No.

IN THE
SUPREME COURT OF THE UNITED STATES

CARLOS BAYON,

PETITIONER

v.

UNITED STATES,

RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals,
Second Circuit

PETITION FOR WRIT OF CERTIORARI

Jamesa J. Drake
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com
Counsel of Record

QUESTION PRESENTED

Federal Rule of Evidence 404(b) permits the admission of evidence of any other crime, wrong or act to prove a criminal defendant's motive, opportunity, intent, preparation, plan, knowledge identity, absence of mistake, or lack of accident. The Second, Eighth, Ninth, Eleventh, and D.C. Circuits characterize this as a rule of inclusion, and as a result, other-acts evidence is routinely admitted. The Third, Fourth, and Seventh Circuits, however, reason that Rule 404(b) is a general rule of exclusion, meaning that it confers no presumption of admissibility. Is Federal Rule of Evidence 404(b) a rule of inclusion or exclusion?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

INDEX OF APPENDICES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carlos Bayon respectfully petitions for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit under review was reported at *United States v. Bayon*, 838 Fed. Appx. 618 (2d Cir. 2021), and is attached at Appendix A.

STATEMENT OF JURISDICTION

The First Circuit issued its decision on January 5, 2021. The time within which to file a petition for writ of certiorari extends until June 4, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULE OF EVIDENCE 404(b)

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

(b) Other Crimes, Wrongs, or Acts.

(1) Prohibited Uses. Evidence of any other crime, wrong, or act 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.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

STATEMENT OF THE CASE

I. Proceedings in the district court

Bayon was charged with two counts of retaliating against a federal official under 18 U.S.C. § 115(a)(1)(B), which makes it a criminal offense to "threaten[] to assault, kidnap, or murder, a United states official…with intent to impede, intimidate, or interfere with such official…or with intent to retaliate against such official" in relation to his or her public duties. Bayon was also charged with two counts under 18 U.S.C. § 875(c), which criminalizes the "transmi[ssion] in interstate or foreign commerce [of] any communication containing any threat to kidnap any person or any threat to injure the person of another." The charges were based on telephone calls that Bayon made on June 30, 2018, to the offices of two members of the U.S. Congress.

Bayon left a voicemail message for Representative Steve Scalise at his Congressional office in Louisiana, which stated:

> Hey listen, this message is for you and the people that sent you here. You are taking ours, we are taking yours. Anytime, anywhere. We know where they are. We are not going to feed them sandwiches, we are going to feed them lead. Make no mistake you will pay. Ojo por ojo, diente por diente.[1] This is our law and we are the majority. Have a good day.

(Tr. 47). Bayon also left a voicemail message for Representative Cathy McMorris Rodgers at her Congressional office in the State of Washington, which was substantially the same. (Tr. 107).

---

1 This is Spanish for "an eye for an eye, a tooth for a tooth." (Tr. 156).

Congressional staff reported receiving these messages to the United States Capitol Police, who subsequently conducted an investigation which led them to identify Bayon as the person who left the messages. (*See* Tr. 151-62). Bayon admitted at trial that he left the messages. (Tr. 321-22).

In August 2018, agents executed search warrants for Bayon's residence and a storage unit he rented. (Tr. 165). At Bayon's residence, agents recovered rifle ammunition and shotgun ammunition, a receipt from 2004 for the purchase of an SKS assault rifle; and a receipt from 1987 for the purchase of a revolver. (Tr. 167, 223-24). Despite the ammunition and the receipts, the agents did not find the SKS rifle or the revolver.

