

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 2023 Term

ROBERT E. HARRISON

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

1. *United States v. Robert E. Harrison*, No. 22-1537
Slip Opinion (8th Cir., June 14, 2020) 1-8
2. *United States v. Robert E. Harrison*, No. 22-1537,
Order denying rehearing (8th Cir., Aug. 14, 2023) 9
3. *Robert E. Harrison v. United States*, No. 23A396, Order granting
application to file Petition by Jan. 11, 2024) 10
4. *United States v. Robert E. Harrison*, No. 4:20CR-1432-JAR
Pretrial Conference segment (ED. Mo. Oct 28, 2021). . 11-19

United States Court of Appeals
For the Eighth Circuit

No. 22-1537

United States of America

Plaintiff - Appellee

v.

Robert E. Harrison

Defendant - Appellant

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: December 14, 2022
Filed: June 14, 2023

Before SMITH, Chief Judge, GRUENDER and STRAS, Circuit Judges.

SMITH, Chief Judge.

A jury convicted Robert E. Harrison of being a felon in possession of a firearm. The district court¹ sentenced him to 84 months' imprisonment. Harrison appeals,

¹The Honorable John A. Ross, United States District Judge for the Eastern District of Missouri.

challenging the admission of evidence of his prior firearm conviction. For the following reasons, we affirm.

I. Background

Richard Eskew heard a loud noise outside his home. He and his family went outside and observed that their retaining wall had been destroyed and that a van had come to rest on the sidewalk. They saw Harrison, the van's driver, near the area. Eskew's daughter called 911. She testified that she heard Harrison say, "They were shooting at me." R. Doc. 107, at 180. However, neither Eskew nor his daughter heard any gunshots prior to the crash.

Officers Kyle Lyon and Joseph Kopfensteiner of the St. Louis Metropolitan Police Department responded. The officers found Harrison standing in the street looking at the crash. Officer Kopfensteiner testified that Harrison explained that "he was trying to park the van, and the power steering or something went wrong with the steering, and he lost control of it." *Id.* at 190. Officer Kopfensteiner had a clear view of Harrison and saw him pull a firearm from his waistband, drop it on the ground, and kick it under the vehicle. Officer Kopfensteiner immediately restrained Harrison and called out to Officer Lyon, who helped secure Harrison. Officer Kopfensteiner then retrieved the firearm from under the vehicle.

Harrison was charged with being a felon in possession of a firearm. Prior to trial, the government moved to introduce evidence that Harrison possessed a firearm in 2010. Harrison's gun possession led to a 2012 conviction for unlawful possession of a firearm under Missouri law. The government sought admission of this evidence under Federal Rule of Evidence 404(b) to show knowledge, absence of mistake, and lack of accident. The government also noted that it would be requesting a limiting instruction as to this evidence.

Harrison opposed the introduction of this evidence as improper. He argued that “[w]hen the government claims a defendant personally held a gun, ‘a defendant’s knowledge is almost never a material issue . . . absent unusual circumstances (such as when a defendant claims he did not realize the object in his hand was a gun)[.]’” R. Doc. 57, at 3 (second and third alterations in original) (quoting *United States v. Caldwell*, 760 F.3d 267, 279 (3rd Cir. 2014)). Harrison asserted that “[a]bsent a claim of mistaken or accidental possession of a firearm by the defendant, the issue of knowing possession of [the] firearm the government claims the defendant personally possessed is not material to resolution of the case.” *Id.* at 3–4. Thus, he averred, no basis existed to admit any evidence of his prior conviction, unless he disputed knowing possession of the gun.

The district court admitted the evidence of the prior conviction. It noted that “under these circumstances . . . where a gun is found under the car, it is ultimately recovered under the car, and the Government has the burden of proving knowledge . . . the Court does believe that this evidence is admissible under Rule 404(b) as it has been stated many times.” R. Doc. 103, at 27. The district court also noted that it would give a limiting instruction.

