

No. 25-_____

IN THE UNITED STATES SUPREME COURT

William Ewing,
Petitioner,

v.

United States of America,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the
Sixth Circuit

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

VOLUME 1

J. NICHOLAS BOSTIC (P40653)
Counsel of record for Petitioner
909 N. Washington Ave.
Lansing, MI 48906
517-706-0132
barristerbosticlaw@gmail.com

TABLE OF CONTENTS

Volume 1 – pp. 001 – 111

- 1. Excerpts from Jury Trial, Volume 2-B with ruling on challenge to other acts evidence, Record Item #202,..... 3-7**
- 2. Judgment of the District Court, Record Item #260 8-14**
- 3. Sixth Circuit Court of Appeals Opinion and Judgment 15-38**
- 4. Third superseding indictment, Record Item #153 39-44**
- 5. Other acts motion hearing transcript, Record Item #201..... 45-111**

Volume 2 – pp. 112- 159

- 6. Excerpts from Jury Trial, Volume 2-B, Record Item #202 3-7**
- 7. Excerpts from Jury Trial, Volume 3, Record Item #203 8-13**
- 8. Excerpts from Jury Trial, Volume 4, Record Item #204 14-30**
- 9. Excerpts from Jury Trial, Volume 5, Record Item #205 31-38**

1 going to take our lunch break. It's just a few minutes
2 before noon. We'll plan on coming back at 1:00 to resume the
3 proof. Please don't discuss the case or the evidence you've
4 heard with anyone, including each other. Some juries I've
5 had in the past took that very literally and thought they
6 couldn't talk to each other at all. That's not what I'm
7 saying. You certainly can talk to each other about any
8 number of topics, just not this case. Also, please don't do
9 any independent research concerning this case while you're on
10 your lunch break. Just put it out of your minds and enjoy
11 lunch. Looks like decent weather, perhaps a little bit hazy
12 from the Canadian wildfires. We'll have you back here at
13 1:00 ready to resume. Have a good lunch.

14 (The jury was excused from the courtroom at
15 11:58 a.m.)

16 THE COURT: All right. Be seated, please. All
17 right. We'll have them back at 1. If counsel can be back at
18 ten minutes to the top of the hour, we'll try to wrap up this
19 Moulton, Alabama, issue, and then we'll have a better map for
20 the afternoon. So we'll plan on coming back at ten till.

21 (Recess taken from 12:00 p.m. to 12:55 p.m.)

22 THE COURT: All right. After consideration of the
23 parties' arguments, cases cited, both in court and in the
24 filings, just to summarize, the Court -- and this is on the
25 Moulton, Alabama, robbery issue. We had an out-of-jury

1 hearing on that this morning. Government seeks to admit
2 evidence in the form of video footage, pictures and witness
3 testimony concerning a robbery of a Cash Express store in
4 Moulton, Alabama on March the 24th of 2022, and the defendants
5 object to any evidence concerning that robbery.

6 The government offers two alternative bases for
7 admissibility of the Moulton, Alabama, robbery. First, that
8 it's *res gestae* or intrinsic to a robbery of a Cash Express
9 store in Ardmore, Tennessee, approximately 90 minutes after
10 the Moulton robbery. Moulton and Ardmore are approximately a
11 one-hour drive from each another. Alternatively, the
12 government seeks to admit it through 404(b) specifically to
13 show identity, opportunity or *modus operandi*.

14 As far as the *res gestae*, evidence of conduct
15 that's intrinsic to a charged offense may be admitted if it
16 is inextricably intertwined with the charged offense. And
17 then there must be a causal, temporal or spatial connection
18 with the charged offense. And that's from the *Littles* case,
19 688 F.App'x 321 from 2017. That cites the *Clay* case that
20 Mr. Evans discussed this morning, which is a reported case.

21 The Court can include intrinsic or *res gestae*
22 evidence under certain circumstances that the Sixth Circuit
23 has directed district courts to review, including to
24 preclude -- it's a prelude, sorry, to the charged offense;
25 it's directly probative of a charged offense that arises from

1 the same events as the charged offense; it forms an integral
2 part of witness testimony; or it completes the story of the
3 charged offense.

4 Those last three I don't think apply at all.
5 Here, at best, it might be considered prelude or probative --
6 directly probative. And, again, that's the *Littles* case I
7 cited there. They're citing the *Churn* Sixth Circuit case
8 from 2015, 800 F.3d 768.

9 The overarching purpose of the res gestae doctrine
10 is to provide a natural narrative event so as to avoid a
11 sanitized recounting of facts. The problem with the Moulton
12 robbery being res gestae is that it's difficult for the Court
13 to conclude that it could fairly be seen as a natural
14 narrative of the Ardmore robbery. I think you can tell the
15 story of the Ardmore robbery without the Moulton robbery at
16 all. And so I think that for that reason I will not allow it
17 on the grounds of res gestae.

18 Turning to 404(b), the Court has to find that
19 there's sufficient evidence that supports a finding that the
20 perpetrators of the Moulton robbery were also the
21 perpetrators of the Ardmore robbery. In particular, the
22 sufficient evidence approach was used by the Court in the
23 *Clay* opinion. Again, that's 677 F.3d 689. Second, that it's
24 offered for permissible purpose. And third, that the Court
25 does a Rule 403 analysis.

1 The Court finds sufficient evidence that the
2 perpetrators of the Moulton robbery of the Cash Express were
3 also the perpetrators of the Ardmore, Tennessee, Cash Express
4 90 minutes later on March the 24th of 2022. That's based on
5 the testimony and evidence about the same or similar car,
6 similar clothing, general description of the perpetrators,
7 and then the method of robbery that's depicted on video and
8 still shots of the two facilities.

9 Second, the Court finds that the government has
10 offered it for two legitimate purposes. I don't think that
11 opportunity is an appropriate purpose here, but I do think
12 that identity and modus operandi for the Ardmore robbery --
13 it would be appropriate -- it would be admissible for those
14 two legitimate purposes.

15 And third, that the Court will alleviate any
16 issues with 403 by giving a limiting instruction as
17 follows -- and this would be given before the testimony about
18 the Moulton events. And that will be words to this effect:

19 You will be presented with evidence of a robbery
20 in Moulton, Alabama, which was not a robbery charged in the
21 indictment. If you find that individuals committed the
22 robbery in Moulton, you can consider that evidence as it
23 relates to the government's claim as that those are the --
24 they identify as the rob -- those who committed the robbery
25 in Ardmore and for modus operandi, that is the mode of

1 operation, in the charged robbery, but you may not consider
2 it for any other purpose.

3 And then I'll remind them that the defendants are
4 on trial here only for the crimes charged in the indictment,
5 not for any other acts, and they should not return a guilty
6 verdict on a crime charged in the indictment, unless the
7 government proves the crime charged beyond a reasonable
8 doubt. That's how I plan to handle that.

9 All right?

10 MR. EVANS: Your Honor, just for purposes of the
11 record, just note defendant's exception to Your Honor's
12 ruling as it relates to the admissibility of the Moulton
13 robbery under 403 analysis.

14 THE COURT: Okay.

15 MR. CARTWRIGHT: Same here.

16 THE COURT: All right. Those objections are noted
17 for the record.

18 All right. Are we ready for another witness?

19 MS. KLOPF: Yes, Your Honor, although I just want
20 to note one thing for the record, or just more for the Court,
21 less for the record. It appears that the jury may not be
22 getting shepherded down to the jury assembly room
23 immediately. We've noticed that they've been lingering in
24 the hallway a little bit after we have adjourned. And, you
25 know, just to avoid any chance -- I just wanted to flag it

UNITED STATES DISTRICT COURT

Middle District of Tennessee

UNITED STATES OF AMERICA

v.

WILLIAM JOHN EWING

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:22CR00174-2

USM Number: 00253-510

Paul J. Bruno

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☒ was found guilty on count(s) 5 and 6 of the Third Superseding Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:2113(a)	Bank Robbery	4/4/2022	5
18:924(c)	Brandishing a Firearm During a Violent Crime	4/4/2022	6

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 1

☒ Count(s) 3, 4, 9, and 10 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/28/2025

Date of Imposition of Judgment

Signature of Judge

WILLIAM L. CAMPBELL, JR.

Chief United States District Judge

1/28/2025

Date

Petitioner's Appendix, Vol. 1 - 008

DEFENDANT: WILLIAM JOHN EWING
CASE NUMBER: 3:22CR00174-2

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
147 months (63 months for count 5; 84 months for count 6 to run consecutive)

☒ The court makes the following recommendations to the Bureau of Prisons:
FCI Talladega, Alabama
RDAP

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ , with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

Petitioner's Appendix, Vol. 1 - 009

DEFENDANT: WILLIAM JOHN EWING

CASE NUMBER: 3:22CR00174-2

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 years, per count, to run concurrent

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☒ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

Petitioner's Appendix, Vol. 1 - 010

DEFENDANT: WILLIAM JOHN EWING
CASE NUMBER: 3:22CR00174-2

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: WILLIAM JOHN EWING
CASE NUMBER: 3:22CR00174-2

SPECIAL CONDITIONS OF SUPERVISION

1. You shall participate in a program of drug testing and substance abuse treatment which may include a 30-day inpatient treatment program followed by up to 90 days in a community correction center at the direction of the United States Probation Office. You shall pay all or part of the cost for substance abuse treatment if the United States Probation Office determines you have the financial ability to do so or has appropriate insurance coverage to pay for such treatment.
2. You shall participate in a mental health program as directed by the United States Probation Office. You shall pay all or part of the cost of mental health treatment if the United States Probation Office determines you have the financial ability to do so or has appropriate insurance coverage to pay for such treatment.
3. You must take all mental health medications that may be prescribed by your treating physician.
4. You shall pay restitution, joint and several with Fredrick Carney, in an amount totaling \$15,770.85 to the following:

Regions Bank
ATTN: Corporate Security-Restitution
2090 Parkway Office Circle
Hoover, Alabama 35244

Payments shall be submitted to the Clerk, United States District Court, 719 Church Street, Suite 1300, Nashville, TN 37203. Restitution is due immediately. If you are incarcerated, payment shall begin under the Bureau of Prisons' Inmate Financial Responsibility Program. Should there be any unpaid balance when supervision commences, you shall pay the remaining restitution at a minimum monthly rate of 10 percent of your gross monthly income. No interest shall accrue as long as you remain in compliance with the payment schedule ordered. Pursuant to 18 U.S.C. § 3664(k), you shall notify the court and United States Attorney of any material change in economic circumstances that might affect ability to pay.
5. You shall furnish all financial records, including, without limitation, earnings records and tax returns, to the United States Probation Office upon request.
6. You shall not incur new debt or open additional lines of credit without prior approval of the United States Probation Office until all monetary sanctions are paid.
7. You must not communicate, or otherwise interact, with Regions Bank and its employees, either directly or through someone else, without first obtaining the permission of the probation officer.

DEFENDANT: WILLIAM JOHN EWING
CASE NUMBER: 3:22CR00174-2

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Restitution</u>	<u>Fine</u>	<u>AVAA Assessment*</u>	<u>JVTA Assessment**</u>
TOTALS	\$ 200.00	\$ 15,770.85	\$	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss***</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Regions Bank	\$15,770.85	\$15,770.85	
ATTN: Corporate Security-Restitution			
2090 Parkway Office Circle			
Hoover, Alabama 35244			

TOTALS	\$	15,770.85	\$	15,770.85
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☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: WILLIAM JOHN EWING
CASE NUMBER: 3:22CR00174-2

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A** ☒ Lump sum payment of \$ 15,970.85 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D** ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E** ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☒ Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
3:22-cr-00174-1 Fredrick Carney	15,770.85	15,770.85	

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVT A assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Petitioner's Appendix, Vol. I - 014

NOT RECOMMENDED FOR PUBLICATION

File Name: 26a0149n.06

Nos. 24-6051, 25-5097

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

FILED

Mar 24, 2026

KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

FREDRICK EUGENE CARNEY (24-6051);
WILLIAM JOHN EWING (25-5097),

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE MIDDLE
DISTRICT OF TENNESSEE

OPINION

Before: CLAY, GIBBONS, and HERMANDORFER, Circuit Judges.

CLAY, Circuit Judge. Following a joint trial, the jury convicted Defendants William John Ewing (“Ewing”) and Fredrick Eugene Carney (“Carney”) of various crimes relating to a series of armed robberies. This consolidated appeal followed, wherein: (1) Ewing challenges the district court’s failure to sever defendants and charges for trial under Federal Rule of Criminal Procedure 8; (2) Carney challenges the district court’s denial of his motion to suppress; (3) both Defendants challenge the district court’s admission of evidence under Federal Rule of Evidence 404(b); and (4) Ewing challenges the sufficiency of the evidence supporting his conviction under 18 U.S.C. § 924(c). For the reasons below, we **AFFIRM** the rulings of the district court.

I. BACKGROUND

A. Factual History

On March 24, 2022, an armed robbery occurred at a loan business, Cash Express, in Moulton, Alabama. At approximately 2:45 PM, only one employee was working at the Cash

No. 24-6051/25-5097, *United States v. Carney, et al.*

Express. After two people drove up in a black Honda Civic and parked outside the Cash Express, Defendant Fredrick Eugene Carney (“Carney”) exited the car and entered the store. Carney asked the employee about obtaining a loan, and as the employee began discussing the topic, an accomplice entered the store, pulled out a gun, and jumped the counter. The accomplice was alleged by the government to be Defendant William John Ewing (“Ewing”). Upon directing the employee to open the safe, Carney and the accomplice stole money from the safe and then exited the store saying, “Let’s go get the next one.” Trial Tr. Vol. 2-B, R. 202, Page ID #1283-85. Carney and his accomplice returned to the black Honda Civic and drove north. Surveillance footage recorded the black Honda Civic driving away from the Cash Express with a non-functioning left reverse light and distinctive weatherstripping.

At approximately 4:30 PM on the same day, Carney and his accomplice drove up in the black Honda Civic to another Cash Express in Ardmore, Tennessee, which is about 45 minutes away from Moulton. Carney and his accomplice were still wearing the same clothes. Carney’s accomplice entered the Cash Express and asked the only employee working there at the time about obtaining a loan. As the employee began discussing the topic, Carney entered the store and pulled out a gun, and the two men conducted another armed robbery by walking around the counter and directing the employee to open the money drawer.

On the morning of April 4, 2022, surveillance footage from Ewing’s apartment complex recorded the same black Honda Civic, with a non-functioning left reverse light and distinctive weatherstripping, parked outside Ewing’s apartment. Carney and Ewing exited the black Honda Civic outside Ewing’s apartment in the surveillance footage. The car was also later confirmed to be registered under Ewing’s name. On that morning, Ewing texted his sister, Latika Poole (“Poole”): “I’m trying to get rich.” Trial Tr. Vol. 5, R. 205, Page ID #2072-73.

No. 24-6051/25-5097, *United States v. Carney, et al.*

At around 2 PM that day, Carney and Ewing entered Regions Bank in Smyrna, Tennessee, stood for a while, then came around the employees' desks, pulled out guns, and proclaimed, "This is a robbery." Trial Tr. Vol. 2-B, R. 202, Page ID #1228. One of them pointed his gun at an employee and stated that if the employee pushed the alarm button, he would shoot the employee. Carney and Ewing directed employees to unlock the money drawer and vault, and they then stole money from those places. They also said that they were going to "take somebody out" if they did not get money from the vault. *Id.* at 1229. Afterward, Carney and Ewing drove off in a red Chevy Impala that Carney owned. Carney later exchanged the red Chevy Impala for a black Dodge Charger at a used car lot.

On April 20, 2022, Carney robbed another Cash Express in Greenbrier, Tennessee. Carney. Carney escaped from the scene in his black Dodge Charger and evaded the police pursuing him. On April 23, 2022, Carney told his girlfriend at the time, Shyanne McCullough ("McCullough"), that he robbed the Regions Bank in Smyrna and multiple other Cash Express locations, and she reported his confession to the police.

On May 1, 2022, while McCullough, Carney, and Ewing were at Ewing's apartment, Carney stated, "We're going to hit a bigger bank." Trial Tr. Vol. 3, R. 203, Page ID #1606-07. During that conversation, McCullough also saw guns under Ewing's couch and a gun on Carney's person. The next day, Carney and an accomplice alleged by the government to be Ewing robbed First Horizon Bank in Whites Creek, Tennessee. During the robbery, Carney warned an employee that he would get shot if he did not open the vault and then fired a gunshot into a nearby door.