Agents did, however, find a number of books with incriminating-sounding titles, which were seized from Bayon's residence and subsequently introduced into evidence at trial, over Bayon's objection. The introduction of this evidence was the centerpiece of Bayon's direct appeal. The books were titled:

- Lock Picking Simplified
- Homemade SemTex C4's Ugly Sister
- Improvised Radio Detonation Techniques
- Expedient B & E – Tactics and Techniques for Bypassing Alarms and Defeating Locks
- Hit Man – A Technical Manual for Independent Contractors
- Secrets of a Super Hacker
- How to Build Practical Firearms Suppressors
- How to Make Disposable Silencers
- Bomb Designs
- How to Circumvent Security Alarms in 10 Seconds or Less – Insider's Guide to How It's Done and How to Prevent It
- Silent But Deadly – More Homemade Silencers from Hayduke the Master
- New and Improved C-4 – Better-Than-Ever Recipes for Half the Money and Double the Fun
- Poor Man's TNT – Improvised Guncotton

- CIA Field Expedient Methods of Explosives Preparations
- Disguise Techniques – Fool All of the People Some of the Time
- Homemade C4 – A recipe for Survival
- Ragnar's Homemade Detonators – How to Me 'Em, How to Salvage 'Em, How to Detonante 'Em
- Advanced Lock Picking Secrets
- New I.D. in America – How to Create a Foolproof New Identity

(Tr. 262, 265-67). Herein after, Bayon refers to this as the "book evidence."

Nearly a year later, in June 2019, agents executed a second search warrant at Bayon's storage unit. (Tr. 170-71). There, they found an inoperable SKS rifle (it was missing the bolt), two cans of aluminum powder, and a five-gallon can of methanol alcohol. (Tr. 171, 173-74). These items were seized and introduced into evidence, as well. (Tr. 177, 179). According to a Special Agent with the Capitol Police, these chemicals could be used for making explosives. (*Id.*). At least one of the books seized from Bayon's apartment contained a reference to making bombs with aluminum powder. (Tr. 204).

Bayon argued at trial that the meaning of the voicemail messages was ambiguous and anyways not threatening, and that the "feed them lead" portion of the message referred to the Flint, Michigan water crisis involving lead contamination. (Tr. 56-58, 92-93, 117-18). Bayon explained that the messages reflected his frustration with the government's policy of separating women and children at the Mexican border and then "caging" the children. (Tr. 321).

Bayon further established that the last time he accessed his storage unit was in February 2018, and that he did not have access to the unit either when he left the voicemail messages or on the occasions when it was searched by law enforcement.

(Tr. 147-49). Bayon suggested that the chemicals found in the garage were commercially available, and were used appropriately in his line of work, which was garage-door repair. (Tr. 284). Bayon emphasized that just about any common household item could be used to make an explosive. (Tr. 201, 284).

Bayon contemporaneously objected to the admission of the book evidence, referring to Federal Rule of Evidence 404(b), and specifically citing Federal Rule of Evidence 403. (Tr. 262). The district court overruled the objection, and admitted testimony about the book titles and the books themselves, ruling:

> The Court: Looking at all the names, the ones that initially gave me concern was A, Lock Picking; 11-D, which is Expedient B & E, which I believe would be breaking and entering. … On reflection, the alleged threat here is going after individuals, and obviously that could be one of the needs to get into people's houses.
>
> Obviously it has prejudicial value. I think your argument goes to weight, not admissibility. So I'm going to overrule the objection.

(Tr. 264-65, 382).

During closing argument, Bayon suggested to the jury that the relevancy of the books hinged entirely on an impermissible propensity inference:

> Now, he has these books, right? All these making explosives, and breaking and entering or whatever it is. Who knows why he has them. We don't know. It's not in the record.
>
> Some people have an interest in World War II and they [have] lots of books on Nazis. Does it make him a Nazi? People who have an interest in the history of this country and they have books on the Klu Klux Klan, right? … It's all innocent activity, but here, the Government, they're cherry picking, they're pulling…[t]hey're trying to make a composite of the bad guy.

(Tr. 329).

The Government in summation urged the jurors to draw, and rely on, a propensity inference to convict. The prosecutor argued:

> [T]he fact that he…had these books, you can consider that with respect to his state of mind when he made the threatening phone calls.
>
> * * * * *
>
> [H]e had an interest in how to commit these acts of violence, how to make bombs. These 19 books that were found on his bookshelf in his apartment, what do they tell you about his state of mind? You can take a look at them, they're in evidence.
>
> [Prosecutor reads the titles of the books].
>
> What does this tell you about his state of mind? Look at the book notes about poisons. How to surveil people. How to watch people without knowing you're there. There's a book on that.