At trial, the district court gave the following limiting instruction:

Ladies and gentlemen, you are about to hear evidence that the Defendant previously possessed a firearm on September 30th of 2010. You may consider this evidence only if you unanimously find it is more likely true than not true. You decide that by considering all of the evidence and deciding what evidence is more believable. This is a lower standard than proof beyond a reasonable doubt. If you find this evidence has been proved, then you may consider it to help you decide motive, opportunity, knowledge, absence of mistake, or lack of accident.

You should give it the weight and value you believe it is entitled to receive. If you find that the evidence has not been proved, you must disregard it. Remember even if you find that the Defendant may have

committed similar acts in the past, that is not evidence that he committed such an act in this case. You may not convict a person simply because you believe he may have committed similar acts in the past.

The Defendant is on trial only for the crime charged, and you may consider the evidence of prior acts only on the issues stated above.

R. Doc. 104, at 49–50.

The government read the evidence into the record as follows:

[T]he Defendant, Robert Harrison, Unlawfully Possessed a Firearm on September 30th, 2010, in St. Louis County, Missouri. The Defendant entered a plea of guilty and was convicted of this crime on January 6, 2012, in St. Louis County, within the Eastern District of Missouri.

Id. at 53.

The jury found Harrison guilty. The district court sentenced Harrison to 84 months' imprisonment. Harrison appeals the admission of his prior conviction.

II. Discussion

Harrison argues that the district court abused its discretion when it allowed the government to introduce evidence of his prior firearm conviction. Harrison asserts that Rule 404(b) was designed to exclude this sort of evidence and that the evidence would only be admissible if knowledge was a material issue in this case. He maintains that knowledge is not material here because he “made no claim that he accidentally possessed a firearm or mistook a firearm for a toy or something other than a gun.” Appellant’s Br. at 21.

A district court’s ruling under Rule 404(b) is reviewed for an abuse of discretion. *United States v. Geddes*, 844 F.3d 983, 989 (8th Cir. 2017).

To be admissible under Rule 404(b), the evidence must be 1) relevant to a material issue raised at trial, 2) similar in kind and close in time to the crime charged, 3) supported by sufficient evidence to support a jury finding the defendant committed the other act, and 4) its probative value is not substantially outweighed by its prejudicial value.

United States v. Oaks, 606 F.3d 530, 539 (8th Cir. 2010). We will reverse only if “the evidence clearly had no bearing on the case and was introduced solely to prove the defendant’s propensity to commit criminal acts.” *Geddes*, 844 F.3d at 989 (internal quotation marks omitted).

A. Relevance to a Material Issue

“Knowing possession of a firearm . . . is an element of 18 U.S.C. § 922(g)(1) . . .” *United States v. Walker*, 470 F.3d 1271, 1274 (8th Cir. 2006). “[A] not-guilty plea in a felon-in-possession case makes past firearm convictions relevant to show the material issues of [the defendant’s] knowledge of the presence of the firearm and his intent to possess it.” *United States v. Drew*, 9 F.4th 718, 723 (8th Cir. 2021) (cleaned up). This rule applies “even when the prosecution proceeds solely on an actual possession theory.” *United States v. Smith*, 978 F.3d 613, 616 (8th Cir. 2020) (internal quotation marks omitted).

Harrison’s knowledge is at issue here because he did not plead guilty. Thus, Harrison’s prior conviction for unlawful possession of a firearm was relevant to prove knowledge. Element (1) is satisfied.

B. Similarity with Crime Charged

As to element (2), both offenses involved Harrison unlawfully possessing a firearm, specifically a handgun, as a felon. According to paragraph 36 of the presentence report, Harrison’s prior conviction charged him with knowingly possessing a revolver despite having a prior felony conviction for unlawful use of a weapon. The instant offense similarly charged Harrison with knowingly possessing

a handgun despite his status as a felon. “When admitted to show intent, the prior acts need not be duplicates, but must be sufficiently similar to support an inference of criminal intent.” *Walker*, 470 F.3d at 1275 (internal quotation marks omitted) (finding defendant’s prior conviction for first degree robbery was similar in kind to his felon-in-possession conviction at issue, “as each involved his possession of a firearm in connection with a criminal act”).