Following reports of a robbery, law enforcement visited various addresses associated with the suspected perpetrators, Carney and Ewing. One of those locations was Poole's residence, and during law enforcement's visit there on May 2, 2022, law enforcement saw Carney, who attempted

No. 24-6051/25-5097, *United States v. Carney, et al.*

to flee, but eventually arrested him pursuant to a warrant. While Carney initially fled from law enforcement, officers spoke with Poole outside her residence, and she signed a consent form that authorized a complete search of her address. As officers took photographs inside and outside of her residence, interviewed her in the driveway, and searched the entire premises, Poole never attempted to withdraw or limit her consent. Poole told officers that the black Dodge Charger parked in the nearby carport belonged to Carney and that Carney “sometimes sleeps” at her residence. Suppression Hr’g Tr., R. 144, Page ID #682, 693-94. Law enforcement towed the black Dodge Charger, and after obtaining a search warrant, gathered incriminating evidence from the vehicle.

B. Procedural History

On May 22, 2023, the grand jury returned the Third Superseding Indictment, which is the operative indictment in this case. The Third Superseding Indictment charged Ewing and Carney with: two counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951 (regarding the Cash Express robberies in Ardmore and another location); two counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) (regarding the robberies at the Regions Bank in Smyrna and the First Horizon Bank in Whites Creek); two counts of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c); and one count of discharging a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). The Third Superseding Indictment also charged Carney with: two additional counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951 (regarding the Cash Express robberies in Greenbrier and another location); one additional count of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c); and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924.

No. 24-6051/25-5097, *United States v. Carney, et al.*

Neither Carney nor Ewing were charged with any crimes relating to the Cash Express robbery in Moulton.

Prior to the Third Superseding Indictment, Ewing had moved to sever his trial from Carney's trial after the grand jury returned the Superseding Indictment. Ewing had also filed a motion objecting to misjoinder and requesting to sever his trial after the Second Superseding Indictment. The district court denied all of these motions.

Ewing did not, however, raise any objection to misjoinder or move for severance after the grand jury returned the Third Superseding Indictment. Instead, Ewing's counsel indicated that Ewing did not want the district court to sever his trial. At a pretrial conference, the district court requested Carney's and Ewing's counsel's thoughts regarding "how the trial [will] go forward [since] there's a new indictment," referring to the Third Superseding Indictment. Pretrial Conference Tr., R. 273, Page ID #3067-68. Carney's counsel stated that Carney "wishes to proceed [to trial] on the entire indictment" and "does not wish to have it severed." *Id.* at 3076. After some back and forth, the district court asked Ewing's counsel for his views, and Ewing's counsel stated that he "second[s] everything [his] colleague has said," and "Ewing . . . is very adamant that he wants to go [to trial] on all charges in the third superseding indictment." *Id.* at 3089. Ewing's counsel further confirmed, "I won't go over all of the responses my colleague has given, but I agree with them." *Id.*

Carney also filed a motion to suppress evidence that resulted from the seizure of the black Dodge Charger, which he alleged was an unreasonable seizure in violation of his Fourth Amendment rights. Following a suppression hearing, where the government presented testimony from five witnesses and introduced twelve exhibits and Carney did not present any evidence, the district court denied Carney's motion to suppress.

No. 24-6051/25-5097, *United States v. Carney, et al.*

In preparation for trial, the government filed a notice of intent to introduce evidence regarding the uncharged robbery of the Cash Express that occurred in Moulton, Alabama on March 24, 2022. The district court admitted such evidence pursuant to Federal Rule of Evidence 404(b), finding that the government offered it for the legitimate purposes of establishing the identity and *modus operandi* of the perpetrators of other charged robberies at issue in the case, including the robbery of the Cash Express in Ardmore that occurred on the same day. The district court assured the parties that the evidence would be accompanied by a limiting instruction for the jury. At trial, the district court provided the limiting instruction once when the jury first heard the evidence of the Moulton robbery and again at closing instructions.

Following trial, the jury convicted Ewing of one count of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and one count of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (both regarding the Regions Bank robbery in Smyrna). The jury convicted Carney of two counts of Hobbs Act robbery in violation of 18 U.S.C. § 1951 (regarding the Cash Express robberies in Ardmore and another location); two counts of armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) (regarding the robberies at the Regions Bank in Smyrna and the First Horizon Bank in Whites Creek); three counts of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c); one count of discharging a firearm during a crime of violence in violation of 18 U.S.C. § 924(c); and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924. The district court sentenced Ewing and Carney to 147 and 384 months of imprisonment respectively.

This appeal followed. Ewing challenges the district court's failure to sever the defendants and charges for trial. Carney challenges the district court's denial of his motion to suppress evidence resulting from the seizure of his black Dodge Charger. Both Ewing and Carney challenge

No. 24-6051/25-5097, *United States v. Carney, et al.*

the district court's admission of evidence regarding the uncharged robbery of the Cash Express in Moulton. And Ewing challenges the sufficiency of the evidence for his conviction of brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c).

II. DISCUSSION

A. Severance of Defendants and Charges

Ewing argues that his convictions must be vacated because severance was mandatory due to misjoinder of defendants and charges in the Third Superseding Indictment.

After the grand jury returned the Second Superseding Indictment, Ewing moved for severance based on misjoinder under Federal Rule of Criminal Procedure 8 and, alternatively, moved for severance based on prejudicial joinder under Rule 14. The district court denied Ewing's motion. The grand jury later issued a Third Superseding Indictment, which became the operative indictment in this case and served as the basis for the charges against Ewing at trial. Ewing did not file any motion for severance or raise any objection to misjoinder regarding the Third Superseding Indictment.

On appeal, Ewing presents argument only on his motion for severance based on misjoinder under Rule 8 and does not discuss his motion for severance based on prejudicial joinder under Rule 14. This is likely so because we “have long held that a defendant waives an argument for severance under Rule 14 if he does not renew his Rule 14 motion ‘following the close of the evidence at trial.’” *United States v. Abbott*, No. 24-5602, 2025 WL 2237656, at *4 (6th Cir. Aug. 6, 2025) (quoting *United States v. Sherrill*, 972 F.3d 752, 762 (6th Cir. 2020)). Because Ewing did not renew his motion at the end of the trial, Ewing waived any argument for severance under Rule 14.

No. 24-6051/25-5097, *United States v. Carney, et al.*

And, as the government correctly contends, Ewing also waived his argument for severance under Rule 8. At a pretrial conference, the district court requested Carney’s and Ewing’s counsel’s thoughts regarding “how the trial [will] go forward [since] there’s a new indictment,” referring to the Third Superseding Indictment. Pretrial Conference Tr., R. 273, Page ID #3067-68. In response, Carney’s counsel stated that Carney “wishes to proceed to trial on the entire indictment, the third superseding indictment,” and “does not wish to have it severed.” *Id.* at 3076. Ewing’s counsel then stated that he “second[s] everything [his] colleague has said,” and “Ewing . . . is very adamant that he wants to go [to trial] on all charges in the third superseding indictment.” *Id.* at 3089. Ewing’s counsel further confirmed, “I won’t go over all of the responses my colleague has given, but I agree with them.” *Id.* He then agreed with the district court’s proposed timeline for a joint trial on all charges.

Through these statements at the pretrial conference, Ewing’s counsel agreed that Ewing did not wish to have the Third Superseding Indictment severed and instead wished to proceed jointly with Carney on the entire indictment. By agreeing with Carney’s counsel’s statement that he did not wish to have the indictment severed for trial, Ewing’s counsel waived any argument on appeal that the district court should have severed the defendants or charges in the Third Superseding Indictment. Such an “intentional relinquishment or abandonment of a known right” is not reviewable by this Court. *United States v. Carter*, 89 F.4th 565, 568 (6th Cir. 2023) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). For we have held that an “attorney cannot agree in open court with a judge’s proposed course of conduct and then charge the court with error in following that course,” and when an attorney does so, his client “waive[s] his claim on the issue.” *United States v. Aparco-Centeno*, 280 F.3d 1084, 1088 (6th Cir. 2002); accord *United States v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990).

No. 24-6051/25-5097, *United States v. Carney, et al.*

Ewing argues that waiver should not apply to this argument because he filed the motion for severance regarding the Second Superseding Indictment, and a “new motion to sever or claiming misjoinder would not have brought anything new to the trial court.” Ewing Appellant’s Reply at 6. But that is incorrect. Ewing’s motion for severance contemplates only the counts in the Second Superseding Indictment. But the Third Superseding Indictment replaced the Second Superseding Indictment as the operative indictment for trial, and all of the counts except for one in the Third Superseding Indictment are different from the counts in the Second Superseding Indictment. Moreover, the Third Superseding Indictment alleged two new robberies and added four new counts, including one new alleged crime. A defendant must raise a “defect in the indictment” prior to trial, Fed. R. Crim. P. 12(b)(3)(B), and Ewing did not raise any defect in the Third Superseding Indictment prior to his trial. But, in any event, Ewing relinquished any argument regarding severance when his counsel provided that Ewing did not wish to have the Third Superseding Indictment severed for trial.

Ewing next argues that his “counsel’s statement about the desire to proceed to trial can only be considered a waiver if taken grossly out of context.” Ewing Appellant’s Reply at 7. But we reasonably view Ewing’s counsel’s statements in the context established by the district court when it invited counsel’s thoughts on “how the trial [will] go forward [since] there’s a new indictment.” Pretrial Conference Tr., R. 273, Page ID #3067-68. Ewing contends that his counsel’s indication that he did not want the Third Superseding Indictment to be severed was limited solely to the context of severance as “an option to address concerns over speedy trial issues” and “did not include severance of charges at all under Rule 8(a).” Ewing Appellant’s Reply at 10. But that suggested limitation exists nowhere in the record. Ewing’s counsel stated that he “second[s] everything [his] colleague has said,” including that he did not want the indictment to

No. 24-6051/25-5097, *United States v. Carney, et al.*

be severed (without any exception or limitation), and that he “is very adamant that he wants to go [to trial] on all charges in the third superseding indictment.” Pretrial Conference Tr., R. 273, Page ID #3089. A “party cannot tell the district court one thing and then tell us the opposite.” *United States v. Artrip*, 364 F. App’x 204, 205 (6th Cir. 2010). And Ewing’s counsel told the district court that he did not wish to have the indictment severed and now tells us that he did wish to have the indictment severed.

Because Ewing did not make any objection to the Third Superseding Indictment regarding severance or misjoinder and instead provided that he did not wish for the Third Superseding Indictment to be severed for trial, we find that Ewing did not preserve the issue of severance for appellate review.

B. Carney’s Motion to Suppress

Carney challenges the district court’s denial of his motion to suppress evidence resulting from the seizure of his black Dodge Charger from Poole’s residence, arguing that the seizure violated his Fourth Amendment rights.

In reviewing the denial of a motion to suppress, we apply a “mixed standard of review.” *United States v. Simmons*, 129 F.4th 382, 386 (6th Cir. 2025). “We review the district court’s factual findings for clear error and legal conclusions *de novo*.” *Id.* (emphasis added). In doing so, we “consider the evidence in the light most favorable to the government.” *United States v. Taylor*, 121 F.4th 590, 594 (6th Cir. 2024). The denial of a motion to suppress “will be affirmed if it ‘can be justified for any reason.’” *United States v. Burrell*, 114 F.4th 537, 550 (6th Cir. 2024) (quoting *United States v. Whitley*, 34 F.4th 522, 528 (6th Cir. 2022)).

The Fourth Amendment prohibits “unreasonable searches and seizures.” U.S. Const. amend. IV. Fourth Amendment rights are “personal,” so “a defendant must show that his own

No. 24-6051/25-5097, *United States v. Carney, et al.*

rights were infringed.” *United States v. Russell*, 26 F.4th 371, 374 (6th Cir. 2022) (citations and quotations omitted). A defendant thus bears “the burden of establishing his standing to assert a Fourth Amendment violation.” *United States v. Smith*, 263 F.3d 571, 582 (6th Cir. 2001). To establish standing, “the defendant must show (1) that he had a subjective expectation of privacy, and (2) that his expectation was objectively reasonable.” *United States v. Washington*, 573 F.3d 279, 282 (6th Cir. 2009).

The government argued at the district court and now argues on appeal that Carney lacks standing to challenge the seizure of his vehicle from Poole’s residence. In denying Carney’s motion to suppress, the district court did not make any finding regarding whether Carney had standing to contest the seizure and, instead, concluded that the seizure was lawful regardless. But Carney failed to carry his burden of “establishing his standing to assert a Fourth Amendment violation.” *Smith*, 263 F.3d at 582.

“It is well-settled that a person has no reasonable expectation of privacy where he is neither a resident nor an overnight guest in a residence.” *United States v. Plavcak*, 411 F.3d 655, 665 (6th Cir. 2005). “The Supreme Court has recognized an overnight guest’s ‘legitimate expectation of privacy in his host’s home.’” *United States v. Knowledge*, 418 F. App’x 405, 407 (6th Cir. 2011) (quoting *Minnesota v. Olson*, 495 U.S. 91, 98 (1990)). To otherwise have a reasonable expectation of privacy as a guest at another person’s residence, a defendant must “establish that he has a meaningful connection to the residence.” *United States v. Haynes*, 108 F. App’x 372, 374 (6th Cir. 2004) (quotation omitted). For example, in *United States v. Pollard*, we held that a defendant had standing to contest a search of another person’s residence where he provided evidence that he “had been staying at the home earlier in the week,” “occasionally spent the night at the residence,” “kept some personal belongings in a closet,” “sometimes ate meals with the family during his

No. 24-6051/25-5097, *United States v. Carney, et al.*

visits,” and “was allowed to stay in the home even if the residents were not present.” 215 F.3d 643, 647-48 (6th Cir. 2000). But we have also held that “a casual, transient visitor” lacks Fourth Amendment standing to challenge a search or seizure at another person’s residence. *United States v. McNeal*, 955 F.2d 1067, 1070 (6th Cir. 1992); *see also United States v. Anderson*, 166 F.3d 1215, 1998 WL 833701, at * 7 (6th Cir. 1998) (“A casual visitor, unlike an overnight visitor, does not have standing to contest a warrantless search.”).

The only argument that Carney offers as to why he had a reasonable expectation of privacy at Poole’s residence is that he “was a frequent overnight guest” at Poole’s residence and “was permitted to keep his car at the residence.” Carney Appellant’s Br. at 13, 15. But Carney does not cite to any evidence in the record that substantiates these assertions. Carney does not confirm that he was in fact an overnight guest at the time of the seizure of his vehicle or elaborate on the frequency of his overnight stays at Poole’s residence. Carney does not indicate what belongings, if any, that he kept at Poole’s residence or whether he had any other privileges there besides parking his car outside the residence while visiting. *Cf. United States v. Waller*, 426 F.3d 838, 844-45 (6th Cir. 2005) (holding that a defendant had a reasonable expectation of privacy at another person’s apartment that he used “primarily for showering, changing clothes, and storing his personal belongings,” including in a bedroom closet); *United States v. Heath*, 259 F.3d 522, 533 (6th Cir. 2001) (holding that a defendant had a reasonable expectation of privacy at his cousin’s apartment where he “slept on the couch . . . once a week for approximately two years” and “possessed a key which . . . allowed [him] unfettered access to the apartment and the ability to admit and exclude others” (quotations omitted)). And although Carney was Poole’s brother, “merely having a relationship with the homeowner does not by itself establish a reasonable expectation of privacy.” *United States v. Johnson*, 171 F. App’x 499, 501-02 (6th Cir. 2006)

No. 24-6051/25-5097, *United States v. Carney, et al.*

(citing *United States v. Buckner*, 717 F.2d 297, 300 (6th Cir. 1983) (holding that a defendant does not have a reasonable expectation of privacy at his mother’s apartment)). The only evidence in the record regarding Carney’s connection to Poole’s residence that is apparent to the Court, as highlighted by the government, is Poole’s statement that Carney “sometimes sleeps” at her residence. Suppression Hr’g Tr., R. 144, Page ID #682. That statement alone does not establish that Carney had a reasonable expectation of privacy at Poole’s residence during the seizure. Given the dearth of evidence, we may liken Carney to only a casual visitor, who lacks Fourth Amendment standing to challenge a search or seizure at Poole’s residence. *See McNeal*, 955 F.2d at 1070; *see also Anderson*, 1998 WL 833701, at *7.

Since Carney does not have standing to contest the seizure, the district court’s denial of Carney’s motion to suppress “can be justified for any reason.”¹ *Burrell*, 114 F.4th at 550 (quoting *Whitley*, 34 F.4th at 528). We therefore affirm the district court’s denial of the motion.

C. Rule 404(b) Evidence of the Uncharged Moulton Robbery

Both Ewing and Carney argue that the district court erred in admitting evidence regarding the uncharged robbery at Cash Express in Moulton on March 24, 2022. The district court admitted this evidence under Federal Rule of Evidence 404(b) for the purposes of establishing identity and *modus operandi*, and Ewing and Carney preserved their objections.