(Tr. 316-17). The Government then connected one of the books – New and Improved C4 – to the cans of aluminum powder found in Bayon's storage unit. (Tr. 317-18). The Government made this argument even though the uncontroverted evidence, from its own witness, was that Bayon had no ability to access the storage locker either immediately before or after he left the voicemail messages. (Tr. 147-49). Later in summation, the Government again referenced "these books on how to be a hit man, how to make homemade C4" and argued, "it gives you a window into his state of mind into what's going on in his mind." (Tr. 331).

Importantly, the book evidence was not admitted by the District Court as relevant to Bayon's objective or subjective intent. Rather, the book evidence was admitted because, as the District Court ruled: "[T]he alleged threat here is going after individuals, and obviously that could be one of the needs to get into people's homes."

(Tr. 264). However, Bayon's ability to carry through with a threat was irrelevant. As the District Court correctly instructed the jurors: "It is not necessary that the Government prove that the defendant intended to carry out the threat or that he had the present ability to carry out the treat." (Tr. 364, 369, 374, 375; *see also* Tr. 316 (Prosecutor, in summation: "Let me be clear. The judge will instruct you that we do not have to prove that the defendant intended to carry out the threat. … [W]e do not have to prove that he was actually going to carry out the threat or that he had the ability to do so.")).

Following three days of proceedings, a jury found Bayon guilty as charged. Bayon was principally sentenced on each count to an above-guidelines sentence of 60 months' prison, to run concurrently, followed by one year of supervised release.

II. The Second Circuit's decision

On appeal, Bayon renewed his argument that the district court abused its discretion in admitting the nineteen books discovered in his apartment on topics such as bomb-making, explosives, and circumventing alarms. *Bayon*, 838 Fed. Appx. at 619. The Second Circuit affirmed the judgment of the district court. *Id.* 621.

The court reasoned that the book evidence was relevant for two reasons. One, because it "tended to make more probable the factual inference that Bayon intended to intimidate the members of the U.S. Congress whose offices he contacted." *Id.* at 621. Two, because it "disprov[ed] Bayon's contention that he did not intend to make a threat but merely chose his words poorly while attempting to convey his political views." *Id.*

The court further reasoned that the danger of unfair prejudice resulting from admitting the book evidence outweighed its probative value. *Id.* In making that assessment, the court observed: "In reviewing a district court's Rule 403 ruling, we generally maximize the evidence's probative value and minimize its prejudicial value." *Id.* (cleaned up; collecting cases). The court concluded: "Even if, as the district court noted, some of the books may have been less probative of Bayon's intent, the potential for prejudice resulting from admitting those books was limited in light of the other evidence, which included bomb-making materials, a rifle, ammunition, and books on explosives and terrorism – all of which had been found in Bayon's possession." *Id.* at 621. And, at any rate, the court explained, admission of the book evidence was harmless because "the government's case against Bayon was overwhelming" and thus, the introduction of the book evidence was not at all likely to have 'substantially swayed' the jury." *Id.* at 621 (quoting *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007)).

Lastly, in a footnote, the court addressed Bayon's Rule 404(b) argument. The court observed that it "follows the 'inclusionary approach' to Rule 404(b) and admits all 'other act' evidence that does not 'serve the purpose of showing the defendant's bad character and that is neither overly prejudicial under Rule 403 nor irrelevant under Rule 402." *Id.* at 621 n. 1 (quoting *United States v. Curley*, 639 F.3d 50, 56 (2d Cir. 2011)). The court summarily concluded that because "the challenged evidence was relevant to Bayon's intent in leaving the voicemail messages and was not unduly prejudicial," Bayon's "Rule 404(b) argument is without merit." *Id.* at 621 n. 1.