“To determine if a crime is too remote in time to be admissible under Rule 404(b), we apply a reasonableness standard, evaluating the facts and circumstances of each case.” *Id.* (holding 18-year-old conviction not too remote in time when defendant was incarcerated for 10 of those 18 years such that the total number of years between the offenses did not “significantly diminish the probativeness of the evidence” (internal quotation marks omitted)); *see also United States v. Williams*, 796 F.3d 951, 960 (8th Cir. 2015) (holding prior convictions that were 11 and 18 years old were not too remote where, in the period since the 18-year-old conviction, defendant was incarcerated for 12 years). Harrison’s conviction was not too remote in time. Although it occurred 8 years before his arrest in this case, he was incarcerated for more than 3 of those years. Thus, element (2) is satisfied.

C. Sufficient Evidence

Sufficient evidence may be provided via certified copy of the conviction. *Walker*, 470 F.3d at 1275. Element (3) is met because the government’s attorney read a redacted certified copy of the conviction into the record. Harrison did not specifically object to the admission of this form’s contents; he objected to introduction of Rule 404(b) evidence overall. The record evidence was sufficient under our precedent.

D. Probative v. Prejudicial Value

“The district court’s determination that the probative value of the evidence outweighed any prejudice is afforded substantial deference, and a limiting instruction

diminishes the danger of unfair prejudice arising from the admission of the evidence.” *Id.* (citation omitted). Here, the district court found the conviction admissible by relying on the recovery of the gun from underneath Harrison’s car. An officer provided credible eyewitness testimony describing Harrison’s attempt to conceal the presence of the firearm by removing from his person, throwing it to the ground, and kicking it underneath his vehicle. The government had the burden of proving Harrison knowingly possessed the weapon. It carried that burden. Harrison’s prior firearm conviction was thus relevant to prove his knowledge.

The district court addressed the potential for unfair prejudice by giving a limiting instruction. The district court’s action and its balancing of the effects of the conviction’s admission against its potential prejudice were not erroneous and satisfied element (4) of *Oaks*. *See id.* (holding that limiting instruction stating that “[y]ou may not convict a person simply because you believe he may have committed similar acts in the past” and . . . ‘consider the evidence of prior acts only on the issue of intent or knowledge,’” sufficiently diminished the danger of unfair prejudice arising from the admission of a defendant’s prior robbery conviction in his trial for being a felon in possession of a firearm (first alteration in original)).

Therefore, based on its compliance with the requirements of *Oaks*, we conclude the district court did not abuse its discretion in admitting evidence of Harrison’s prior firearm conviction.

III. *Conclusion*

We affirm Harrison’s conviction.

STRAS, Circuit Judge, concurring in the judgment.

How does a decade-old firearm-possession offense show that Harrison knowingly possessed a gun this time around? Neither the government nor the court

provides much of a reason, so I will. It shows that Harrison has committed the same criminal act before and “acted in accordance” with that character by doing it again. Fed. R. Evid. 404(b)(1). Once a criminal, always a criminal. The problem, however, is that this is precisely the situation in which the rules *require* the conviction to stay out. *See id.* (“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.”); *see also United States v. Vaca*, 38 F.4th 718, 721 (8th Cir. 2022); *State v. Griffin*, 887 N.W.2d 257, 266 (Minn. 2016) (Stras, J., concurring).

