 (holding that error created by the improper introduction of identity evidence could not be cured by a limiting instruction).

The remaining evidence in the record further persuades us that Schram has satisfied the "substantial rights" factor of the plain-error test. *See United States v. Marcus*, 560 U.S. 258, 262 (2010). In arguing for the admission of the erroneously admitted evidence at the district court, the government itself acknowledged that this was a "circumstantial case." Other than the erroneously admitted evidence, the government rested its case against Schram on (1) a cigarette butt found outside the Minute Market that tested positive for Schram's DNA, (2) testimony from Schram's niece, her fiancé, and a detective involved in the case, all identifying Schram's voice as the one on the Minute Market robbery video, and (3) Schram's

backpack, which, like the backpack of the Minute Market robber, was black with gray striping. Based on this record, we believe there is "a reasonable probability that the error affected the outcome of the trial." *Id.*

Finally, we conclude that this is a case where ensuring the fairness and integrity of the proceeding justifies our reversal for a new trial. *See Puckett*, 556 U.S. at 135. In *McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993), we acknowledged that the rule prohibiting evidence of a defendant's prior wrongful acts "is based on . . . a fundamental conception of justice and the community's sense of fair play and decency." *Id.* at 1384 (internal quotation marks omitted). These principles echo the concerns motivating the final prong of plain-error review—"fairness, integrity or public reputation of judicial proceedings." *Puckett*, 556 U.S. at 135 (internal quotation marks and citation omitted).

Further, as noted above, the other evidence at trial was neither "overwhelming" nor "uncontroverted." *United States v. Cotton*, 535 U.S. 625, 633–34 (2002) (holding that (1) "numerous state arrests and seizures . . . that resulted in the seizure of 795 ziplock bags . . . containing approximately 380 grams of cocaine base," (2) another seizure of 51.3 grams of cocaine base, (3) testimony that a defendant was seen cooking one-quarter of a kilogram of cocaine powder, and (4) testimony that a drug operation bagged one kilogram of cocaine base into ziplock bags was "overwhelming and uncontroverted" evidence that the defendants

were responsible for at least 50 grams of cocaine base).

Recognizing that "[m]eeting all four prongs" of the plain-error test "is difficult, as it should be," *Puckett*, 556 U.S. at 135 (internal quotation marks and citation omitted), we reverse Schram's conviction for Hobbs Act robbery and remand to the district court for further proceedings consistent with this disposition.[3]

REVERSED AND REMANDED.

[3] We therefore do not reach Schram's arguments about sentencing.

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OWENS, Circuit Judge, dissenting:

I respectfully dissent. I agree that the evidence in question was improperly admitted under Federal Rule of Evidence 404(b)(2), *see United States v. Luna*, 21 F.3d 874, 878–79 (9th Cir. 1994), but I do not believe that Schram has carried his burden of establishing that this error prejudiced him, *see United States v. Marcus*, 560 U.S. 258, 262 (2010). Based on the other evidence in the record, including DNA evidence, testimony from Schram's niece and her fiancé identifying Schram's voice as the one in the robbery video, as well as a letter and photographs tying Schram to the backpack worn by the robber in the video, I disagree that there is a "reasonable probability that the error affected the outcome of the trial." *Id.* (citing *United States v. Olano*, 507 U.S. 725, 734–35 (1993)). I would therefore affirm the district court.