REASONS FOR GRANTING THE WRIT

I. The circuits are divided over whether Rule 404(b) is a rule of inclusion or exclusion.

Rule 404(b) "is the most frequently utilized and cited rule of evidence and it has generated more published [appellate] opinions than any other subsection of the rules." Daniel J. Capra, Character Assassination: Amendment Federal Rule of Evidence 404(b) to Protect Criminal Defendants, 118 Colum. L. Rev. 769, 771 (2018) (internal citation omitted). As Professor Capra explains: "The prohibition on character evidence is a time-honored tenant of evidence law. The American adversary system was designed to convict defendants based upon their conduct and not based on their general character or past misdeeds." *Id.* "Rule 404(b) was designed to further this purpose as a rule of exclusion, prohibiting evidence of uncharged acts offered to prove a person's character (most often the criminal defendant's character) in order to demonstrate his or her conduct on the occasion in question." *Id.* However, "[n]otwithstanding its origins as part of a rule with exclusionary purposes, Rule 404(b) has been characterized by many federal circuit courts as a rule of inclusion." *Id.* at 772. It is against that backdrop, that Bayon presses his claim.

The Second, Eighth, Ninth, Eleventh and D.C. Circuits view Rule 404(b) as a rule of inclusion. For example, the Eighth Circuit has written that Rule 404(b) is a rule "of inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue at trial, unless it tends to prove only criminal disposition." *United States v. Geddes*, 844 F.3d 983, 989 (8th Cir. 2017) (citing *United States v.*

Oaks, 606 F.3d 530, 538 (8th Cir. 2010) (quoting *United States v. Simon*, 767 F.2d 524, 526 (8th Cir. 1985)). *See also United States v. Sanders*, 668 F.3d 1298, 1314 (11th Cir. 2012) ("Rule 404(b) is one of inclusion which allows extrinsic evidence unless it tends to prove only criminal propensity."); *United States v. Curtin*, 489 F.3d 935, 944 (9th Cir. 2007) (en banc) (Rule 404(b) "is a rule of inclusion – not exclusion."); *United States v. Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000) ("Rule 404(b) is a rule of inclusion rather than exclusion.").

Treating the rule as one of inclusion, "federal courts routinely admit other-acts evidence…even when the relevance of the defendant's uncharged acts depends on the defendant's propensity to behave in certain ways and even when the defendant has not contested elements of the charged offenses that the other-acts evidence would be used to prove." Capra, *supra*, at 772. The problem is compounded by the Rule 403 balancing – the next step in the admissibility calculus – because that standard "favors the admission of evidence" and "federal courts routinely find that the probative value of other-acts evidence is not 'substantially outweighed' by the risk of prejudice to a criminal defendant." *Id.*

The First Circuit has acknowledged that it has sometimes treated Rule 404(b) as a rule of inclusion; other times, as a rule of exclusion:

> Rule 404(b) is sometimes understood as one of inclusion, and sometimes as one of exclusion. *See* Wright & Graham, § 5239. We ourselves have used both formulations. *Compare United States v. Rodriguez-Cardona*, 924 F.2d 1148, 1153 (1st Cir. 1991) ("Rule 404(b) is a rule of exclusion.") *with United States v. Carty*, 993 F.2d 1005, 1011 (1st Cir. 1993) ("Rule 404(b) is a rule of inclusion.").

United States v. Varoudakis, 233 F.3d 113, 125 n. 11 (1st Cir. 2000).

Recognizing the aforementioned problems, recently, the Seventh, Third, and Fourth Circuits have begun to view Rule 404(b) as a rule of exclusion. In *United States v. Gomez*, 763 F.3d 845, 853 (7th Cir. 2014), the Seventh Circuit observed that pursuant to Rule 404(b), "other-act evidence is too often admitted almost automatically, without consideration of the legitimacy of the purpose for which the evidence is to be used and the need for it." The issues arises like this:

> Because other-act evidence can serve several purposes at once, evidentiary disputes under 404(b) often raise the following question: Does a permissible ultimate purpose (say, proof of the defendant's knowledge or intent) cleanse an impermissible subsidiary purpose (propensity)? On the surface the rule seems to permit it. But, if subsection (b)(2) of the rule allows the admission of other bad acts whenever they can be connected to the defendant's knowledge, intent, or identity (or some other plausible non-propensity purpose), then the bar against propensity evidence would be virtually meaningless.