Decades of precedent allow this shoehorning to happen. The scenario usually proceeds this way: the government asserts that the prior conviction is relevant to knowledge, intent, and absence of mistake—a kitchen-sink approach because no one really understands Rule 404(b) the way we have interpreted it. The district court then asks why, and the government usually responds with some variation of “the Eighth Circuit says so.” The truth is that a prior conviction is irrelevant in most actual-possession cases, unless, of course, the whole point is to allow the jury to make a propensity inference. *See United States v. Caldwell*, 760 F.3d 267, 282 (3d Cir. 2014).

Although I believe that we should revisit our precedent at some point, this is not the right case. As the court’s recitation of the facts shows, there was plenty of evidence against Harrison, and admitting the prior conviction had no “substantial influence on the jury’s verdict.” *United States v. Aldridge*, 664 F.3d 705, 714 (8th Cir. 2011) (citation omitted). Given my “reluct[ance] to magnify the burdens that our” counter-textual Rule-404(b) “jurisprudence imposes on” criminal defendants, *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring), I would affirm because any error here was harmless.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 22-1537

United States of America

Appellee

v.

Robert E. Harrison

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:20-cr-00143-JAR-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 14, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans



Search documents in this case:

No. 23A396

Title: **Robert E. Harrison, Applicant**
v.
United States

Docketed: November 1, 2023

Lower Ct: United States Court of Appeals for the Eighth Circuit

Case Numbers: (22-1537)

DATE	PROCEEDINGS AND ORDERS
Oct 27 2023	Application (23A396) to extend the time to file a petition for a writ of certiorari from November 12, 2023 to January 11, 2024, submitted to Justice Kavanaugh. Main Document Proof of Service
Nov 01 2023	Application (23A396) granted by Justice Kavanaugh extending the time to file until January 11, 2024.

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2 EASTERN DISTRICT OF MISSOURI

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BEFORE THE HONORABLE JOHN A. ROSS
UNITED STATES DISTRICT JUDGE

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1 MR. AHMED: Thank you. (Mr. Ahmed had technical
2 zoom problems, and logged back into the hearing.)

3 THE COURT: Okay. We have you back on video. I
4 know you have been able to hear everything; is that correct,
5 Mr. Ahmed?

6 MR. AHMED: (Zoom muted).

7 THE COURT: Mr. Ahmed, you are muted.

8 MR. AHMED: Yes, I heard everything. Can you hear
9 me now, your Honor?

10 THE COURT: Yes, I can.

11 MR. AHMED: Yes, you are correct. I heard
12 everything. Thank you.

13 THE COURT: Okay. The next Government's motion is
14 requesting and supporting the admission of 404(b) evidence.
15 This relates, as I understand it, to again this evidence of
16 the prior conviction, and it is based on the State of
17 Missouri case number 1022-CR05168. It was a conviction from
18 January 6, 2012 for Unlawful Use of a Weapon, and the
19 Government has moved to allow the admission of the evidence
20 as 404(b) evidence; is that correct, Mr. Bell, Mr. Holmes?

21 MR. BELL: Yes, your Honor.

22 THE COURT: And you've filed a memorandum in
23 support of that. Is it the Government's intent to just read
24 from a certified copy of the record into evidence, the date
25 of the offense, that it was for Unlawful Use of a Weapon, and

1 the date of the conviction; is that correct?

2 MR. BELL: Yes, your Honor.

3 THE COURT: The length of the sentence seems to be
4 to me to be not relevant. So I'm assuming the Government
5 would not seek to introduce that. It would just be that this
6 is the date of the conviction, and it was, in fact, a
7 conviction; is that correct?

8 MR. BELL: Yes, your Honor.

9 THE COURT: Okay.

10 MR. HOLMES: Your Honor, the Government would also
11 propose -- would also propose the 404(b) limiting instruction
12 to be given as a result of -- if this Court is inclined to
13 grant the motion and the use of 404(b) evidence. The
14 Government would be submitting a 404(b) limiting instruction.

15 THE COURT: Okay. And Mr. Ahmed, you've filed a
16 motion to exclude the 404 -- or you have filed a response to
17 the Government's motion. I want to give you an opportunity
18 if there is anything you want to tell me about that, to go
19 ahead and tell me.