Rule 404(b) prohibits district courts “from permitting evidence of other crimes or wrongs (‘bad acts’) to be used to prove character or propensity to violate the law.” *United States v. Fairley*, 137 F.4th 503, 517 (6th Cir. 2025). “However, such evidence may be admitted for other purposes, such as to show ‘motive, opportunity, intent, preparation, plan, knowledge, identity, absence of

¹ The district court indicated that the plain view and automobile exceptions justify law enforcement’s seizure of the vehicle, but because the district court’s denial of Carney’s motion to suppress “can be justified for any reason,” we need not review the merits of the other bases for the district court’s conclusion. *Burrell*, 114 F.4th at 550 (quoting *Whitley*, 34 F.4th at 528).

No. 24-6051/25-5097, *United States v. Carney, et al.*

mistake, or lack of accident.” *Id.* (quoting Fed. R. Evid. 404(b)). And that list is “not exhaustive”—another “proper purpose” is “*modus operandi*.” *United States v. Perry*, 438 F.3d 642, 648 (6th Cir. 2006) (emphasis added). “District courts possess broad discretion in admitting evidence under Rule 404(b).” *United States v. Will*, 612 F. App’x 265, 267 (6th Cir. 2015). We use a three-part test to review their exercise of that discretion: “First, we review for clear error the factual determination that other acts occurred. Second, we review *de novo* the legal determination that the acts were admissible for a permissible 404(b) purpose. Third, we review for abuse of discretion the determination that the probative value of the evidence is not substantially outweighed by unfair prejudicial impact.”² *Fairley*, 137 F.4th at 517 (quoting *United States v. Adams*, 722 F.3d 788, 810-11 (6th Cir. 2013)).

1. Step One

At the first step, there is no dispute that the robbery in Moulton occurred, so the district court did not clearly err in so finding. But in *United States v. Clay*, we also held that, at the first step, we “must review for clear error the district court’s determination that there is ‘sufficient evidence to support a finding by the jury that the defendant committed’” the other act. 667 F.3d 689, 694 (6th Cir. 2012) (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988)). To that end, the district court stated that it would follow the “sufficient evidence approach used by the Court in the *Clay* opinion” and found that there was “sufficient evidence that the perpetrators of the Moulton robbery of the Cash Express were also the perpetrators of the Ardmore, Tennessee, Cash Express [robbery] 90 minutes later on March 24, 2022.” Trial Tr. Vol. 2-B, R. 202, Page ID #1251-52 (citation modified). The district court highlighted the “testimony and evidence about

² As the government points out, this Court’s caselaw is unsettled as to whether *de novo* or abuse of discretion review governs the district court’s determination that prior bad acts were admissible for a proper purpose under Rule 404(b). *E.g., United States v. Mandoka*, 869 F.3d 448, 457 (6th Cir. 2017). Because the government does not object to applying *de novo* review in this case, we take that route.

No. 24-6051/25-5097, *United States v. Carney, et al.*

the same or similar car, similar clothing, general description of the perpetrators, and then the method of the robbery that's depicted on video and still shots of the two facilities.” *Id.*

Ewing and Carney argue that the district court clearly erred at the first step because it found that sufficient evidence shows that the perpetrators of the Moulton robbery were the same perpetrators of the Ardmore robbery, instead of finding that sufficient evidence shows that Ewing and Carney committed the Moulton robbery. To the extent that the district court did not use the exact words articulated by this Court in *Clay*, under clear error review, we “look to the entire record and determine whether we are ‘left with the definite and firm conviction that a mistake has been committed.’” *United States v. Ibarra*, Nos. 24-5174/5176/5248/5361, 2025 WL 1542319, at *8 (6th Cir. May 30, 2025) (quoting *Mathis*, 738 F.3d at 739). We “may affirm on any grounds supported by the record, even if different from the reasons of the district court.” *United States v. Gilbert*, 952 F.3d 759, 762 (6th Cir. 2020).

The record provides ample evidence to support a finding that Carney and Ewing committed the Moulton robbery. McCullough, who personally knew Ewing and Carney, identified both of them as the perpetrators of the Moulton robbery based on the surveillance footage. Surveillance footage also recorded the perpetrators of the Moulton robbery driving away from the Cash Express in a black Honda Civic with a non-functioning left reverse light and distinctive weatherstripping. That same black Honda Civic was confirmed to be registered under Ewing's name. And surveillance footage also showed Carney and Ewing together exiting that same black Honda Civic outside Ewing's apartment. The perpetrators of the Moulton robbery were also wearing the same clothes as the perpetrators of the Ardmore robbery only 90 minutes later, and cell phone records placed Carney in Ardmore at the time of the Ardmore robbery. In light of this evidence, the district court did not clearly err in finding that there was sufficient evidence at the first step.

No. 24-6051/25-5097, *United States v. Carney, et al.*

2. Step Two

At the second step, the district court found that the government offered evidence of the Moulton robbery for two proper purposes: identity and *modus operandi*.

The district court properly admitted evidence of the Moulton robbery to establish the identity of Ewing and Carney as the perpetrators of other charged robberies, including the robbery of the Cash Express in Ardmore on the same day of the Moulton robbery and the robbery of the Regions Bank in Smyrna on April 4, 2022. As already indicated, the perpetrators of the Moulton and Ardmore robberies, which occurred within 90 minutes of each other, were wearing the same clothes and driving the same car—a car registered under Ewing’s name and a car that Ewing and Carney were later seen exiting outside Ewing’s apartment. While leaving the site of the Moulton robbery, the perpetrators said, “Let’s go get the next one,” and then drove the car north in the direction of Ardmore. Trial Tr. Vol. 2-B, R. 202, Page ID #1283-85, 1287, 1312. Because McCullough identified Ewing and Carney as the perpetrators of the Moulton robbery, and that robbery was connected to the Ardmore robbery, evidence of the Moulton robbery would indicate that Ewing and Carney were also the perpetrators of the Ardmore robbery. Moreover, when exiting the car used in the Moulton and Ardmore robberies while outside of Ewing’s apartment, Ewing and Carney were wearing the same clothes as the perpetrators who later that day committed the Smyrna robbery. In light of these links to other charged robberies, the district court properly admitted evidence of the Moulton robbery to establish identity. To be sure, the identity of the perpetrators of the charged robberies was a major, if not the most important, issue at trial, and “when the issue is one related solely to identity, this Court has overwhelmingly approved of the admission of ‘other acts’ evidence.” *Perry*, 438 F.3d at 648 (quoting *United States v. Fountain*, 2 F.3d 656, 668 (6th Cir. 1993)).

No. 24-6051/25-5097, *United States v. Carney, et al.*

The district court also properly admitted evidence of the Moulton robbery to show *modus operandi*. “To qualify as *modus operandi* evidence, the similarity between the prior crime and the charged offense must be striking, and the method must amount to a ‘signature.’” *United States v. Joseph*, 270 F. App’x 399, 406 (6th Cir. 2008) (quoting *Perry*, 438 F.3d at 648). But “it is not necessary . . . that the crimes be identical in every detail.” *Id.* (quoting *Perry*, 438 F.3d at 648). So “two crimes of sufficient distinctive similarity can create . . . *modus operandi*.” *Perry*, 438 F.3d at 648 (emphasis added). For example, in *Perry*, we found that the district court admitted evidence of the other bank robbery for the proper purpose of establishing *modus operandi* where the defendant followed a similar pattern in both the other bank robbery and the charged bank robbery: the defendant entered the business carrying a gun, then made requests for change and money orders, and then pulled out his gun to commit the robbery. *Id.*

Similarly, the Moulton robbery has sufficient distinctive similarity to at least one of the charged crimes, the Ardmore robbery. Both of these robberies occurred at a Cash Express on the same day within 90 minutes of each other. During these robberies, one of the perpetrators entered the business and made a monetary request, and then the other perpetrator entered the business with a firearm and initiated the robbery, in which they threatened the employee with their gun and directed the employee to unlock the location where the money was stored. These “two crimes of sufficient distinctive similarity” can establish “*modus operandi*.” *Id.* (emphasis added). Further, other charged robberies also featured a similar method. To the extent that there were any slight differences in the methods of the various charged robberies, “it is not necessary . . . that the crimes

No. 24-6051/25-5097, *United States v. Carney, et al.*

be identical in every detail” to establish *modus operandi*.³ *Joseph*, 270 F. App’x at 406 (quoting *Perry*, 438 F.3d at 648).

3. Step Three

At the third step, the district court recognized that it would “do[] a Rule 403 analysis” and found that the court would “alleviate any issues with 403 by giving a limiting instruction” that the jury “may not consider [the evidence of the Moulton robbery] for any other purpose” apart from identity and *modus operandi*. Trial Tr. Vol. 2-B, R. 202, Page ID #1251-5.

“In the case of a Rule 403 analysis, we grant the district court ‘very broad’ discretion in making its determinations.” *United States v. Libbey-Tipton*, 948 F.3d 694, 701 (6th Cir. 2020) (quoting *United States v. Newsom*, 452 F.3d 593, 603 (6th Cir. 2006)). We take “a maximal view of the probative effect of the evidence and a minimal view of its unfairly prejudicial effect, and will hold that the district court erred only if the latter outweighs the former.” *Id.* (quoting *United States v. Sassanelli*, 118 F.3d 495, 498 (6th Cir. 1997)).

Ewing and Carney argue that the district court abused its discretion at this step because it did not explicitly state on the record that the probative value of the evidence was not substantially outweighed by unfair prejudice. But the district court acknowledged that it would “do[] a Rule 403 analysis,” which precisely involves evaluating whether the probative value of the evidence was substantially outweighed by unfair prejudice. Trial Tr. Vol. 2-B, R. 202, Page ID #1251; Fed. R. Evid. 403 (“The court may exclude relevant evidence if its probative value is substantially

³ It is worth noting that we need not even consider whether the evidence was properly admitted to show *modus operandi* because the district court properly admitted the evidence of the Moulton robbery to show identity. The district court’s admission of the evidence for any other reason besides identity “does not affect the ultimate admissibility of the evidence,” because if the district court “admitted evidence for a single legitimate reason, the court’s articulation of additional erroneous reasons is of no consequence.” *United States v. Ray*, 549 F. App’x 428, 433 (6th Cir. 2013); *see also United States v. Higgins*, No. 22-3538, 2023 WL 6536752, at *7 n.5 (6th Cir. Oct. 6, 2023) (“Because the recordings served the proper purpose of pro[v]ing [the defendant’s] intent, the court need not address his alternative argument that they fail as *modus operandi* evidence.”).

No. 24-6051/25-5097, *United States v. Carney, et al.*

outweighed by a danger of . . . unfair prejudice.”). And by finding that the court would “alleviate any issues with 403 by giving a limiting instruction,” the district court indicated that the limiting instruction would prevent the probative value of the evidence from being substantially outweighed by the unfair prejudice. *Id.* at 1252. In doing so, the district court did not “rel[y] on erroneous findings of fact, appl[y] the wrong legal standard, misapply[y] the correct legal standard when reaching a conclusion, or ma[ke] a clear error of judgment,” as Ewing argues. Ewing Appellant’s Br. at 40 (quoting *Schlaud v. Snyder*, 717 F.3d 451, 457 (6th Cir. 2013)); *see also Randleman v. Fid. Nat’l Title Ins. Co.*, 646 F.3d 347, 351-52 (6th Cir. 2011). Although the district court could have stated its finding more clearly, the district court did not abuse its discretion where it recognized that it would undertake the proper analysis at this step and then concluded that a limiting instruction would alleviate any concern that the defendants would be unfairly prejudiced by the evidence.

And to be clear, the probative value of the evidence was not substantially outweighed by unfair prejudice to Ewing and Carney. The evidence of the Moulton robbery had significant probative value because it linked Ewing and Carney to other charged robberies, including one that occurred on the same day, and demonstrated their method of carrying out those robberies. Although Ewing and Carney may have been prejudiced by this evidence, such prejudice was not “unfair.” *See Fairley*, 137 F.4th at 518. “Unfair prejudice does not mean the damage to a defendant’s case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest a decision on an improper basis.” *United States v. Choate*, 208 F.3d 215, 2000 WL 263348, at *6 (6th Cir. 2000) (quoting *United States v. Talley*, 164 F.3d 989, 1000 (6th Cir. 1994)). Through the limiting instruction, the district court ensured that the jury would not use the evidence to render a decision based on an improper basis. *See United States*

No. 24-6051/25-5097, *United States v. Carney, et al.*

v. Townsend, 796 F.2d 158, 162 (6th Cir. 1986) (“[T]he district court, by giving a strong cautionary instruction, insured [sic] that defendant would not be unfairly prejudiced by the testimony.”). The district court provided the limiting instruction that the jury “must not consider [the evidence] for any other purpose” to the jury once when they first heard the evidence of the Moulton robbery and again at closing instructions. Trial Tr. Vol. 2-B, R. 202, Page ID #1262; Trial Tr. Vol. 7, R. 207, Page ID #2369; *see United States v. Cordero*, 973 F.3d 603, 621 (6th Cir. 2020) (“[A]ny prejudice resulting from [the] testimony was diminished by the court’s legally correct cautionary instructions, which were delivered both at the time the testimony was given and again at the conclusion of trial. The trial court’s delivery of consistent, frequent, and accurate limiting instructions weighs against a finding of unfair prejudice.”). Although Ewing argues that the jury may have used the evidence to show character or propensity, that argument fails to consider “the almost invariable assumption of the law that jurors follow their instructions.” *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987) (collecting cases); *see also Samia v. United States*, 599 U.S. 635, 646 (2023) (“[O]ur legal system presumes that jurors will attend closely the particular language of such instructions in a criminal case and strive to understand, make sense of, and follow them.” (citation modified)).

The district court thus did not err in exercising its discretion and admitting evidence of the Moulton robbery under Rule 404(b).

D. Sufficiency of the Evidence for Ewing’s Conviction under 18 U.S.C. § 924(c)

Ewing argues that his conviction for brandishing a firearm during a crime of violence in violation of 18 U.S.C. § 924(c) (regarding the Regions Bank robbery in Smyrna) should be vacated because insufficient evidence supports the jury’s finding that Ewing used a real gun during the

No. 24-6051/25-5097, *United States v. Carney, et al.*

bank robbery. Ewing raised this argument at the district court by moving for a judgment of acquittal under Federal Rule of Criminal Procedure 29, and the district court denied the motion.

“We review the district court’s denial of [a] motion for judgment of acquittal *de novo*.” *United States v. Howard*, 947 F.3d 936, 947 (6th Cir. 2020) (emphasis added). “Our task is to determine whether, ‘viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.’” *United States v. Robinson*, 99 F.4th 344, 353 (6th Cir. 2024) (quoting *United States v. Baggett*, 251 F.3d 1087, 1095 (6th Cir. 2001)). “In doing so, we do not ‘weigh the evidence presented, consider the credibility of witnesses, or substitute our judgment for that of the jury.’” *Id.* (quoting *United States v. Jackson*, 470 F.3d 299, 309 (6th Cir. 2006)). We simply ask whether the “jury behaved irrationally in concluding beyond a reasonable doubt” that the defendant committed the charged crime. *United States v. Miller*, 982 F.3d 412, 440 (6th Cir. 2020).

18 U.S.C. § 924(c)(1)(A) criminalizes brandishing a firearm “during and in relation to any crime of violence[.]” The only element of this crime that Ewing contests is whether he used a real firearm, as opposed to a fake firearm, during the bank robbery in Smyrna. It is true that a weapon qualifies as a firearm under the statute if it is capable of “expel[ing] a projectile by the action of an explosive” or is a “destructive device.” 18 U.S.C. § 921(a)(3); see *United States v. Sherer*, 770 F.3d 407, 412 (6th Cir. 2014).

But sufficient evidence supported the jury’s finding that Ewing used such a firearm during the bank robbery in Smyrna. Multiple witnesses at trial supported such a finding. Daniel Krouse (“Krouse”), the assistant manager for Regions Bank in Smyrna, indicated that based on his experience with guns and his observations of the bank robbery on April 4, 2022, Ewing “had a gun” during the bank robbery and the “gun was real.” Trial Tr. Vol. 2-B, R. 202, Page ID

No. 24-6051/25-5097, *United States v. Carney, et al.*

#1227-28, 1238-39. Krouse stated that one of the robbers said that “they were going to take somebody out” if they did not get money from the vault at the bank. *Id.* at 1229. Krouse also stated that, after the bank robbery, he “questioned if it’s worth going to work to lose [his] life.” *Id.* at 1244. Derrick Wallace (“Wallace”), another employee at Regions Bank who witnessed the bank robbery, indicated that Ewing was holding a “real gun” and it did not “look to be a toy gun” because he noticed that the gun was like a “semi-automatic pistol type of gun.” *Id.* at 1334, 1338-39. Wallace stated that he felt his “life was in jeopardy that day.” *Id.* at 1343. Additionally, McCullough also testified that she observed guns under Ewing’s couch in his apartment. Given this evidence, and especially “viewing the evidence in the light most favorable to the government,” *Robinson*, 99 F.4th at 353 (quoting *Baggett*, 251 F.3d at 1095), the jury did not “behave[] irrationally” in finding that Ewing brandished a real firearm within the meaning of the statute during the bank robbery in Smyrna. *See Miller*, 982 F.3d at 440.