Id. at 855. "To resolve this inherent tension in the rule," the Seventh Circuit has "cautioned that it's not enough for the proponent of the other-act evidence simply to point to a purpose in the 'permitted' list and assert that the other-act evidence is relevant to it." *Id.* at 856. This is so because "Rule 404(b) is not just concerned with the ultimate conclusion, but also with the chain of reasoning that supports the non-propensity purpose for admitting the evidence." *Id.*

The Third Circuit has likewise sought to impose limits on the prosecutorial use of Rule 404(b) evidence. In *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014), the court explained: "We have on occasion noted that Rule 404(b) adopted an inclusionary approach. …. [L]et us be clear: Rule 404(b) is a rule of general exclusion, and carries with it 'no presumption of admissibility.'" 1 Christopher B. Mueller &

Laird C. Kirkpatrick, Federal Evidence § 4:28, at 731 (4th ed. 2013)." Like the Seventh Circuit, the Third Circuit emphasizes close scrutiny of the "chain of inferences," making sure that no link requires a propensity inference. *Id.* at 276-77.

The Fourth Circuit has similarly characterized Rule 404(b) as a rule of exclusion. In *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017), the court instructed:

> Rule 404(b)'s purposeful exclusion of prior…'bad act' evidence is not grounded in its irrelevance. Instead, the general inadmissibility of such evidence is based on the danger that this type of evidence will overly influence the finders of fact and thereby persuade them to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. Additionally, Rule 404(b)'s general exclusion of evidence of a defendant's prior bad acts reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is.

Id. at 265-66 (internal citations omitted; emphasis in the original).

In addition to demanding careful scrutiny of the chain of inferences, the Seventh, Third, and Fourth Circuits have "emphasized the importance of assessing the genuine disputes involved in a criminal trial" and even eliminating "the ill-defined 'inextricably intertwined' doctrine, which allows other-acts evidence to be admitted without scrutiny under Rule 404(b), on the theory that the evidence is vaguely connected to the charged offense." Capra, *supra,* at 773 (citing *Caldwell*, 760 F.3d at 283-84 ("[T]he probative value of prior act evidence is diminished where the defendant does not contest the fact for which supporting evidence has been offered.")); and *United States v. Green*, 617 F.3d 233, 248 (3d Cir. 2010) (demonstrating that the inextricably intertwined test is "vague, overbroad, and prone to abuse" and ultimately rejecting it as the primary standard for intrinsic evidence.)). *See also United States*

v. Gorman, 613 F.3d 711, 719 (7th Cir. 2010) ("Henceforth, resort to inextricable intertwinement is unavailable when determining a theory of admissibility.").

Recognizing the controversy, the Judicial Advisory Committee on Evidence Rules recently considered, but ultimately rejected, substantive changes to Rule 404(b) keyed to this disagreement among the circuits. *See* Judicial Conference of the U.S., Report of the Advisory Comm. on Evidence Rules ("Adv. Comm. on Evid. Report") at 4-5 (June 12, 2018).[2] Instead, to provide "some protection for defendants in criminal cases," the Advisory Committee recommended an amendment requiring the prosecutor to describe, in noticing 404(b) evidence, "the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports that purpose." *Id.* at 5. This Court endorsed those amendments, and they are now in effect. Nevertheless, this new notice requirement does not resolve the current "war raging over the admissibility of prior bad acts of criminal defendants in federal trials." Capra, *supra*, at 769. Additional guidance from this Court is needed.

II. This case is a good vehicle for resolving the division.

As Bayon emphasized, his possession of books with menacing-sounding titles strongly suggests that he has a propensity for criminal activity, and such propensity evidence is inadmissible under Rule 404(b). In fact, the titles of the books purported to cover such a broad range of criminal activity – bomb making, lock picking and alarm breaking, computer hacking, making silencers, creating a new identity and disguise techniques – that the only plausible inference was that Bayon was inclined

[2] *See* https://www.uscourts.gov/sites/default/files/ev_report_1.pdf.

to, and capable of, committing all manner of nefarious criminal acts. It is axiomatic that this type of unmoored[3] character attack is precisely what Rule 404(b) was designed to prevent against. And even if some of the books were arguably probative, others unambiguously were not.