20 MR. AHMED: Yes, your Honor. Given that the nature
21 of the -- (Mr. Ahmed had technical Zoom problems.)

22 THE COURT: Mr. Ahmed, you are frozen right now. I
23 know we have you on a back-up on your phone. Can you hear
24 us, Mr. Ahmed?

25 MR. AHMED: I can hear you, your Honor. Can you

1 hear me?

2 THE COURT: Yes, now I can.

3 MR. AHMED: I'm sorry, your Honor. Can you hear me
4 now?

5 THE COURT: Yes, go ahead.

6 MR. AHMED: That's correct. Yes, your Honor. We
7 filed an objection to this -- a response and objection to
8 this motion, because we believe that the nature of the
9 Defense that Mr. Harrison did not possess this gun, and so it
10 really has no evidentiary value in terms of the things listed
11 under 404(b) in terms of motive, opportunity, intent, things
12 of that nature.

13 And so, from our vantage point, it looks as though
14 this evidence is merely to be used to show that for the
15 express purpose that it is not supposed to be used for, which
16 is propensity to be guilty of the act charged. And so for
17 those reasons, we object to it, and we you know just don't
18 see the relevance. And it is overly prejudicial, and I
19 believe I cited a case in the response where we pointed out
20 that that limiting instruction is not very useful once the
21 bell is rung, it is rung.

22 THE COURT: Okay. Let me go back to the
23 Government. First of all in the memo that you filed, you
24 talk about a single count indictment on November 19, 2010,
25 and then it goes on in that last paragraph on the first page

1 to say "Defendant at his change of plea hearing admitted that
2 on October 4th, 2011, that he possessed the firearm." So I'm
3 assuming there is an error in the date.

4 What's the date of the offense of the prior
5 conviction?

6 MR. BELL: Your Honor, October 4, 2011, is the date
7 that Mr. Harrison pled. The date of the conviction, which
8 would be the date of the conviction, he was sentenced on
9 January 6, 2012, and the incident occurred on November --
10 September 30, 2010.

11 THE COURT: So what's the date of the incident?

12 MR. BELL: September 30, 2010.

13 THE COURT: Okay. For future reference, it is
14 important for the Court to know the date that he is alleged
15 to have been in possession of the firearm in determining
16 whether or not it is too remote from the date of this
17 offense, which is January 8, 2020. So that is an important
18 date. So in any event, that's the date, as I understand it
19 now, is September 30, 2010; is that correct?

20 MR. BELL: Yes, your Honor.

21 THE COURT: Okay. All right, I'd like for the
22 Government to articulate the particularized reasons why you
23 believe that this prior conviction should be admitted in this
24 particular case, given the facts of the case. So if you can
25 just give me the specific reasons how it shows intent,

1 motive, lack of mistake, tell me how that applies in this
2 case.

3 MR. BELL: Yes, your Honor, one second.

4 MR. HOLMES: Your Honor, as this Court is aware,
5 the United States has to prove that the Defendant -- sorry --
6 the United States has to prove beyond a reasonable doubt that
7 the Defendant knowingly possessed this firearm. Even in
8 situations where a general defense is going to be submitted
9 by the Defendant, the fact that "I didn't have the gun", the
10 issue of intent and knowledge is always present even in a
11 general denial type defense.

12 This 404(b) evidence -- and we anticipate the type
13 of defenses that the Defendant may present in this case, one,
14 that the Officers may have planted the gun on that day; and
15 two, that the gun was already at that location, and he has
16 the worst luck of anyone in the area. He just happened to
17 have an accident and stopped right over a gun.

18 So the history of the intent, the knowledge of and
19 the prior pattern or habit of this Defendant possessing
20 firearms is relevant, and it is right on point with the
21 issues as the Eighth Circuit has said that 404(b) is
22 appropriate. The prior bad acts is appropriate in this case,
23 because those are issues that the Government bears the burden
24 to prove the knowing and intentionally possessing a firearm
25 on the date in question in this case.