Ewing challenges the testimony of these witnesses because “Krouse claimed experience but that experience was not provided to the jury to properly weigh his conclusion” and “Wallace’s belief is standing alone with no foundation at all.” Ewing Appellant’s Br. at 47. But we do not “consider the credibility of witnesses” in reviewing the sufficiency of evidence supporting a conviction. *Robinson*, 99 F.4th at 353 (quoting *Jackson*, 470 F.3d at 309). Ewing also highlights *United States v. Farrad*, 895 F.3d 859 (6th Cir. 2018) and *United States v. Crowe*, 291 F.3d 884 (6th Cir. 2002), wherein this Court sustained convictions involving a firearm after the government presented as proof different types of evidence than that used in this case. But we do not “weigh the evidence presented,” *Robinson*, 99 F.4th at 353 (quoting *Jackson*, 470 F.3d at 309), and instead we merely ask whether the jury in this case “behaved irrationally in concluding beyond a

No. 24-6051/25-5097, *United States v. Carney, et al.*

reasonable doubt” that Ewing used a firearm within the meaning of the statute during the bank robbery. *See Miller*, 982 F.3d at 440. And the jury did not do so.

We thus affirm the district court’s denial of Ewing’s motion for judgment of acquittal.

III. CONCLUSION

For the reasons set forth above, this Court **AFFIRMS** the rulings of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 24-6051/25-5097

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

FREDRICK EUGENE CARNEY (24-6051); WILLIAM
JOHN EWING (25-5097),
Defendants - Appellants.

FILED
Mar 24, 2026
KELLY L. STEPHENS, Clerk

Before: CLAY, GIBBONS, and HERMANDORFER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED as to both Defendants.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

MAY 22 2023

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA)

v.)

[1] FREDRICK EUGENE CARNEY)

[2] WILLIAM JOHN EWING, III)

NO. 3:22-CR-00174

18 U.S.C. § 2

18 U.S.C. § 922(g)(1)

18 U.S.C. § 924

18 U.S.C. § 924(c)(1)(A)

18 U.S.C. § 1951

18 U.S.C. § 2113(a)

18 U.S.C. § 2113(d)


DEPUTY CLERK

Judge Campbell

THIRD SUPERSEDING INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES:

On or about February 18, 2022, in the Middle District of Tennessee, **[1] FREDRICK EUGENE CARNEY** and **[2] WILLIAM JOHN EWING, III**, did unlawfully obstruct, delay, and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b), and the movement of articles and commodities in such commerce, by robbery, as that term is defined in Title 18, United States Code, Section 1951(b), in that **[1] FREDRICK EUGENE CARNEY** and **[2] WILLIAM JOHN EWING, III**, did unlawfully take and obtain United States currency from and in the presence of employees of Cash Express, 909 NW Broad Street, Murfreesboro, Tennessee, against the employee's will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to the employee's person and to the property in the employee's custody and possession.

In violation of Title 18, United States Code, Sections 1951 and 2.

Petitioner's Appendix, Vol. 1 - 039

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

On or about March 10, 2022, in the Middle District of Tennessee, [1] **FREDRICK EUGENE CARNEY**, did unlawfully obstruct, delay, and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b), and the movement of articles and commodities in such commerce, by robbery, as that term is defined in Title 18, United States Code, Section 1951(b), in that [1] **FREDRICK EUGENE CARNEY**, did unlawfully take and obtain United States currency from and in the presence of employees of Cash Express, 6000 Charlotte Pike, Nashville, Tennessee, against the employee's will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to the employee's person and to the property in the employee's custody and possession.

In violation of Title 18, United States Code, Sections 1951 and 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

On or about March 24, 2022, in the Middle District of Tennessee, [1] **FREDRICK EUGENE CARNEY** and [2] **WILLIAM JOHN EWING, III**, did unlawfully obstruct, delay, and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b), and the movement of articles and commodities in such commerce, by robbery, as that term is defined in Title 18, United States Code, Section 1951(b), in that [1] **FREDRICK EUGENE CARNEY** and [2] **WILLIAM JOHN EWING, III**, did unlawfully take and obtain United States currency from and in the presence of employees of Cash Express, 26299 Main Street, Ardmore, Tennessee, against the employee's will, by means of actual and threatened force, violence, and fear of injury,

immediate and future, to the employee's person and to the property in the employee's custody and possession.

In violation of Title 18, United States Code, Sections 1951 and 2.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES:

On or about March 24, 2022, in the Middle District of Tennessee, **[1] FREDRICK EUGENE CARNEY** and **[2] WILLIAM JOHN EWING, III**, did knowingly use, carry, and brandish a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is Hobbs Act Robbery as charged in Count Three, in violation of Title 18, United States Code, Sections 1951 and 2.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

COUNT FIVE

THE GRAND JURY FURTHER CHARGES:

On or about April 4, 2022, in the Middle District of Tennessee, **[1] FREDRICK EUGENE CARNEY** and **[2] WILLIAM JOHN EWING, III**, by force and violence, and by intimidation, did take from the person and presence of another, to wit, employees at Region Bank, 415 Sam Ridley Parkway West, Smyrna, Tennessee, approximately \$15,770, belonging to and in the care, custody, control, management, and possession of Regions Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing this offense, **[1] FREDRICK EUGENE CARNEY** and **[2] WILLIAM JOHN EWING, III**, did assault the employees of Regions Bank, and did put said persons' lives in jeopardy by the use of a dangerous weapon.

In violation of Title 18, United States Code, Sections 2113(a) and (d) and 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES:

On or about April 4, 2022, in the Middle District of Tennessee, [1] **FREDRICK EUGENE CARNEY** and [2] **WILLIAM JOHN EWING, III**, did knowingly use, carry, and brandish a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is Armed Bank Robbery as charged in Count Five, in violation of Title 18, United States Code, Sections 2113(a) and (d).

All in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES:

On or about April 20, 2022, in the Middle District of Tennessee, [1] **FREDRICK EUGENE CARNEY** did unlawfully obstruct, delay, and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b), and the movement of articles and commodities in such commerce, by robbery, as that term is defined in Title 18, United States Code, Section 1951(b), in that [1] **FREDRICK EUGENE CARNEY** did unlawfully take and obtain United States currency from and in the presence of employees of Cash Express, U.S. Highway 41, Greenbrier, Tennessee, against the employee's will, by means of actual and threatened force, violence, and fear of injury, immediate and future, to the employee's person and to the property in the employee's custody and possession.

In violation of Title 18, United States Code, Sections 1951 and 2.

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES:

On or about April 20, 2022, in the Middle District of Tennessee, [1] **FREDRICK EUGENE CARNEY**, did knowingly use, carry, and brandish a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is Armed Robbery affecting commerce as charged in Count Seven, in violation of Title 18, United States Code, Sections 1951 and 2.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

COUNT NINE

THE GRAND JURY FURTHER CHARGES:

On or about May 2, 2022, in the Middle District of Tennessee, [1] **FREDRICK EUGENE CARNEY** and [2] **WILLIAM JOHN EWING, III**, by force and violence, and by intimidation, did take from the person and presence of another, to wit, employees at First Horizon Bank, 4410 Whites Creek Pike, Whites Creek, Tennessee, approximately \$357, belonging to and in the care, custody, control, management, and possession of First Horizon Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in committing this offense, [1] **FREDRICK EUGENE CARNEY** and [2] **WILLIAM JOHN EWING, III**, did assault the employees of First Horizon Bank, and did put said persons' lives in jeopardy by the use of a dangerous weapon.

In violation of Title 18, United States Code, Sections 2113(a) and (d) and 2.

COUNT TEN

THE GRAND JURY FURTHER CHARGES:

On or about May 2, 2022, in the Middle District of Tennessee, [1] **FREDRICK EUGENE CARNEY** and [2] **WILLIAM JOHN EWING, III**, did knowingly use, carry, brandish, and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is Armed Bank Robbery as charged in Count Nine, in violation of Title 18, United States Code, Section 2113(a) and (d).

All in violation of Title 18, United States Code, Sections 924(c)(1)(A) and 2.

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES:

Between on or about May 2, 2022, and May 4, 2022, in the Middle District of Tennessee, [1] **FREDRICK EUGENE CARNEY**, knowing he had been previously convicted of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed, in and affecting commerce, ammunition, to wit: twenty-five (25) 9mm caliber cartridge cases bearing head stamp markings "GFL 9mm LUGER."

In violation of Title 18, United States Code, Sections 922(g)(1) and 924.

A TRUE BILL

FORFEITURE

HENRY C. LEVENTIS
UNITED STATES ATTORNEY

Joseph P. Montminy
JOSEPH P. MONTMINY
ASSISTANT UNITED STATES ATTORNEY

Petitioner's Appendix, Vol. 1 - 044

1 UNITED STATES DISTRICT COURT
 2 MIDDLE DISTRICT OF TENNESSEE
 3 NASHVILLE DIVISION

4 UNITED STATES OF AMERICA }

5 vs }

Case No. 3:22-cr-00174

6 (1) FREDRICK EUGENE CARNEY }

(2) WILLIAM JOHN EWING III }

7 - - - - -

8
 9 BEFORE THE HONORABLE
 10 WILLIAM L. CAMPBELL, JR., DISTRICT JUDGE

11 TRANSCRIPT OF PROCEEDINGS

12 June 9, 2023

13 VOLUME 2-A

14 (Motion Hearing)

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 16 - - - - -

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 19
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 22
 23 Patricia A. Jennings, RMR, CRR
 24 Official Court Reporter
 25 719 Church Street, Suite 2300
 Nashville, TN 37203
 patty_jennings@tnmd.uscourts.gov

1 APPEARANCES:

2 For the Government:

Amanda J. Klopf
Joseph P. Montminy
US Attorney's Office
719 Church Street
Suite 3300
Nashville, TN 37203

5 For Defendant Carney:

Luke A. Evans
Evans Bulloch Parker PLLC
302 North Spring Street
P.O. Box 398
Murfreesboro, TN 37133-0398

8 For Defendant Ewing:

James Kevin Cartwright
Attorney at Law
PO Box 184
Clarksville, TN 37041-0184

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I N D E X

GOVERNMENT'S PROOF

CASEY BAKER

Direct Examination by Ms. Klopf.....	7
Cross-Examination by Mr. Evans.....	24
Redirect Examination by Ms. Klopf.....	32
Recross-Examination by Mr. Evans.....	35
Further Redirect Examination by Ms. Klopf.....	36

GOVERNMENT'S EXHIBITS

NUMBER	DESCRIPTION	PAGE
5	Surveillance video from Moulton Cash Express	10
6	Still shots from Surveillance Video	10
7	A, C, D - ATM Bank Video, Alabama Pawn Video	16
8	Still shots from Exterior Video	33
9	Aerial Photo of Moulton Scene	17
11	Cash Express Moulton Pics	14

1 The above-styled cause came to be heard on
2 June 9, 2023, at 8:40 a.m., before the Honorable William L.
3 Campbell, Jr., District Judge, when the following proceedings
4 were had, to-wit:

5
6 THE COURT: All right. Good morning. Looks like
7 I've got a copy of the exhibit list and overall witness list
8 with a lineup for today. Is that what I'm looking at?

9 MS. KLOPF: Does it have handwriting on it also?

10 THE COURT: Yes.

11 MS. KLOPF: Yes, that is the lineup for today.
12 Well, the ambitious lineup for today.

13 THE COURT: All right.

14 MS. KLOPF: Optimistic. Maybe not ambitious.

15 THE COURT: Are we ready with this gentleman or
16 this person from Alabama?

17 MS. KLOPF: We are, Your Honor.

18 THE COURT: All right. Go ahead and put on the
19 proof that you would intend to offer on this Moulton issue,
20 and then we can talk about it a little bit.

21 MS. KLOPF: We also have the victim that we -- at
22 trial, we would also put the victim on. We're just -- in
23 effort to try and minimum the stress that she goes through,
24 we're trying to only call her once.

25 THE COURT: What is the victim going to add that

1 the video doesn't tell the jury?

2 MS. KLOPF: She goes to what she's feeling, the
3 reason that she gives the money so that we can establish, you
4 know, that the robbery was -- that she was reacting to the
5 firearm and, you know, giving the money over because she was
6 in fear for her life. So those elements, but in terms of
7 like the proof itself, like the substantive proof, she will
8 admit and authenticate the video.

9 THE COURT: Well, wait, let me make sure I got it.
10 This is the victim that I saw in the Moulton robbery?

11 MS. KLOPF: The Moulton robbery, yes.

12 THE COURT: Why are we proving the elements of
13 fear for the firearm in the Moulton robbery?

14 MS. KLOPF: Oh, I'm sorry. Well, we're
15 establishing what happened. She describes the attendant
16 circumstances. She can describe her firsthand view of what
17 she's seeing, you know, the description of the men, because
18 the video captures a lot, but only so much. So she'll kind
19 of add a little bit more color to it, but it's not like
20 she's -- and she also describes seeing a vehicle outside. So
21 she describes -- there's one angle when you watch it, you
22 know how you -- you can only see so much. So she's going to
23 describe that exterior.

24 THE COURT: Will she provide additional testimony
25 about specificity on clothes or a vehicle, that kind of

1 thing?

2 MS. KLOPF: Yeah. And she also will describe --
3 if you watch the video, there's a period of time where you
4 can't see what's happening. She's describing what's
5 happening in the back. Very similar to the other robberies,
6 where the victim gets locked in a back room, and the safe is,
7 you know, out of the picture.

8 THE COURT: Okay. Is it a gentleman or a lady
9 who's here this morning to testify?

10 MS. KLOPF: It's a gentleman.

11 THE COURT: Is that gentleman expected to, if he's
12 allowed to testify, go ahead and provide that while he's here
13 today?

14 MS. KLOPF: He will testify twice today.

15 THE COURT: Okay.

16 MS. KLOPF: So the law enforcement officer will be
17 getting in, you know, the exterior surveillance. We'll talk
18 about that this morning and later on today, later on today in
19 a bit more detail because there's some weirdness with the
20 time stamp on a pawn shop video. For the purposes of this
21 morning, unless defense counsel says otherwise, I don't think
22 it's necessary to get into that.

23 But we'll admit both of those for the purposes of
24 this hearing. He'll show -- kind of describe seeing this
25 black Honda on these two videos. And then he will admit the

1 surveillance footage of the interior of the Cash Express.
2 When the victim testifies later today, we'll have some
3 demonstrative to help her that are photos of the Cash Express
4 that, you know, cover more angles than this one surveillance
5 camera did. So we would be moving those in later today if
6 the Court allows us to do that, but we wouldn't be doing that
7 with Sergeant Baker this morning.

8 THE COURT: All right. Let's go ahead and hear
9 from that witness, and we'll see where we go.

10 MS. KLOPF: United States calls Sergeant Casey
11 Baker.

12 COURTROOM DEPUTY: Raise your right hand, please.

13 CASEY BAKER,
14 called as a witness, having been duly sworn, was examined and
15 testified as follows:

16 THE WITNESS: Yes, ma'am.

17 COURTROOM DEPUTY: State your full name for the
18 record, please, and spell your last.

19 THE WITNESS: Casey Donald Baker, B-A-K-E-R.

20 DIRECT EXAMINATION

21 BY MS. KLOPF:

22 Q. Good morning.

23 A. Good morning.

24 Q. Where are you from?

25 A. Moulton, Alabama.

1 Q. How far away is that from here?

2 A. Two-and-a-half hours.

3 Q. And what do you do?

4 A. I'm a police officer for the City of Moulton.

5 Q. Sergeant Baker, do you mind just twisting the microphone
6 a little closer to you just so that --

7 A. Is that better?

8 Q. That's much better. Thank you. Generally, what
9 sorts -- oh, I'm sorry. How long have you done that?

10 A. I've been at Moulton ten years. I've been in law
11 enforcement since '07.

12 Q. Generally, what sorts of crimes do you investigate?

13 A. Anything that happens in Moulton.

14 Q. Is Moulton a pretty small town?

15 A. It is.

16 Q. How many officers are in the police department?

17 A. Counting chief and investigator, I think 11, 10 or 11.

18 Q. Were you involved in the investigation of an armed
19 robbery of a Cash Express in Moulton, Alabama on March 24th
20 of 2022?