Moreover, Rule 404(b) authorizes the admission of other-acts evidence to prove, *inter alia*, motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. But, identity was never an issue. From the outset – during his opening statement – Bayon admitted that he left the voicemail messages. (Tr. 32). The book evidence was inadmissible to establish Bayon's subjective intent, as well. The inferential chain was books, criminal propensity, intent to threaten, intimidate, retaliate, etc. In other words, the relevancy of the books hinged entirely on an impermissible propensity inference.

The actual reason why the books were received in evidence is important; here, they were not admitted to prove subjective intent, but to demonstrate that Bayon could carry through with this threat. But, this was irrelevant, also. *See e.g.* Tr. 316 (Prosecutor, in summation: "Let me be clear. The judge will instruct you that we do

---

[3] Two of the books have handwritten notions in the margins. On page 11 of New and Improved C-4, under the picture of a can of Aluminum Powders and Pigments, the notation "Bayon C14" appears. On page 13 of that book, the section heading Nitromethane is circled and an arrow points to what appears to be a telephone number. On page 9 of Homemade C4 – A Recipe for Survival, there's a picture of a bag of ammonium nitrate fertilizer and the notations "calcium nitrate" and "DW Dickey and Sons, Inc." and an address. On page 18 there is an arrow alongside a paragraph about heating ammonium nitrate, and on page 20 there is an indecipherable marking. On the last page of the book, the notation: section 841(c) Title 18 US Code Chapter 40 Clydes Feed & Animal" and an address and telephone number appears.

not have to prove that the defendant intended to cary out the threat. … [W]e do not have to prove that he was actually going to carry out the threat or that he had the ability to do so.").

Respectfully, and contrary to the Second Circuit's reasoning, admission of the book evidence was not harmless. For one thing, the books were found inside Bayon's apartment. The other items – the inoperable firearm and the so-called bomb-making material – were kept in Bayon's storage garage, which he had no ability to access. This fact was not disputed. (Tr. 147-49). Thus, the book evidence was materially different than the other evidence cited by the Second Circuit. *Bayon*, 838 Fed. App. at 621 ("[T]he potential for prejudice resulting from admitting those books was limited in light of the other evidence, which included bomb-making materials, a rifle, ammunition…all of which had been found in Bayon's possession.").

For another, whether Bayon possessed a culpable mental state was the central issue at trial, and the government's proof in that regard was thin. *See* Gov't Br. at 18: "Bayon did not testify; the only way for the government to establish his intent was through circumstantial evidence such as the books…."; *see also* Gov't Br. at 17: "As was clear from the government's summation, the books were offered to demonstrate Bayon's state of mind and his intent when he left the voice mail messages – the only element truly contested in this case." Also, the jurors received no instruction about how they might permissibly use the book evidence (although Bayon contends that no such permissible use existed), leaving them with the government's propensity argument during summation.

CONCLUSION

The petition for a writ of certiorari should be granted.

May 16, 2021

Respectfully submitted

CARLOS BAYON
By his attorney,

JAMESA J. DRAKE
Counsel of Record
Drake Law LLC
P.O. Box 56
Auburn, ME 04212
(207) 330-5105
jdrake@drakelawllc.com

Appendix

838 Fed.Appx. 618
This case was not selected for
publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Carlos BAYON, Defendant-Appellant.

19-3948
|
January 5, 2021

Synopsis

Background: Defendant was convicted in the United States District Court for the Western District of New York, Frank P. Geraci, Jr., Chief Judge, of retaliating against a federal official and threat by interstate commerce. Defendant appealed.

Holdings: The Court of Appeals held that:

defendant's books on topics such as bomb-making, explosives, and circumventing security alarms was relevant;

probative value of books was not outweighed by the potential for prejudice; and

any error in admitting books was harmless.

Affirmed.

Procedural Posture(s): Appellate Review.

***619** Appeal from a judgment of the United States District Court for the Western District of New York (Geraci, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Attorneys and Law Firms

For Defendant-Appellant: Jamesa J. Drake, Drake Law LLC, Auburn, ME.