1 THE COURT: Well, you talk about a pattern of
2 carrying a gun. This is one incident, and it is almost 10
3 years prior to the date of this offense.

4 MR. HOLMES: It is 10 years older, but as the case
5 law indicates, prior bad conduct 10 years -- 10 years old, it
6 is not too remote in time. I think the -- if I remember
7 correctly, the example given in the case is like a 10 or 11
8 year old prior. So it is not too remote according to case
9 law, the 10 years.

10 THE COURT: So as I understand it, the Government's
11 position is that because the Government has the burden of
12 proving that the Defendant knowingly possessed the firearm,
13 and under the facts of this case, as I understand them, the
14 police are going to testify that Mr. Harrison had a gun,
15 dropped it, and then kicked it under a vehicle, and under
16 those circumstances where the gun is not found on the person,
17 that knowledge and intent are clearly relevant and important
18 issues in the case, and his prior possession of a firearm
19 would tend to show knowledge and intent; is that all correct,
20 Mr. Holmes?

21 MR. HOLMES: That's correct, your Honor. And to
22 the point that I made previously, according to case law in
23 *United States vs. Gaddie*, the Eighth Circuit has held that
24 prior convictions occur in four, eight, and even 11 years
25 prior are not too remote to be inadmissible. This is 10

1 years old. So it falls within the timeframe established by
2 the Eighth Circuit.

3 I know that is a case-by-case analysis, but an 11
4 year old prior has been found to be relevant and not too
5 remote in time.

6 THE COURT: Okay. Mr. Ahmed, can you still hear
7 us, sir?

8 MR. AHMED: Yes, your Honor. I'm here, and I can
9 hear you. I would just say that as the facts present
10 themselves in this case, there is just no way at this point
11 for someone to know that Mr. Harrison is making an issue out
12 of knowledgeable possession, and I just don't think there is
13 pain of inference sufficient to show why this is relevant at
14 this point.

15 If and until Mr. Harrison makes an issue, or I
16 bring it out on cross of knowing possession, there just
17 really is no relevance, and I just think that the harm and
18 the prejudice is just too great versus any probative value.

19 THE COURT: The Court believes under the facts, as
20 I understand them in this case, where a gun is found and
21 ultimately recovered from under the car that -- and the
22 Government does have the burden of proving knowing
23 possession, that the prior conviction for Possession --
24 Unlawful Possession of a Firearm, does go to the issue of
25 knowledge and intent. It is not unduly remote in time. It

1 is 10 years is a long time, and obviously, the jury can
2 consider that as it goes to the issue of knowledge and
3 intent, and clearly, you can argue that.

4 But under these circumstances, again where a gun is
5 found under the car, it is ultimately recovered under the
6 car, and the Government has the burden of proving knowledge,
7 that under these circumstances, the Court does believe that
8 this evidence is admissible under Rule 404(b) as it has been
9 stated many times. It is a rule of inclusion, and given the
10 circumstances of this case, the Court is going to grant this
11 motion in limine as it relates to the admission of the fact
12 that he has this conviction from an incident in September of
13 2010. The Court will give the limiting instruction. I do
14 think the limiting instruction is important, and I think
15 jurors follow the limiting instruction and consider it only
16 for that purpose, and so I don't believe it is a situation
17 where once the bell is rung, you can't un-ring it. I think
18 they will consider it and follow that instruction. I think
19 jurors, in my experience, work very hard to follow the
20 instructions of law and do follow the instructions of law.

21 So the Court is going to grant the motion in limine
22 to allow the use of that prior conviction. Again, before the
23 Government would present that evidence, you need to let me
24 know, and I'll read the limiting instruction. If you will
25 provide a copy of the limiting instruction to Defense