21 A. Yes, ma'am.

22 Q. What was your role that day?

23 A. I came in after the fact. My role was to secure camera
24 footage from local areas.

25 Q. And did you do that?

1 A. Yes, ma'am.

2 Q. From where?

3 A. Alabama Title Pawn, Champion Credit Union.

4 Q. And did you also --

5 A. And the actual from the -- from the Cash Express.

6 Q. So let's start with that victim business, Cash Express.

7 Did you collect surveillance from Cash Express?

8 A. Yes, ma'am.

9 Q. So has that recording from Cash Express -- I believe it

10 may be up in that binder, but been marked as Exhibit 5?

11 A. Okay. Do I need to look at it?

12 Q. Sure. I mean, are you comfortable saying that it was

13 marked as Exhibit 5?

14 A. Yes, ma'am.

15 Q. Okay. And then this is in that binder. Are still shots

16 of that surveillance -- have they been marked for trial as

17 Exhibit 6?

18 A. I believe so.

19 Q. Are those true for -- in terms of the surveillance, are

20 those true and accurate copies of the surveillance that you

21 collected from the Cash Express in Moulton, Alabama?

22 A. Yes, ma'am.

23 Q. And are the still shots true and accurate still shots

24 from that surveillance that you collected from Cash Express

25 in Moulton, Alabama?

1 A. Yes, ma'am.

2 MS. KLOPF: Move to admit and publish.

3 THE COURT: This is --

4 MS. KLOPF: 5 and 6. Trial Exhibits 5 and 6.

5 THE COURT: Okay.

6 MS. KLOPF: Just for the sake of --

7 THE COURT: For the purpose of this jury-out
8 hearing and possibly for admission later, any objection?

9 MR. EVANS: No objection.

10 MR. CARTWRIGHT: No objection.

11 THE COURT: All right. Without objection,
12 Government's Exhibits 5 and 6 are admitted for the purpose of
13 this portion of the trial.

14 (Government's Exhibits 5 and 6 received in
15 evidence.)

16 MS. KLOPF: Now, Your Honor, I can publish them
17 for you if you'd like. These are the images and the
18 recordings that I provided in the briefing for this.

19 THE COURT: Right. I'd say go ahead and publish
20 them in case defense counsel have questions about it.

21 MS. KLOPF: Perfect.

22 Let's start with the still shots -- I'm sorry.
23 Let's start with the still shots, please, which is Exhibit 6.

24 BY MS. KLOPF:

25 Q. Is this a zoomed-in part screenshot of the Cash Express

1 surveillance?

2 A. It is.

3 Q. Okay.

4 MS. KLOPF: Can we go to the next page, please.

5 Okay. And then the next page.

6 BY MS. KLOPF:

7 Q. All right. Can you describe his pant leg?

8 A. Sweatpants with a strap and tied at the bottom.

9 Q. And do you see that there's some sort of --

10 A. Writing.

11 Q. -- letters or something like that on the side?

12 A. Yes, ma'am.

13 Q. Okay. And what does this man have on his head?

14 A. He's got a black ball cap and blue mask.

15 MS. KLOPF: Can we go to the next page, please.

16 BY MS. KLOPF:

17 Q. And do you see that distinctive pattern on his
18 sweatshirt?

19 A. Yes, ma'am.

20 MS. KLOPF: Can we please go to the next page.

21 BY MS. KLOPF:

22 Q. Is that a zoomed-in of his hat?

23 A. Yes, ma'am.

24 MS. KLOPF: Next page, please.

25 BY MS. KLOPF:

1 Q. All right. Is that the second robber?

2 A. Yes, ma'am.

3 MS. KLOPF: And can we click through these,
4 please. Is that all the pages? Okay. All right. And can
5 we please play Exhibit 5.

6 (Video played.)

7 BY MS. KLOPF:

8 Q. Do you see the Honda Civic pulling up right over here?

9 A. Yes, ma'am, I do.

10 Q. During the course of your investigation, did you see
11 further video of a similar Honda Civic?

12 A. Yes, ma'am.

13 Q. Would you agree with me just a matter of seconds passed
14 before the man got out of that car?

15 A. Yes, ma'am.

16 (Video played.)

17 BY MS. KLOPF:

18 Q. Do you see the two men getting into that Honda?

19 A. Yes, ma'am.

20 Q. And then driving away?

21 A. Yes, ma'am.

22 Q. And just so that we have all of the evidence that would
23 get in through the victim, can you please take a look in that
24 binder, the one with the light blue cover -- I'm sorry, the
25 red cover, and look at Exhibit 11.

1 A. Yes, ma'am.

2 Q. And just flip through those pictures.

3 THE COURT: Do I have one with a red cover?

4 MS. KLOPF: I think it's the witness binder, is
5 why it's marked -- has red. It's the government -- the
6 government binder.

7 THE COURT: Oh. I was intending for all of the
8 government's to have the same color and all the defendants'
9 to have the same color.

10 MR. EVANS: Just for the record, mine's the bright
11 blue, the bright blue that's at the witness stand.

12 THE COURT: We'll get a color coding done later.

13 MR. CARTWRIGHT: Ours is a yellow legal pad.

14 MS. KLOPF: We can change it at a break.

15 THE COURT: Is what he's getting out right now in
16 this?

17 MS. KLOPF: Yes, Your Honor.

18 THE COURT: Okay. What tab are we going to?

19 MS. KLOPF: 11, please.

20 THE COURT: All right.

21 BY MS. KLOPF:

22 Q. Are those photographs?

23 A. Yes, ma'am.

24 Q. Generally, do those depict the interior of the Moulton
25 Cash Express?

1 A. Yes, ma'am.

2 Q. Are those fair and accurate representations of the
3 exterior and interior of the Cash Express in Moulton?

4 A. Yes, ma'am, it is.

5 MS. KLOPF: I will move to admit these,
6 Your Honor, for the purposes of this hearing.

7 MR. EVANS: No objection.

8 MR. CARTWRIGHT: No objection.

9 THE COURT: Without objection, Government's
10 Exhibit 11 is admitted for this hearing.

11 (Government's Exhibit 11 received in evidence.)

12 MS. KLOPF: So let's publish those quickly. Can
13 we look at Exhibit 11, please.

14 BY MS. KLOPF:

15 Q. So is it correct to say that's the exterior of the Cash
16 Express?

17 A. Yes, ma'am.

18 Q. Is this a pretty small business?

19 A. It is.

20 Q. What's next door?

21 A. It's a thrift store.

22 MS. KLOPF: And can we go to the next page. And
23 the next page.

24 BY MS. KLOPF:

25 Q. Is this the interior of the business?

1 A. It is.

2 Q. Based on your experience on this case, is this a
3 pretty -- is the security pretty lacking in the business?

4 A. It is.

5 Q. Okay. Just one surveillance camera; right?

6 A. Yes, ma'am.

7 Q. Okay.

8 MS. KLOPF: Let's just click through the rest.

9 Thank you.

10 BY MS. KLOPF:

11 Q. All right. So let's talk about the surveillance that
12 you collected from the surrounding businesses. In
13 preparation for this hearing and this trial, have you
14 reviewed something marked as Exhibit 9?

15 A. I believe so.

16 Q. It's a DVD?

17 A. Yes, ma'am.

18 Q. I can get it for you if you'd like.

19 A. No, I have it.

20 Q. Okay. When you reviewed it, did you determine that it's
21 a true and accurate copy of surveillance that you collected
22 from a bank?

23 A. Yes, ma'am.

24 MS. KLOPF: I'll move to admit the surveillance
25 from the bank.

1 MR. EVANS: No objection.

2 MR. CARTWRIGHT: No objection.

3 THE COURT: Without objection, Government's
4 Exhibit 9 --

5 MS. KLOPF: I'm so sorry. I'm going too fast.
6 Exhibit 9 is actually a diagram of the relevant businesses.
7 I'm going too quickly.

8 THE COURT: Okay. So we've covered the video.
9 Which one is that?

10 MS. KLOPF: 7-A and 7-C.

11 THE COURT: Then are you going to seek the
12 admission of those?

13 MS. KLOPF: I will seek admission. I will not
14 publish it. And now I will circle back to Exhibit 9.

15 (Government's Exhibit 7A and 7C received in
16 evidence.)

17 BY MS. KLOPF:

18 Q. Can you look in that binder at Exhibit 9.

19 A. Yes, ma'am.

20 Q. Did you prepare that?

21 A. Yes, ma'am, I did.

22 Q. Okay. Are those photographs of local businesses?

23 A. It is.

24 Q. Okay. And did you make notes on it?

25 A. Yes, ma'am.

1 Q. Is that a true and correct copy of what you prepared for
2 trial?

3 A. Yes, ma'am.

4 MS. KLOPF: I will move to admit and publish this.

5 MR. EVANS: No objection.

6 MR. CARTWRIGHT: No objection.

7 THE COURT: Without objection, Government's
8 Exhibit 9 is admitted.

9 (Government's Exhibit 9 received in evidence.)

10 BY MS. KLOPF:

11 Q. Okay. So is this a diagram of the relevant businesses
12 that you talked about earlier?

13 A. Yes, ma'am, it is.

14 Q. Okay. So starting at the top, can you just walk down
15 what we're talking about.

16 A. We're looking at 157. We're facing south.

17 Q. When you say "157," do you mean the road?

18 A. Alabama Highway 157. And to the left is the Cash
19 Express, where the robbery occurred. If you track back to
20 the route, you've got a Burger King, then you've got Champion
21 Credit Union, where the video came from, and also Alabama
22 Title Pawn.

23 Q. So let's talk about that credit union. Did you pull --
24 that 7-A and 7-C that we've already talked about, is that
25 some of the footage that you pulled from that bank?

1 A. Yes, ma'am, it is.

2 MS. KLOPF: So let's play 7-A, please.

3 (Video played.)

4 BY MS. KLOPF:

5 Q. And based on your investigation, is the time stamp on
6 this accurate?

7 A. I don't believe it was.

8 Q. We're talking about the bank footage at this point, not
9 the pawn shop.

10 A. Okay. Yes.

11 Q. Did you determine the bank footage was accurate?

12 A. Yes, ma'am.

13 Q. Okay. Do you see a black Honda Civic drive by?

14 A. Yes, ma'am.

15 Q. Do you see a driver in the driver's seat?

16 A. Yes, ma'am.

17 Q. Okay. Do you see a mask on the driver's face?

18 A. I do.

19 Q. And a black ball cap?

20 A. I do.

21 Q. I know it's a little grainy.

22 MS. KLOPF: Can we finish playing -- we won't play
23 the whole thing, but just finish playing it drive through.

24 Okay. And now can we play 7-C, please.

25 (Video played.)

1 BY MS. KLOPF:

2 Q. Do you see a black Honda Civic pulling in?

3 A. Yes, ma'am.

4 MS. KLOPF: Okay. Ms. Green, would you mind
5 pausing right there. Can you zoom in on the taillights?

6 BY MS. KLOPF:

7 Q. Sorry. I picked a bad place to pause. But in the
8 course of your review of this, did you determine that one of
9 the taillights was damaged?

10 A. I didn't.

11 Q. We can back up. I think this is a better shot. Do you
12 see there that only one light is lit?

13 A. Yes, ma'am.

14 Q. All right. And then in preparation for trial -- so
15 let's talk about the pawn shop. Did you pull footage from
16 the pawn shop?

17 A. Yes, ma'am, I did.

18 Q. Is 7-D a true and accurate copy of the footage that you
19 pulled?

20 A. It was.

21 Q. In the course of preparing for trial, did you determine
22 that the time stamp on these recordings was too fast?

23 A. I believe it was off, yes.

24 Q. Okay. Approximately 28 minutes?

25 A. Yes, ma'am.

1 Q. Okay. Based on that math, is it correct to say that the
2 pawn shop covers up to the time of about 2:37 p.m.?

3 A. Yes, ma'am.

4 Q. Okay. Were you able to capture surveillance of the
5 actual robbery?

6 A. No, ma'am, other than the indoor.

7 Q. Other than -- pardon me?

8 A. The indoor.

9 Q. Okay. So if the pawn shop covers up to 2:37 -- I guess
10 let me jump ahead. Was there a 911 call?

11 A. There was.

12 MS. KLOPF: Now, the parties have a stipulation
13 about the 911 call, Your Honor, that on March 24, 2022,
14 p.m. -- I'm sorry, 2022, at 3:02 p.m., a caller dialed 911
15 from the Cash Express in Moulton, Alabama, a recording of
16 which has been marked for trial as Exhibit 88-A. And the
17 parties agree to Exhibit 88-A's authenticity and
18 admissibility.

19 THE COURT: Okay.

20 MS. KLOPF: I will play the 911 call for purposes
21 of trial, but I won't today right now just for the purpose of
22 the time.

23 THE COURT: Okay.

24 BY MS. KLOPF:

25 Q. So is it correct to say that we don't have surveillance

1 footage from 2:37 p.m. to 3:02 p.m.?

2 A. No, ma'am, not from Cash Express.

3 Q. When you were preparing all of these, did you initially
4 think that the robbery occurred during the period of time
5 captured here?

6 A. Yes, ma'am.

7 Q. Did you later determine that, in fact, it did not occur
8 during this period of time?

9 A. I did.

10 Q. Why did you capture these subsets of videos?

11 A. Do what now?

12 Q. Why did you capture these subsets of videos?

13 A. For evidence to figure out what vehicle was being
14 driven.

15 Q. Okay. And there's a Honda Civic that is --

16 MS. KLOPF: Your Honor, would you like us to play
17 the pawn shop video, so you can kind of see what that would
18 look like at trial?

19 THE COURT: How long is it?

20 MS. KLOPF: It's approximately, I think, 9 minutes
21 long, but I can fast-forward a little bit.

22 THE COURT: Just the part with the car because I
23 guess that's what you're going to --

24 MS. KLOPF: Exactly.

25 THE COURT: -- present to the jury in the event

1 it's admitted.

2 MS. KLOPF: Exactly.

3 THE COURT: Okay. If you can just get to that
4 point.

5 MS. KLOPF: Okay, great.

6 With the caveat that the time stamp is wrong and
7 that we will deal with that at trial if we need to, United
8 States moves to admit Exhibit 7-D into the record for
9 purposes of this hearing.

10 THE COURT: Okay.

11 MR. EVANS: No objection for purposes of this
12 hearing.

13 MR. CARTWRIGHT: Same.

14 THE COURT: All right. It's admitted for the
15 purpose of the hearing.

16 MS. KLOPF: Thank you.

17 (Government's Exhibit 7-D received in evidence.)

18 MS. KLOPF: Can we go to Exhibit 7-D, please.

19 (Video played.)

20 MS. KLOPF: Can you jump -- I think it's to 1:11,
21 please.

22 BY MS. KLOPF:

23 Q. And is it correct to say this is the Cash Express right
24 up here?

25 A. It is.

1 Q. Okay.

2 MS. KLOPF: I might have been wrong about the
3 1:11. Ms. Green, do you mind just slowly clicking forward
4 until we get the car coming in. There we go. I'm sorry.

5 BY MS. KLOPF:

6 Q. All right. Do you see the Honda Civic in the top right
7 corner?

8 A. Yes, ma'am.

9 Q. Do you see the lights kind of flashing?

10 A. Yes, ma'am.

11 MS. KLOPF: And then, Ms. Green, do you mind
12 jumping forward a little bit. And, I'm sorry, I don't have
13 the time stamp.

14 BY MS. KLOPF:

15 Q. Is it fair to say at some point you see that black Honda
16 Civic pull into the parking lot in front of the Cash Express?

17 A. I believe it is.

18 Q. And it sits for a little bit?

19 A. Yes, ma'am.

20 Q. Okay.

21 MS. KLOPF: Your Honor, I'm sorry, I don't have
22 the time stamp. I can let it play, or if you're comfortable
23 with that, we can move forward from there.

24 THE COURT: That's fine.

25 ///

1 BY MS. KLOPF:

2 Q. Okay. So did you pull this footage because the pawn
3 shop video showed a black Honda Civic in the parking lot?

4 A. Yes, ma'am.

5 Q. And does this black Honda Civic match that same
6 description?

7 A. It does.

8 Q. Okay. So based on your investigation, does this appear
9 to be the Honda Civic in the Moulton area immediately prior
10 to the robbery?