For Appellee: Katherine A. Gregory, Assistant United States Attorney, for James P. Kennedy, Jr., United States Attorney, Western District of New York, Buffalo, NY.

Present: Debra Ann Livingston, Chief Judge, Gerard E. Lynch, Joseph F. Bianco, Circuit Judges.

SUMMARY ORDER

Carlos Bayon ("Bayon") appeals from his conviction in the United States District Court for the Western District of New York (Geraci, *J.*) entered on December 2, 2019, after a jury found Bayon guilty of two counts of retaliating against a federal official in violation of 18 U.S.C. § 115(a)(1), and two counts of threat by interstate commerce in violation of 18 U.S.C. § 875(c). Bayon was charged with leaving threatening voicemails at the offices of two members of the U.S. Congress. The district court sentenced Bayon to concurrent sixty-month terms of imprisonment to be followed by a one-year term of supervised release. On appeal, Bayon argues that the district court abused its discretion in admitting nineteen books discovered in his apartment on topics such as bomb-making, explosives, and circumventing security alarms. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

"We review evidentiary rulings for abuse of discretion." *United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009). An "[a]buse of discretion occurs when the court acts in 'an arbitrary and irrational manner.' " *United States v. McCallum*, 584 F.3d 471, 474 (2d Cir. 2009) (quoting *United States v. Lombardozzi*, 491 F.3d 61, 78-79 (2d Cir.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

2007)); *accord* *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006). A district court's decision to admit evidence, moreover, is subject to harmless error analysis. *See* Fed. R. Crim. P. 52(a); *United States v. Madori*, 419 F.3d 159, 168 (2d Cir. 2005).

"Evidence is relevant if 'it has any tendency to make a fact more or less probable than it would be without the evidence' and if 'the fact is of consequence in determining the action.' " *United States v. Monsalvatge*, 850 F.3d 483, 494 (2d Cir. 2017) (quoting Fed. R. Evid. 401). "A district court 'may exclude relevant evidence if its probative value is substantially outweighed by a danger of [unfair prejudice].' " *Id.* (citing Fed. R. Evid. 403). In reviewing a district court's evidentiary decision, we are "mindful of [the district court's] superior position to assess relevancy and to weigh the probative value of evidence against its potential for unfair prejudice." *United States v. Abu-Jihaad*, 630 F.3d 102, 131 (2d Cir. 2010).

In this case, Bayon was charged with two counts of retaliating against a federal ***620** official under 18 U.S.C. § 115(a)(1)(B), which makes it a criminal offense to "threaten[ ] to assault, kidnap, or murder, a United States official ... with intent to impede, intimidate, or interfere with such official ... or with intent to retaliate against such official" in relation to his public duties. He was also charged with two counts under 18 U.S.C. § 875(c), which criminalizes the "transmi[ssion] in interstate or foreign commerce [of] any communication containing any threat to kidnap any person or any threat to injure the person of another." *See also* *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2012, 192 L.Ed.2d 1 (2015) (interpreting § 875(c) as requiring the government to prove that the defendant had the mental state of "transmit[ting] a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat"); *United States v. Kirsch*, 903 F.3d 213, 232 (2d Cir. 2018).

The district court did not abuse its discretion in determining that the books found in Bayon's apartment were relevant to proving these charges. *See* *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003) (noting that "[d]eterminations of relevance are entrusted to the sound discretion of the trial judge" (internal quotation marks omitted)). The books, in combination with other evidence, tended to make more probable the factual inference that Bayon intended to intimidate the members of the U.S. Congress whose offices he contacted. In particular, the jury could have reasonably inferred from Bayon's possession of the books that he intended to make a genuine threat because he had collected the means and know-how to follow through on that threat. The books were also relevant to disproving Bayon's contention that he did not intend to make a threat but merely chose his words poorly while attempting to convey his political views.

Bayon argues that, in any event, the books should not have been introduced because the danger of unfair prejudice resulting from admitting the books outweighed their probative value. We disagree. Evidence is unfairly prejudicial when "it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." *United States v. Massino*, 546 F.3d 123, 132 (2d Cir. 2008) (quoting *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980)). "[I]n reviewing a district court's Rule 403 ruling, we 'generally maximize the evidence's probative value and minimize its prejudicial value.' " *Monsalvatge*, 850 F.3d at 494 (quoting *United States v. LaFlam*, 369 F.3d 153, 155 (2d Cir 2004) (per curiam) (alterations omitted)).

In this case, the books were significantly probative of Bayon's intent. All of the books related to methods by which Bayon may have sought to harm the recipients of his voicemail messages and thus make good on his threats. At least one of the books also recommended certain bomb-making supplies that Bayon obtained and kept in a storage unit. While the introduction of the books was not without some risk of prejudice, the books did not have the sort of " 'strong emotional or inflammatory impact' that would 'pose a risk of unfair prejudice' " by " 'distract[ing] the jury from the issues in the case' " and " 'arous[ing] the jury's passions to a point where they would act irrationally in reaching a verdict.' " *Monsalvatge*, 850 F.3d at 495 (quoting *United States v. Robinson*, 560 F.2d 507, 514 (2d Cir. 1977)). Bayon contends that the books were prejudicial because they invited a jury improperly to infer that Bayon had a propensity for criminal activity. However, the district court considered this risk and weighed it against the probative value of the

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

evidence ***621** before admitting it.[1] *See* *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006) ("Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational."). Even if, as the district court noted, some of the books may have been less probative of Bayon's intent, the potential for prejudice resulting from admitting those books was limited in light of the other evidence, which included bomb-making materials, a rifle, ammunition, and books on explosives and terrorism—all of which had been found in Bayon's possession. Against this background it is difficult to see how the challenged books would have "unfairly ... excite[d] emotions against the defendant," *Massino*, 546 F.3d at 133 (internal quotation marks omitted), and how that risk outweighed their probative value.

Nonetheless, even if we were to accept Bayon's position that the admission of some of the books was prejudicial, any error in admitting them was harmless. "A district court's erroneous admission of evidence is harmless if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *United States v. Al-Moayad*, 545 F.3d 139, 164 (2d Cir. 2008) (internal quotation marks omitted). Here, in addition to the books, the government's evidence of Bayon's intent consisted of Bayon's tone of voice on the recorded communications, the fact that he left nearly the exact same message on two different voicemails, Bayon's choice of language for the voicemail messages, as well as the bomb-making materials, rifle, and ammunition. By contrast, Bayon did not introduce any evidence in support of his own theory of the case. Because the government's case against Bayon was overwhelming, the introduction of the book evidence was not at all likely to have "substantially swayed" the jury. *United States v. Kaplan*, 490 F.3d 110, 123 (2d Cir. 2007) (internal quotation marks omitted). Accordingly, we have no doubt that any error resulting from admitting the evidence was harmless.

* * *

We have considered Bayon's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

All Citations

838 Fed.Appx. 618

Footnotes

1 On appeal, Bayon also challenges the admission of the books with reference to Rule 404(b)(1), which prohibits admission of "[e]vidence of any other crime, wrong, or act ... 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); *see also* *Huddleston v. United States*, 485 U.S. 681, 685, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). Assuming, *arguendo*, that Bayon's possession of the books is properly challenged as "other act" evidence, this argument, too, is unavailing. This Circuit follows the "inclusionary approach" to Rule 404(b) and admits all "other act" evidence that does not "serve the sole purpose of showing the defendant's bad character and that is neither overly prejudicial under Rule 403 nor irrelevant under Rule 402." *United States v. Curley*, 639 F.3d 50, 56 (2d Cir. 2011) (internal quotation marks omitted). As discussed herein, the challenged evidence was relevant to Bayon's intent in leaving the voicemail messages and was not unduly prejudicial. *See* *United States v. Brand*, 467 F.3d 179, 196 (2d Cir. 2006) (noting that the district court "is in the best position to evaluate the evidence and its effect on the jury," and that a district court's admissibility ruling under Rule 404(b) will not be overturned "absent a clear showing of abuse of discretion" (quoting *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992))). Accordingly, Bayon's Rule 404(b) argument is without merit.

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.