11 A. It does.

12 MS. KLOPF: No further questions, Your Honor.

13 THE COURT: Okay.

14 CROSS-EXAMINATION

15 BY MR. EVANS:

16 Q. Good morning.

17 A. Good morning.

18 Q. Are you Deputy -- no, you're a police officer.

19 A. Yes, sir. Sergeant Baker.

20 Q. Sergeant. There we go. That's what I was looking for.
21 Good morning, Sergeant Baker. My name is Luke Evans. I'm
22 going to be asking you a few questions.

23 So I just want to make clear on something. This
24 is the pawn shop?

25 A. Alabama Title Pawn, yes, sir.

1 Q. Title Pawn. Okay. And when this video first started
2 playing, whatever time stamp, you were noting what you said
3 was -- you saw to be a black Honda Civic up in the right-hand
4 corner of that video --

5 A. Yes, sir.

6 Q. -- on the screen, right, pulling in? Right?

7 A. Yes, sir.

8 Q. Now, let me ask you this: Is it your testimony that
9 you're purporting that you can tell that that car, based on
10 this angle, is a Honda Civic?

11 A. You can tell it's a Honda Civic when it comes through
12 the bank over here on the road.

13 Q. Okay. So -- and you can touch that screen, and I think
14 it will note your finger. When you're saying it comes to the
15 back down that road, where are you talking about?

16 A. Right here.

17 Q. Okay. And you're saying that you can tell it's a Honda
18 Civic there?

19 A. Yes, sir.

20 Q. Okay. Now, just so I'm clear, over here on the left
21 side of the screen in the parking lot, right where I just
22 marked through there --

23 A. It didn't show.

24 Q. -- what kind of car is that? Didn't show you? You see
25 this black car in the parking lot?

1 A. That's a Hyundai.

2 Q. Civic?

3 A. This car?

4 Q. Yeah.

5 A. It's a four-door. I believe that's a Hyundai.

6 THE COURT: Are you saying "Hyundai" as opposed to
7 "Honda"?

8 THE WITNESS: I'm pretty sure this is a Hyundai.

9 THE COURT: Okay.

10 BY MR. EVANS:

11 Q. What makes you think that's a Hyundai?

12 A. Well, the body and headlights look like a Hyundai.

13 Q. But you're struggling to determine what kind of car that
14 is; right? You're not sure. What about that big H right
15 there on the grill there? See it down there? Right down
16 here.

17 A. Can you zoom in on it?

18 Q. Yeah.

19 A. Still looks like a Hyundai H.

20 Q. Not a black Honda Civic?

21 A. No, sir.

22 Q. But you're not sure? Can't be sure; right?

23 A. I still thought it was a Hyundai.

24 Q. Okay. But you can tell unequivocally, according to your
25 testimony, that this vehicle that was at the -- that pulled

1 in at the top right corner of this video, that that, in fact,
2 was a Honda Civic?

3 A. When cross-referenced with the bank, I can see the Honda
4 H very clear on that one.

5 Q. I'm not asking you about cross-referencing with the
6 bank. I mean, looking at this video on its own, it's your
7 testimony that you can tell unequivocally that the car that
8 enters the screen on the top right corner is, in fact, a
9 Honda Civic?

10 A. I do believe I can tell that because my wife had one
11 identical, except it was silver.

12 Q. But this black car in the parking lot you're thinking
13 might be a Hyundai, but you can't be sure?

14 A. I'm pretty sure it's a Hyundai.

15 Q. Okay. You said you investigated the time stamps on
16 these various videos; right?

17 A. Yes, sir.

18 Q. When you say you investigated the time stamps, what did
19 you do as it relates to -- let's go back to the bank video.
20 What did you do to say that time stamp is accurate?

21 A. I actually went to the bank and looked at the video --
22 or looked at their camera later.

23 Q. Did you talk to them, somebody there that maintained it,
24 and went like, "Hey, is this accurate?"

25 A. There was nobody there at the time that had any

1 knowledge of the camera.

2 Q. So what did you base your idea of accuracy on?

3 A. I'm just going by it was right when I went back and
4 looked.

5 Q. I guess my question is, how did you know it was right?

6 A. Don't know. I figured it was close because I rewinded a
7 certain amount of time when I went and looked at it.

8 Q. Okay. And when you say the pawn shop video -- so let me
9 back up. You don't know anything about whether or not the
10 time stamp on the bank video is accurate, other than your own
11 ability to fast-forward and rewind?

12 A. I guess.

13 Q. Okay. Pawn shop. You said -- it's your testimony that
14 it was too fast?

15 A. It is.

16 Q. How do you know that?

17 A. Because if you link the circling of the Honda versus the
18 circling of the Honda, the time's different.

19 Q. Okay. You'd agree with me that a Honda Civic -- a black
20 Honda Civic is a mass-produced vehicle?

21 A. Yes, sir.

22 Q. And you can't say with any certainty that whatever --
23 the black Honda -- what you call to be the black Honda Civic
24 that enters at the top of this video is the same video that
25 you saw -- or the same car that you saw from the, excuse me,

1 the credit union video; right?

2 A. You can tell it's a black Honda. I see it.

3 Q. That's it? You can't -- it could be -- it could be a
4 different Honda? It could be someone else? It could be a
5 different Honda? Right?

6 A. Could be. Could not be.

7 Q. Okay. And you say "too fast." How much too fast?

8 A. It was approximately 28 minutes?

9 Q. Are you asking me?

10 A. I believe it was approximately 28 minutes.

11 Q. All right. How do you know that? Did the government
12 tell you that, or is that something that you deduced
13 yourself?

14 A. The government.

15 Q. All right. So they told you. Okay. But that wasn't
16 part of your investigation; right? They told you that it's
17 running too fast?

18 A. I looked at it. They were correct.

19 Q. Well, how do you know? How do you know they're right?

20 A. I don't, but I know there's 28 minutes' difference
21 between the two videos, but it's the same event.

22 Q. And you're saying it's the same event based on the fact
23 that it's a vehicle -- a black Honda Civic, that's it?

24 A. Yeah, and it pulls into Burger King and then pulls
25 around and circles the bank.

1 Q. Okay. And that video there, when -- in the top
2 right-hand corner, that black vehicle that pulls through,
3 you're saying that's the bank parking lot over there that
4 it's pulling through?

5 A. I don't see the picture no more, but if you're talking
6 about the line I drew on, yeah, that was through the bank
7 parking lot.

8 Q. Okay. Now, you were shown a video of the Cash Express
9 surveillance camera?

10 A. Yes, sir.

11 Q. Do you remember seeing that? And the pictures from the
12 Cash Express. You were able -- well, the government asked
13 you this question, and she said: Can you see the Honda Civic
14 that pulled out -- pulled in the parking lot? You remember
15 that?

16 A. Which parking lot?

17 Q. Of the Cash Express. When you can see through the --

18 A. From the Cash Express video?

19 Q. Yeah. The surveillance video inside, you know, it shows
20 the exterior window.

21 A. Yes, sir.

22 Q. Is that something the government told you, or were
23 you --

24 A. I can tell that's a Honda from the video, if that's what
25 you're asking.

1 Q. Okay. Were you able to tell from the video from what
2 you saw which of the two robbers got out of which side of the
3 car?

4 A. The one that came in first got out of the driver's side.

5 Q. Okay. Now, there were some questions of you about --
6 the 911 call came in at 3:02. And then the government asked
7 you something about -- and I want to make sure I'm clear on
8 this -- asked you something about whether you had
9 surveillance footage actually not from the Cash Express, I
10 guess from other locations, from when the robbery took place.

11 A. I don't have -- the only video of the actual robbery is
12 from inside Cash Express.

13 Q. So why is there -- if these videos were functioning --
14 and you would agree with me that there are videos -- there
15 are angles here that show the Cash Express off in the
16 distance?

17 A. Okay.

18 Q. Why didn't you pull that video, like, when it was going
19 on?

20 A. The next day, the federal government said they was
21 taking it over. I'm not going to investigate over them to
22 mess up their investigation. So I didn't go back.

23 Q. Okay. But when you originally pulled, did you not know
24 what time the robbery had occurred?

25 A. I did. Well, approximate.

1 Q. Approximate?

2 A. 2:45 to 3, I think, is what I was told.

3 Q. Okay. And I guess why didn't you pull those times from
4 the bank?

5 A. You're asking why I cut short?

6 Q. Yeah. Like, why wasn't the time of the robbery captured
7 when you first went to the bank and said, "Hey, can you give
8 me -- can I see your footage from yesterday?"

9 A. I can't give you an answer for that.

10 Q. Okay. And then you said the federal government told you
11 the next day, and you were like "It's your investigation now.
12 I don't want to step on your toes"?

13 A. Yes. Anytime somebody else is investigating, I don't
14 want to do nothing, unless they ask me to.

15 Q. All right. Understood.

16 MR. EVANS: Those are my questions. Thank you.

17 MR. CARTWRIGHT: No questions, Your Honor.

18 THE COURT: All right. Any redirect?

19 MS. KLOPF: Yes, Your Honor.

20 REDIRECT EXAMINATION

21 BY MS. KLOPF:

22 Q. First, in terms of the fact that there's no surveillance
23 footage from approximately 2:45 to 3:02, would you agree with
24 me that you simply made a mistake?

25 A. I did.

1 Q. When you had identified the Honda, did you think that
2 you had identified the period of time of the robbery?

3 A. I did.

4 Q. But would you agree with me that you -- in that footage,
5 you saw a masked man behind the wheel in that ATM angle?

6 A. I do.

7 Q. Just for purposes of -- so that we have a still shot,
8 there are some still shots that I prepared for trial. Can
9 you take a look at Exhibit 8 in your binder, please?

10 A. Eight.

11 Q. Yeah. I think it may be easier for purposes of this
12 conversation.

13 THE COURT: Can you clear that screen?

14 MS. KLOPF: Oh, sure.

15 THE COURT: Mine's not working up here.

16 THE WITNESS: Okay.

17 BY MS. KLOPF:

18 Q. Are these still shots from the -- from that footage that
19 we've talked about today?

20 A. Yes, ma'am, that's from --

21 Q. Okay.

22 MS. KLOPF: All right. Can you stop there. Thank
23 you.

24 BY MS. KLOPF:

25 Q. I think this is from a different angle camera. Do you

1 see two men behind the wheel?

2 A. Yes, ma'am. Well, one behind the wheel and one in the
3 passenger's seat, it appears.

4 Q. Oh, I'm sorry. Thank you for that clarification. Do
5 they both appear to be masked?

6 A. I can't tell on the far side, honestly. I can on the
7 one on this side. Might could if you zoomed it.

8 MS. KLOPF: Ms. Green, would you mind zooming in
9 on the two people in the car.

10 BY MS. KLOPF:

11 Q. All right. I know it's blurry, but would you agree with
12 me that the driver is masked?

13 A. I do.

14 Q. Would you agree with me that it appears that the
15 passenger is masked.

16 A. It does appear that way.

17 Q. Okay.

18 MS. KLOPF: Ms. Green, that's the last slide on
19 that one; right? Okay.

20 All right. No further questions for this witness,
21 Your Honor.

22 THE COURT: Anything in light of that?

23 MR. EVANS: Yeah, Just a couple.

24 ///

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RECROSS-EXAMINATION

BY MR. EVANS:

Q. The vehicle that you've identified as the Honda Civic,
just in those photos, the still photos that you were just
shown --

A. Yes, sir.

Q. -- it's four-door; right?

A. That one's two-door; isn't it? Show me a picture.

MR. EVANS: Can you pull that picture back up,
please?

THE WITNESS: Four-door. Four-door.

BY MR. EVANS:

Q. Four-door. Just like the one you noted in the parking
lot of the pawn shop; right?

A. I'm still pretty sure that's a Hyundai.

Q. But you were saying four-door. That one was a
four-door?

A. Yes, sir.

Q. This one is a four-door too?

A. Yes, sir.

Q. And prior to this, me just asking you that, in your
mind, was it your recollection that the Honda Civic was a
two-door?

A. To be honest, yes.

MR. EVANS: All right. Thank you.

1 MS. KLOPF: All right. Just so that we can clean
2 this up. Ms. Green, would you mind playing Exhibit 7-D and
3 fast-forward -- I think it's about a minute in when
4 the . . .

5 FURTHER REDIRECT EXAMINATION

6 BY MS. KLOPF:

7 Q. Do you see the car you believed to be a Hyundai here on
8 the bottom left?

9 A. Yes, ma'am, I do.

10 MS. KLOPF: Actually, I think it may be another
11 minute in. I may have jumped the gun. Rather than make you
12 jump around, if you could just let it play. We'll wait till
13 the . . .

14 (Video played.)

15 BY MS. KLOPF:

16 Q. Okay. Do you see the black car driving into the parking
17 lot?

18 A. I'm sorry. I was looking over here.

19 Q. Oh, sure.

20 MS. KLOPF: It's okay, Ms. Green, just let it
21 play.

22 BY MS. KLOPF:

23 Q. Has the Hyundai moved at all?

24 A. No.

25 MS. KLOPF: For purposes of making this fast,

1 Ms. Green, would you go to the very beginning. Okay. The
2 Hyundai is there. And would you go to the very end. The
3 very end of 7-D, please. Not the very end then. Can you go
4 back.

5 BY MS. KLOPF:

6 Q. So this is now approximately five minutes into the
7 recording, and the Hyundai has not moved; correct?

8 A. Yes.

9 Q. Okay. I know I was jumping around a little bit. Would
10 you agree with me that the Honda has already circled past at
11 this point of the recording?

12 A. I believe so.

13 Q. Well, I don't want to make you believe.

14 A. You'd have to show me it going by.

15 MS. KLOPF: Could you go to about, I think, the
16 third minute of the recording.

17 THE WITNESS: Yes.

18 BY MS. KLOPF:

19 Q. So both the Hyundai and the Honda are in that image?

20 A. Yes, ma'am.

21 Q. So those aren't the same car? Would you agree with me
22 that that's two different cars?

23 A. Yes, ma'am.

24 MS. KLOPF: No further questions.

25 THE COURT: All right. You can step down, sir.

1 THE WITNESS: Thank you.

2 (Witness excused.)

3 MS. KLOPF: If the Court needs further information
4 about this, we have another witness available to testify
5 about it.

6 THE COURT: What is that witness going to say?

7 MS. KLOPF: That would be to introduce the Ardmore
8 surveillance and then do the comparison between the Ardmore
9 robbers and the Moulton robbers that is similar to Exhibit D
10 that you've been provided for this hearing to work on further
11 identification of the cars, because they have more experience
12 with vehicles, so they can identify them as a Hyundai and a
13 Honda. And then if the Court needs it, in terms of the
14 404(b), talking about the relevance of the black Honda for
15 the rest of the case.

16 THE COURT: Okay. Let me make sure I understand
17 something. Is the government intending -- we've seen three
18 videos from Moulton. Is the government intending to provide
19 other evidence to show that the defendants were in that area,
20 cell phone location things, gas receipts, anything like that,
21 that would show that the Moulton robbery is part of the
22 events leading up to the Ardmore robbery?

23 MS. KLOPF: The Ardmore robbery, there is historic
24 cell site that puts Mr. Ewing's phone in the proximity of --
25 I'm sorry, Carney. Thank you. Carney's phone near the area

1 of the Ardmore robbery.

2 THE COURT: At the time of the robbery?

3 MS. KLOPF: At the time of the robbery. So in
4 terms of the res gestae being that this is all the same
5 thing, where it's the same temporal, spatial and -- is it
6 causal? Why is my brain blanking on that?

7 THE COURT: Yes.

8 MS. KLOPF: Thank you. Causal, temporal and
9 spatial. In terms of that, we have that evidence tying it to
10 Mr. Carney. It's the same car, the same kind of style of
11 robbery. If you look at Exhibit D, same people, same
12 clothing, same modus operandi, same gestures in some cases,
13 same words, "I need a loan," that sort of thing. Those two
14 things will be -- that's our intention to prove up both of
15 those things.

16 THE COURT: Right. I understand what you're
17 trying to do, but part of what courts look for on a
18 res gestae argument is -- one of the concerns with telling a
19 story is that you can sanitize it too much by keeping
20 particular evidence out. That's what courts sometimes are
21 grappling with. Like, well, if we pick this part out and
22 pick this part out, then the jury is getting a very
23 truncated, sort of, unnatural flow of a story, if that makes
24 sense.

25 What I'm trying to understand is, what is

1 Moulton -- why is it part of the Ardmore story? I know
2 you're trying to do it for identity, common, all the things
3 you've just said, but I think underlying the res gestae
4 there's some -- it's part of an overall -- it could be a
5 series of crimes. Are you going to do the same thing with
6 the other robberies that are charged in this case to sort of
7 tell the story of what happened before and after, that kind
8 of thing?

9 MS. KLOPF: In terms of the other robberies,
10 there's less evidence. This is one where we have more. But
11 I will say, you know, in terms of what happened that day,
12 this is what they did that day, March 24, 2022. It's a
13 little hard to hear, but as they're walking out of the
14 Moulton robbery, they actually say "Let's go do the next
15 one," or something like that. Like, other than there being a
16 state line in between these two acts, everything else is the
17 same action in concert. They're casing here. They rob it.
18 They go in quickly. You know, they park. You see it. It's
19 very similar to the other robberies. And then they go up.

20 So this is one of those instances of a -- it's the
21 prelude to the charged offense. You know, the charged
22 offense is the Ardmore robbery, but this is directly
23 probative of the charged offense because it simply provides
24 more evidence of what these people were doing that day. It
25 gives the jury a clearer picture of the Honda Civic. They

1 get to see the same masked men behind the wheel of this
2 Civic, which happens here in Moulton. That evidence is not
3 available up in Ardmore. So the jury is able to have those
4 two things to understand that these men went from Moulton,
5 Alabama, and this is what the car looked like, which they
6 won't be able to see with Ardmore.

7 So this is part of the same events as the charged
8 offense. It's an integral part of that day. It completes
9 the story of that day. And, you know, in terms of the
10 causal, temporal and spatial proximity to this other crime,
11 the only difference is this line in between of the state
12 line.

13 THE COURT: Well, and 60 miles.

14 MS. KLOPF: 60 miles, certainly. That's a fair
15 point, but, you know, about 90 minutes later, this other
16 robbery is happening. And I'm sure the Court's reviewed all
17 of the information, but --

18 THE COURT: I have.

19 MS. KLOPF: I think Exhibit D shows how clearly
20 it's the same people robbing the same place.

21 THE COURT: Okay. And then there still must be --
22 anything that is relevant and probative still has to pass
23 through the 403 filter, to put it simply. And why is this --
24 the concern raised by the defendants is that -- one is that
25 we don't know who committed -- I'm sure you think you know,

1 but there's no evidence to prove that Mr. Carney or Mr. Ewing
2 committed the Moulton robbery such that -- and this is
3 usually more of a 404(b) issue. The other act was -- you can
4 show that to then say, well, therefore, he did this to show
5 intent or identity or opportunity, that sort of thing.

6 MS. KLOPF: And if the Court would like to see it,
7 we could put on evidence. This Honda Civic actually shows up
8 again, where we have surveillance from an apartment complex,
9 with the defendants in proximity to the car. And it's a very
10 similar car with similar weatherstripping. So, yes, Your
11 Honor, I mean, I can't sit here today and say, oh, at
12 Moulton, Alabama, he took his mask off, left his driver's
13 license and shouted his name as he exited the building, but I
14 think -- and I understand, you know, the *res gestae* and the
15 404(b) analysis are different.

16 But in terms of the *res gestae*, this is, you know,
17 very similar to, I think -- it's an Eighth Circuit case, but
18 the *Oman* case that, you know, talks about the evidence of
19 prior bank robberies. And those are prior. That's not even
20 the same day. So -- and, I'm sorry, I think I interrupted
21 you, but I just wanted to point out that we do have further
22 evidence of this Honda Civic.

23 THE COURT: Okay. And the 404(b), should this not
24 be viewed as intrinsic, but extrinsic, and then your
25 position, hence your notice that you filed that the

1 defendants responded to on 404(b), the permitted use
2 identified by the government is identity and opportunity? Is
3 that what basis you're stating under 404(b)(2)?

4 MS. KLOPF: I would also argue it's modus
5 operandi.

6 THE COURT: Okay.

7 MS. KLOPF: But, again, you know, res gestae is
8 actually like the evidence of the crime. In terms of our
9 preference, if the Court were to decide it was both, would be
10 have it res gestae because in terms of how the jury's allowed
11 to consider it.

12 THE COURT: Well, I think it would be incorrect to
13 say that it can be both. I think what probably a different
14 way of saying it is, in the event that it's not intrinsic,
15 then we pivot to -- if it's extrinsic, then you're talking
16 about 404(b) because 404(b) doesn't involve intrinsic.

17 MS. KLOPF: That's an excellent distinction.
18 You're correct, Your Honor. I think it's a Venn diagram
19 that . . .

20 THE COURT: Yeah. And just to be clear, the -- I
21 mean, I think I've heard your explanation of why this is part
22 of the story of the robberies, and that Eighth Circuit case
23 that's cited in your filing is similar --

24 MS. KLOPF: *United States versus Oman*.

25 THE COURT: Thank you. And it's cited in your

1 brief. So it's in the record.

2 And then for a 404(b) analysis, first we have to
3 conclude that it occurred, the robbery occurred. I don't
4 think there's any dispute that a robbery occurred in Moulton,
5 Alabama on that date.

6 Second, that it's offered for a permissible
7 purpose. You're saying identity, opportunity, and modus
8 operandi.

9 And, third, we still have to do that 403 analysis
10 to make sure that the probative value is not substantially
11 outweighed by the prejudice or confusing the issues,
12 misleading the jury, undue delay and so forth, the rest of
13 the grounds listed in 403.

14 So those are the three steps to do 404(b). You
15 agree? I think the parties tend to agree on that in your
16 briefing?

17 MS. KLOPF: Yes, Your Honor.

18 THE COURT: All right. Mr. Evans, your thoughts,
19 as succinctly as can be, but make all your arguments. I've
20 read all the briefs, and we've talked about this before, but
21 go ahead and make your record.

22 MR. EVANS: Yes, Judge. Thank you. So there is
23 one case that I would like to add that was not in my briefing
24 that, I think, is on point and dispositive of the issue.
25 It's *United States versus Clay*. That's Sixth Circuit, 2012,

1 at 667 F.3d 689.

2 THE COURT: 689? Is that a res gestae, 404(b) or
3 both?

4 MR. EVANS: Both.

5 THE COURT: Okay.

6 MR. EVANS: And essentially in *Clay*, it's a trial
7 for a carjacking and 924(c). And in that case, the
8 prosecution, the government, wanted to put in proof and was
9 allowed to put in proof by the trial court of a theft that
10 occurred the previous day with a firearm. And essentially
11 they wanted to put it in for two reasons. They wanted to put
12 it in to show it was the person, and they wanted to show that
13 it was -- he used a firearm the day before; therefore, he
14 used a firearm this day.

15 And I think the holding in that case is pertinent
16 to this, and I think that situation is analogous to the
17 situation on how the Court dealt with it. Essentially, the
18 Court said, if you can't prove it's the same gun, it's not
19 res gestae. And what the Court essentially said without --
20 and this is from the holding. Without confirmation that the
21 gun is the same, the theft and gun possession is neither a
22 prelude to the charged offense nor probative of it.

23 That's exactly what we have here. And the Court
24 goes on to say: For it to be res gestae, there must be,
25 quote, a confirmed link, end quote, between the prior act and

1 the charged offense.

2 THE COURT: Doesn't the clothing get them there?

3 MR. EVANS: I would say no. This Court goes on to
4 talk about mass-produced clothing is not enough. The idea of
5 mass-produced clothing, I think here a mass-produced vehicle,
6 is not enough for the confirmation of that link.

7 THE COURT: But, I mean, if you combine the
8 clothing, plus the car, plus the proximity -- I mean, I know
9 it's 60 miles apart, but -- I know where Moulton is and I
10 know where Ardmore is, and they're not that far apart.

11 MR. EVANS: But the essence --

12 THE COURT: How does that get that analysis to
13 apply?

14 MR. EVANS: Well, the essence is, instead of the
15 gun, what we have here -- and here's where the Court makes
16 the distinction. The Court goes on to say: Instances where
17 the Court allows such evidence as res gestae, right, this
18 type of evidence -- because the government had relied on
19 multiple cases trying to suggest this is allowed. And this
20 is the part where the Court talks about specifically: In
21 those instances, where we, the Sixth Circuit, upheld this is
22 res gestae, quote, there was no dispute that the defendant or
23 the weapon were the same. That's the key line on res gestae
24 here.

25 There is dispute. In the instances where that

1 happens, you're not getting into -- and the Court goes on.
2 And I'll talk about this. The 404(b) analysis gets really
3 specific about similarity in clothing and different things
4 like that. But there is a dispute that it's the same person.
5 That's in dispute. And so, I mean, this -- the *Clay* court
6 says that specifically.

7 If you're trying to establish -- if you can
8 establish -- if you don't have it confirmed that the
9 defendant was the one who was involved in that act, then it's
10 not a prelude to the offense. It's not -- it's not
11 res gestae. Just like the gun, if you can't prove the gun
12 was the same -- here you can't prove the defendant was the
13 same, that the robber was the same. And so it's not part of
14 the story. It can't be an intrinsic event -- yeah, an
15 intrinsic event, it's a necessary part of the story, unless
16 they can -- it's confirmed that that's the person. I mean,
17 it's just not res gestae.

18 I mean, these other instances, where it's allowed,
19 courts are saying -- there's no dispute in those, that, yeah,
20 you've got a defendant, maybe he was charged, or maybe
21 there's a witness that says he did it, he carried that gun
22 the day before, or he committed that other act, or she
23 committed that other act. You don't have that here. I mean,
24 *Clay* says in those instances, if there's that dispute, then
25 it's not the same story. They can't say it's the same story.

1 So I think it just squarely, squarely knocks out
2 res gestae based on that because there's tremendous dispute.
3 And the Court goes on to talk about, like, piling inference
4 upon inference in the fear of that. And that's what we'd be
5 asking the jury to do here. They're having to pile inference
6 upon inference. Whether it be car, clothing, whatever,
7 they're having to pile inference upon inference.

8 And to Your Honor's point, when you spoke earlier,
9 this is not integral to the story of Ardmore. They can tell
10 the story of Ardmore. There's no witness that can't tell the
11 story of Ardmore without going into Moulton. The story of
12 Ardmore starts with, based on everything we've shown -- we've
13 been shown or provided in discovery is, two guys walk into
14 Cash Express at Ardmore. You know, it's like the premise to
15 the old joke, you know. That's where we start. There's
16 nobody that's even talking about, well, earlier that day, the
17 defendants went here, then they went there, then they went to
18 this other place.

19 And I think it also needs to be brought out that
20 we don't have any -- there's no -- there is no unequivocal
21 physical proof, or proof otherwise, that Mr. Carney was in
22 Moulton. What the government purports by their offer of
23 proof is they have cell phone location data that puts
24 Mr. Carney hitting off a tower, and I'll get into that later
25 with that expert, but his phone pinging off a tower that's in

1 the vicinity of Ardmore. Doesn't put him 60 miles away in
2 Moulton.

3 So this is not *res gestae*. I mean, it just isn't
4 *res gestae*. And this Court talks about the idea of the
5 government should not be allowed to try to backdoor -- their
6 words -- backdoor 404(b) evidence in through the claim of
7 *res gestae*.

8 THE COURT: Talk to me about *modus operandi*.
9 Because I've now seen videos of three robberies that seem to
10 have been conducted in a very similar way. Two of them are
11 charged, and one is the Moulton. How is it not probative
12 404(b) to show *modus operandi*?

13 MR. EVANS: So the 404(b) analysis in *Clay* -- and
14 there's a couple other points I'd make on 404(b) as well, but
15 I'll address Your Honor's question first. *Clay* talks about
16 this in light of identity. They don't really -- *Clay* doesn't
17 address *modus operandi* itself. But I will say this, I mean,
18 there's nothing unique -- so unique in these robberies that
19 becomes *modus operandi*. Going in -- we've already heard --
20 we have already heard testimony from a Cash Express person in
21 the trial that says -- you know, the government wants to say
22 this. Well, they come in, and they say they need a loan.

23 Well, we heard a witness up here that says, well,
24 that's typically what they say. People come in and go "I
25 need a loan." That's how they start the conversation.

1 Nothing unique about that. You know, the idea that somebody
2 is wearing masks when they rob a place, that's not modus
3 operandi. The fact that somebody jumps over the counter to
4 get the money is not modus operandi. That's not a signature
5 crime. That's a garden variety robbery of the Cash Express
6 or really of any place. The fact that they want to go to the
7 safe, those are just elements -- typical actions and elements
8 of someone robbing a financial institution. It's not
9 signature. And modus operandi goes to signature. Otherwise,
10 the government would constantly be able to come in here and
11 go "It's modus operandi because they robbed somebody. This
12 other one's a robbery. This is a robbery. It's modus" --
13 and I think the case law is clear that's not enough for it to
14 qualify. And so if I've addressed that part --

15 THE COURT: Yes, you did. Thank you.

16 MR. EVANS: So the other issue I want to hit on
17 404(b) -- and *Clay* talks about this specifically. And this
18 is one of the rubs that I think we have -- or I have with the
19 prosecution's argument and respectfully how Your Honor stated
20 it. You said we have to prove that the crime occurred. And
21 there's no dispute that the crime occurred in Moulton.

22 Well, I agree that the rule says that the crime
23 occurred, but if you look in *Clay*, *Clay* specifically deals
24 with that issue because -- there's dispute in *Clay* as to
25 whether or not this specific defendant was the one who did

1 the crime the day before. And so *Clay* specifically says the
2 issue -- when doing that analysis, the issue is not whether
3 the other act occurred, but whether there is sufficient
4 evidence that the defendant committed that act. And
5 that's -- again, that's where we run into the issue here.

6 THE COURT: Doesn't that undercut Mr. Cartwright's
7 argument a bit in the sense that he's saying we have to know
8 identity for Moulton to apply, and what you're saying is it's
9 not quite you have to know it, but there's got to be
10 sufficient evidence that it was the same person?

11 MR. EVANS: Well --

12 THE COURT: I'm not trying to put you at odds.
13 It's just he draws that distinction clearly in his brief
14 repeatedly and then yesterday said it several times, and I'm
15 just trying to understand. So where is that line? Is it as
16 hard as he's taking it? Is it you have to have sufficient
17 evidence as to identity? Or something less?

18 MR. EVANS: No, I think sufficient evidence means
19 you have to know they did it. I think it goes back to the
20 *res gestae* analysis in *Clay* where they say it can't be in
21 dispute. I think sufficient evidence is equal to the *Clay*
22 analysis, where the Court says where it's not in dispute. If
23 it's in dispute, then under the 403 analysis, you end up --
24 this is where it rolls into the significant prejudice issue
25 that you -- you know, that the defendant would run into.

1 In *Clay* specifically, they find in *Clay* -- number
2 one, you know, under res gestae, the *Clay* court says that the
3 trial court abused its discretion under res gestae on this
4 evidence. Second part of that, under 403, the *Clay* court,
5 while not saying the Court -- while not overturning it on the
6 ground of whether it occurred, infers and says it was
7 tenuous. It was tenuous. And I think the opinion leaves the
8 idea that it was problematic, but the *Clay* court goes on --

9 THE COURT: By tenuous that a crime occurred or
10 tenuous that --

11 MR. EVANS: The defendant.

12 THE COURT: -- the defendant committed the crime?

13 MR. EVANS: Yeah. And *Clay* is saying that's not
14 the -- that's not -- whether somebody got robbed, that's not
15 the analysis, because that still leads to all the problems
16 that run into relevancy and 403. If you're having this jury
17 try to determine whether they're guilty or not of Moulton, I
18 mean, you know -- and I'll say this, I mean, this morning,
19 even the government was talking about, well, if we put in
20 Moulton, we're going to want to put in a victim to talk about
21 they were scared and that they had met the elements of the
22 crimes. And you're going, no, that's -- that's a problem.
23 That's a huge problem with an uncharged offense.

24 In *Clay*, they go into the identity. And that's
25 one of the arguments that the government makes here. The

1 government's saying similar clothes, you know, in both,
2 similar car in both. And it says essentially similar clothes
3 and surveillance to what the defense -- that the Defendant
4 Clay was wearing. And then they also -- in *Clay*, there was
5 evidence from the prior theft found in his vehicle in *Clay*.
6 So they had similar clothing. And then they had some of the
7 things that were stolen from the crime found in Clay's
8 vehicle. And the Court says this link is tenuous at best.
9 And that's direct -- there's direct, you know -- essentially,
10 you know, proof of the crime found in his vehicle, and the
11 *Clay* court is saying that's tenuous at best.

12 They say as to identity, same clothes in both
13 offense -- and I'll say this, that was for also whether the
14 crime occurred under that, whether the defendant committed
15 the crime. Same clothes. You know, evidence from the crime
16 found in his apartment. I said car, but I meant apartment
17 rather. In his apartment. Tenuous at best. Under identity,
18 Court says absolutely not properly admitted for identity
19 purposes. Same clothes in both offenses is not enough.

20 And the Court goes into this because of the shirt.
21 There was a distinctive shirt that was worn by Clay
22 purportedly in the other act and in the charged offense. Or
23 they had seen him. I take that back. It was not that he
24 wore it in the charged offense. They had proof that he wore
25 that shirt. And they talk about mass-produced shirt does not

1 establish unique identity.

2 So that's exactly what we're dealing with here.
3 There's no, like -- that's not unique. They're going like,
4 look, a surgical mask worn during COVID would not be unique.
5 A toboggan, not unique. All mass-produced items. Whatever
6 the clothing was, there was nothing so unique about it that
7 links it to the defendant.

8 And then the *Clay* court goes on saying, look,
9 putting this in, the Court abused its discretion in allowing
10 this under 403. But putting this in was unduly prejudicial.
11 The risk of prejudice was great. And I think the Court says
12 they don't have to do the 403 analysis because they've
13 already found it's not proper purpose, but they do that
14 anyway. And they go, look, by putting this kind of evidence
15 into this trial, the prejudice was great because it would --
16 because it would suggest that the defendant was a repeat
17 violent offender, and it increased the risk that the jury
18 would use that evidence to determine that the defendant was a
19 bad person and a threat to society. I mean, that's -- that's
20 exactly what we have here. That's exactly what we have here.

21 And for the same reasons as set forth in *Clay* and
22 the other information that's been briefed by the defendants
23 in this case, Moulton should not be let into this trial under
24 either theory.

25 THE COURT: All right. Thank you. Anything to

1 add, Mr. Cartwright?

2 MR. CARTWRIGHT: Yes. Your Honor, in the
3 government's reply to our motion, they cited a case -- I
4 believe it was *Brown*. And I read that case and noted that in
5 that case I believe the Court expressed very grave
6 reservations about using res gestae. They go on to mention
7 other cases that give this equal warning. And one particular
8 is, in *Brown*, they say: We have noted how res gestae can
9 easily be abused, and we have noted the importance for the
10 district court to keep in mind both the scope of the charges
11 and the narrow purpose for which the res gestae exception
12 exists. It cites *US v Gibbs*, 797 F.3d 416.

13 In *Gibbs*, they say: Res gestae cannot serve as a
14 backdoor to circumvent the goals of Rule 404(b). And they
15 cite the *Clay* case in *Gibbs*. *Gibbs* cites *Clay*. Res gestae
16 cannot serve as a backdoor. They describe how the purpose of
17 the res gestae is to help complete a story that is necessary
18 to the elements of the charged offense. And in their
19 illustrations, they often talk about a conspiracy case, where
20 one of the elements of a conspiracy charge would be that
21 there's an ongoing agreement or an ongoing set of actions.
22 But we are not dealing with that element here.

23 What is necessary to complete the story of the
24 robbery that is missing from the story of the robbery in
25 Ardmore, what element is not proven that requires that we

1 tell the Moulton story, and we're back to the government
2 trying to say, well, what's necessary to Ardmore is to say
3 that it's similar to another robbery. That's not necessary
4 to tell the Ardmore story. So we get to identity. This is
5 what I'm having the biggest problem with.

6 It would be probative evidence of identity if the
7 identity of the Moulton robbers, not the similarity of the
8 Moulton Ardmore -- not whether Ardmore and Moulton are the
9 identical same. But who did Moulton? Because Moulton is
10 only probative evidence of identity if Moulton's identity has
11 been shown. If Moulton is not done by these two gentlemen,
12 then why would it be *res gestae* to whether they committed
13 Ardmore? It's not probative of identity, unless it's
14 established that the people that did Moulton are these two
15 people. And I think they're confusing the issue by saying
16 that the importance is to establish the Ardmore and Moulton
17 people were the same people.

18 Your Honor, *res gestae* would be used as a backdoor
19 to circumvent the 404(b) analysis. And that's what *Gibbs* and
20 *Clay* are trying to tell us. They're trying to tell us we
21 don't have a blanket exception to go pouring in the door any
22 other robbery that we don't know who did.

23 THE COURT: If we get to 404(b), again, we're back
24 to sort of a three-step process --

25 MR. CARTWRIGHT: Yes, sir.

1 THE COURT: -- that the Moulton robbery occurred.
2 I don't think there's any disagreement that the Cash Express
3 in Moulton was robbed on that particular day.

4 MR. CARTWRIGHT: Yes, sir.

5 THE COURT: We've seen video of it. We would
6 presumably have a witness who would testify "I was there, and
7 I was robbed."

8 Second is this offer for permissible purpose. 403
9 is going to apply to anything that's probative, but the
10 permissible purpose I think establishes the probative nature
11 of it. So that leads us to 403. And their stated purpose is
12 identity, opportunity, or, they've said today, modus
13 operandi. I think your concern, and one that I'm grappling
14 with as well, is if you could establish through -- and I
15 asked the government this earlier -- some other
16 circumstantial evidence that put either of these two
17 gentlemen in Moulton that day, such that -- other than what
18 Mr. Evans was describing as a Honda Civic -- is it a Civic or
19 an Accord?

20 MR. EVANS: Civic.

21 THE COURT: Civic. A car. Similar car, clothing
22 so forth. I think you and I are both grappling with the same
23 issue, which is if you could show that -- if the jury could
24 know these guys did this, and then you say identity,
25 therefore, because same car, similar car, similar clothing,

1 90 minutes later, 60 miles up the road -- I know that's been
2 talked about in the context of res gestae, but as far as
3 identity, then 404(b) kind of gets you there. And your
4 concern is, well, it could also be two different guys who
5 knocked off these same stores, and that would make that story
6 make sense too, right, because you can't identify Moulton.

7 MR. CARTWRIGHT: Yes. Yes. And I'm trying to say
8 we can't let res gestae get us out of that analysis because
9 that analysis is I think where we need to be. We don't need
10 to skip it with res gestae. And my big concern and what I've
11 been trying to emphasize is that even the cases the
12 government cites talking about how res gestae can, in some
13 instances, be an exception, they are very concerned, they're
14 worried that this will be taken too far to allow almost
15 anything in just because there's some theory that these
16 things could have similarities to other -- or that any crime
17 that a person does in the past is a prelude to their future.

18 THE COURT: Well -- and, I mean, that's why I got
19 to the questions early on for the government, which was is it
20 part of the story. Another case nobody's cited, maybe for
21 good reason, is the *Peete* case, which -- you did cite it?
22 Okay, sorry. You didn't beat me up with it, though, at
23 least. Because that was a case that I decided and got
24 reversed on, on a res gestae argument. And I think I cut it
25 fairly narrowly in my ruling, and the Sixth Circuit

1 disagreed.

2 Now, that situation was really close-in-time
3 events, and I was -- I think they thought we sanitized the
4 story too much. Involved a shooting. And I think I said
5 don't get into the -- you can say you saw him with a gun.
6 Witnesses can say that, but not that he was shooting somebody
7 or that he was part of a gang enforcement group. And they
8 said, well, that's all part of the story. That explains why
9 he had a gun. That explains -- if you take out the shooting,
10 it's too narrow. But that was all in a series of events in a
11 matter of minutes, as opposed to what I think -- and it was
12 all in the same location.

13 MR. CARTWRIGHT: And they would have been
14 telling -- I don't mean to be presumptive, but I would
15 presume the Sixth Circuit in this said that it's part of the
16 same story.

17 THE COURT: Right.

18 MR. CARTWRIGHT: But you can't understand the end
19 event unless you know the precursors. That's not the case
20 here. You can understand everything about the Ardmore
21 shooting from the moment they walk in --

22 THE COURT: Robbery.

23 MR. CARTWRIGHT: The Ardmore robbery. From the
24 moment they walk in to the moment they leave, that story can
25 be told. It does not need preparation; otherwise, we don't

1 know how they did; otherwise, we don't know -- here the
2 problem is we don't know who. Would that be supplied by
3 Moulton? No, it's not going to be supplied by Moulton. So
4 if that's not going to be supplied by Moulton, we're kind of
5 back to the 404(b).

6 The res gestae is just too dangerous to go down
7 that road here, when it's going to lead to a jury considering
8 whether to find a person guilty of a precursor crime in order
9 to make a decision about the actual charged crime. It's just
10 too much, Your Honor.

11 THE COURT: Okay. Thank you. Where I seem to be
12 parked -- and we've let our jury cool their heels for half an
13 hour now. Where I seem to be parked here is on the issue
14 of -- opportunity seems a bit of a stretch given that -- if
15 we're under -- put blinders on and think 404(b) just for a
16 minute. If we're talking about opportunity, 60-mile
17 difference, all that seems a bit attenuated. Modus operandi
18 and identity seem to be a little bit closer to the mark,
19 assuming that what you've said earlier occurs, which is other
20 evidence of these two defendants with a black Honda Civic,
21 some voice comparisons. That's the other evidence that
22 you're going to say is going to sort of tie all this
23 together.

24 MS. KLOPF: Yes.

25 THE COURT: That's external to just Moulton and

1 really just to Ardmere. There's more there, I guess. And
2 then, of course, you got the cell coverage. And Mr. Evans is
3 going to, I'm sure, try to pick that up apart, as will, I'm
4 sure, Mr. Cartwright. But that's evidence you intend to
5 offer.

6 MS. KLOPF: Yes.

7 THE COURT: So --

8 MS. KLOPF: So I actually think the *Clay* case
9 helps the United States because they break down 404(b). I
10 was looking at it on my phone while --

11 THE COURT: You were looking at your phone in
12 court?

13 MS. KLOPF: I know. I'm sorry. I apologize, but
14 I wanted to see what Mr. Evans was referencing.

15 THE COURT: I'm just poking at you a little bit,
16 Ms. Klopff. Don't get too sensitive.

17 MS. KLOPF: Well, first I was on Instagram, and
18 then I switched over.

19 THE COURT: Okay. That's all right. At least it
20 wasn't Etsy or shopping, Amazon. Go ahead.

21 MS. KLOPF: Got to get that same-day shopping.

22 I was reading *Clay*. And in the 404(b) analysis,
23 they are distinguishing what happened in *Clay*. So *Clay*, it
24 sounds like, was an armed robbery separate -- a different
25 robbery that happened the day before, where the only thing

1 that was distinctive was one shirt, and it was a different
2 kind of robbery. And it was the day before. So 24 hours.
3 So a lot of dissimilarities to our case. We've got
4 90 minutes. I think, you know, if the Court looks -- this is
5 not one shirt. This is a weird way of wearing a gator over
6 somebody's head, a black hat, a very distinctive sweatshirt,
7 gray pants with very distinctive lettering down the side,
8 black shoes.

9 THE COURT: Does Ardmore -- I looked at them, but
10 it's been a day or so. Does Ardmore show the front of the
11 sweatshirt?

12 MS. KLOPF: Yes, it does.

13 Ms. Green, would you mind pulling up Exhibit D,
14 page 2.

15 THE COURT: D?

16 MS. KLOPF: It's D, what I filed.

17 THE COURT: To the brief. Got it.

18 MS. KLOPF: Yes, the brief. I have a hard copy if
19 it's easier.

20 THE COURT: All right. Anything else briefly you
21 want to say?

22 MS. KLOPF: Yes. So in *Clay*, they quote a case
23 called *Allen*, which is 619 F.3d 518. That's Sixth Circuit,
24 2010. And they describe -- they explain that where it's
25 sufficient -- it's sufficiently distinctive similarity with

1 the charges in the indictment to create a pattern or modus
2 operandi, explaining what proper modus operandi evidence is
3 under the 404(b) analysis, which I think here, you know,
4 you've got -- oh, and then *Johnson*, which is 27 F.3d 1194,
5 also cited in *Clay*, which talks about that other acts is
6 admissible if the perpetrator employed the same modus
7 operandi or method of operation.

8 So where *Clay* was like two different crimes
9 separated by 24 hours that's distinct, instead here we have
10 90 minutes where this same kind of robbery of Cash Express --
11 I think the Court has already seen during the course of
12 trial, Cash Express is a unique business. It's very small.
13 I mean, frankly, it's a sad place with limited surveillance.
14 It's not the sort of business you're seeing on every single
15 corner. It's a unique business that is sought out. During
16 the course of the trial, you will, as you've already
17 mentioned, and I don't want to belabor the point, you will
18 hear other evidence that's tying this Honda Civic to the
19 defendants later on, on a number of different things.

20 So in terms of the 404(b) analysis, I do think it
21 comes in particularly as modus operandi, but also identity
22 and opportunity. But I think, most squarely, it falls under
23 modus operandi.

24 THE COURT: All right.

25 MS. KLOPF: And I can address the *res gestae*

1 arguments if you'd like.

2 THE COURT: It's okay.

3 MS. KLOPF: But I do want to say that *Clay*
4 actually supports the finding that this is *res gestae*.

5 THE COURT: Okay. Well, I'm going to need to read
6 *Clay* a little closer. Let's talk some practical realities
7 for scheduling purposes. Sergeant Baker is here for the day?

8 MS. KLOPF: We can ask him to be. The victim is
9 also here this morning.

10 THE COURT: Okay. And is the victim available
11 today?

12 MS. KLOPF: I think she will be. My one concern
13 is that waiting seems to make the victims suffer some
14 discomfort, and they all want to get it over as fast as
15 possible.

16 THE COURT: I'm sure. Okay. Who are you planning
17 to call -- I think I need a little bit more time to look at
18 these cases, but who can you call such that if I give you a
19 ruling perhaps right after lunch, which is just a couple of
20 hours away now -- can you fill up the rest of the morning
21 with other witnesses you have available, and then we can see
22 if these Alabama folks are going to testify? I imagine that
23 their testimony is not going to be too lengthy. I've heard
24 from Sergeant Baker.

25 MS. KLOPF: Give us one moment. We're just going

1 to check. The victim from Ardmore should be here this
2 morning. So he's just going to go check. I believe we have
3 another witness definitely available. We need to read a
4 couple stips into the record. But I think the other people
5 we could move up. I mean, it's already 10:10. So we will
6 endeavor -- maybe if the Court would indulge us and just
7 explain to the jury that sometimes we have to call witnesses
8 out of order.

9 THE COURT: Sure.

10 MS. KLOPF: I think that would help.

11 THE COURT: All right. Let's do this: If you'll
12 get somebody ready to go -- we're going to take a five-minute
13 break and let everybody stretch your legs and use the
14 restroom because we've been going about an hour and
15 40 minutes, and then we'll get our jury -- I'm sure they're
16 ready -- to line up and be ready to go. We'll probably go
17 ahead and push to noon. That will be, by the time we get
18 back in here, about an hour and 40 minutes. We'll take a
19 10-minute break now and then try to fill up that time with
20 other witnesses and gives me a chance to take a look at these
21 cases that have been identified that I should consider. So
22 we'll take -- anything else?

23 MS. KLOPF: And just checking, Your Honor, just to
24 make sure that our record is complete. If the Court needs
25 more information from a witness about the other information

1 we would elicit from witnesses, we're happy to provide that.

2 THE COURT: You mean as far as the Moulton?

3 MS. KLOPF: Yes.

4 THE COURT: Is it the intention of the government
5 to have the witness tell the story of the day similar to the
6 witnesses yesterday, and that this witness will not be able
7 to positively identify either of these defendants as the
8 perpetrators?

9 MS. KLOPF: It would be the case agent.

10 THE COURT: Oh, the case agent.

11 MS. KLOPF: It would be explaining the Honda
12 connections down the road, that, you know, obviously this
13 witness -- these witnesses can't testify to. If the Court
14 needs to hear about the Honda more or the voice comparisons
15 or anything like that, we'd be happy to provide that.

16 THE COURT: I think sort of where I am right now
17 in the analysis, I don't think those issues really matter.
18 So let's just have some witnesses ready to go in ten minutes.
19 And we'll apologize to our jury for keeping them waiting, but
20 then we'll get some evidence put in.

21 MS. KLOPF: We'll do our best to get people here.

22 THE COURT: Okay.

23 (Recess taken from 10:12 a.m. to 10:25 a.m.)

24 (Trial proceedings continued. See Volume 2-B.)

25

REPORTER'S CERTIFICATE

I, Patricia A. Jennings, Official Court Reporter
for the United States District Court for the Middle District
of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine the
proceedings held in open court on June 9, 2023, in the matter
of UNITED STATES OF AMERICA vs. FREDRICK EUGENE CARNEY and
WILLIAM JOHN EWING III, Case No. 3:22-cr-00174; that said
proceedings in connection with the hearing were reduced to
typewritten form by me; and that the foregoing transcript
(pages 1 through 66) is a true and accurate record of said
proceedings.

This the 31st day of July, 2023.

/s/ Patricia A. Jennings
Patricia A. Jennings, RMR, CRR
Official Court Reporter