

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2025

HEATHER NICOLE BYCROFT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Heather Nicole Bycroft, by and through her court-appointed counsel, Howard A. Pincus, Assistant Federal Public Defender for the District of Colorado, respectfully requests this Honorable Court for leave to proceed *in forma pauperis* in applying for a Writ of Certiorari. In support of this request, Petitioner states that undersigned counsel was

appointed pursuant to the Criminal Justice Act by the United States Court of Appeals for the Tenth Circuit, and that she is unable to retain counsel and pay for costs attendant to the proceedings before this Honorable Court.

WHEREFORE, the Petitioner, Heather Nicole Bycroft, respectfully requests that she be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

MATTHEW K. BELCHER
Interim Federal Public Defender

/s/ Howard A. Pincus
HOWARD A. PINCUS
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

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PETITION FOR A WRIT OF CERTIORARI

MATTHEW K. BELCHER
Interim Federal Public Defender

HOWARD A. PINCUS
Assistant Federal Public Defender
Counsel of Record for Petitioner
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

QUESTION PRESENTED

In this child-pornography prosecution, did the Tenth Circuit err in affirming the admission of evidence, under Federal Rule of Evidence 404(b), that Ms. Bycroft helped make videos up the skirts or dresses of adult women, on the theory that it was relevant to show she operated a device years earlier that recorded the genitalia of a six-year-old girl?

STATEMENT OF RELATED CASES

United States v. Bycroft, No. 21-cr-00325-TDD

Judgment entered July 30, 2024 (E. Dist. Okla.)

United States v. Bycroft, No. 24-7069 (10th Cir.)

Judgment entered May 5, 2026

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PRAYER

Petitioner, Heather Nicole Bycroft, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on May 5, 2026.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, see United States v. Bycroft, 174 F.4th 814 (10th Cir. 2026), is found in the Appendix at A1. The order of the United States District Court for the Eastern District of Oklahoma denying Ms. Bycroft's motion to exclude evidence under Federal Rule of Evidence 404(b) is found in the Appendix at A9.

JURISDICTION

The United States District Court for the Eastern District of Oklahoma had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

This petition implicates Federal Rule of Evidence 404(b), which governs the admission of evidence of other crimes, wrongs or acts. The rule provides as follows:

(b) Other Crimes, Wrongs, or Acts.

- (1) Prohibited Uses.** Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) Permitted Uses.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.
- (3) Notice in a Criminal Case.** In a criminal case, the prosecutor must:
 - (A)** provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it.
 - (B)** articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
 - (C)** do so in writing before trial -- or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 404(b).

STATEMENT OF THE CASE

Heather Bycroft is serving the mandatory, minimum term of fifteen years in prison for the production of child pornography. See 18 U.S.C. § 2251(a), (e). The charge was based on a recording taken at a pool during a July 4, 2015 party at the home of the parents of her then-boyfriend, and later husband, Jason Bycroft. In the recording, Jason Bycroft is seen moving the shorts and underwear of a six-year-old girl. The little girl's genitalia are exposed to the camera for some three seconds.¹

The main issue at trial was whether a woman's voice on the video -- which presumably belonged to the operator of the recording device and which said only "uh-huh" -- was Ms. Bycroft's voice. Ms. Bycroft insisted it was not. Jason's sister and mother, and a Bycroft family friend, said that it was her voice on another, non-pornographic pool video with the same girl, although their claims were subject to question. A detective who had interviewed Ms. Bycroft also thought the voice on the videos was hers.

¹ Ms. Bycroft was also convicted of possessing the image that same day, see 18 U.S.C. §§ 2252(a)(4)(B), (b)(2), based on its having been captured by the device used to record it.

The question presented in this petition concerns the admission of evidence pursuant to Federal Rule of Evidence 404(b). That evidence did not involve a young girl. It did not involve a child at all. Instead, the evidence was of “upskirting” videos taken years later by the Bycrofts of adult women. The district court did not just admit Ms. Bycroft’s voice on those videos to allow the jury to compare the voice on the pool video with Ms. Bycroft’s. Rather, it admitted three of the upskirting videos in their entirety.

The trial testimony about Ms. Bycroft’s voice

Besides the recording in which the young girl’s genitalia were exposed, there were two other recordings introduced at trial of Mr. Bycroft in the pool at with the young girl at the July 4th party. Neither was pornographic, and a woman’s voice can only be heard in one of the two.

In one of the non-pornographic recordings, Exhibit 1 at trial, Mr. Bycroft has his left arm around the girl, at first on the outside of her leg and then up closer to her hip, and then above her waist. Putting his other arm under her legs, he lifts the girl out of the water and, on a count of three, tosses her up in the air and back into the pool. Before he does so, an adult,

female voice can be heard saying “Yeah” in response to “You ready?” A few seconds later, the voice says that Mr. Bycroft is “gonna throw her on top of her,” as there is another little girl swimming nearby. He responds that (as he then does) he will throw the girl he is holding to the side.

In the other non-pornographic recording, Exhibit 2 at trial, Mr. Bycroft moves the girl’s shorts and underwear, revealing part of her groin and the top part of her thigh, but not her genitalia. There is no adult, female voice heard in that video.

Courtney Bycroft, Jason’s sister, testified that when law enforcement played the videos for her, she had identified the adult, woman’s voice as being Ms. Bycroft. As with the witnesses to follow, the only exhibit the prosecution played for Courtney Bycroft to have her identify the voice was Exhibit 1, a video in which there was no effort by her brother to move the girl’s shorts and underwear, and not Exhibit 3, which formed the basis for the prosecution. When the detective had first shown Courtney the pool videos, she told him only that the “voice in question sounded like [Jason’s] wife, Heather Bycroft.”

Jason's mother, Theresa Bycroft, identified Heather as being the voice on Exhibit 1, the same, non-pornographic video played for Courtney. She could not hear an adult, female voice on either of the two other videos, including Exhibit 3, the one in which the little girl's genitalia are exposed. A Bycroft family friend, Delena Ratliff, also said the adult, female voice in Exhibit 1 was Heather's. But when she was first shown the video, she said only that she "thought" the voice was Heather's, but that she was unsure.

Ms. Bycroft insisted at trial that she did not participate in recording any of the pool videos. She specifically denied that she filmed Jason trying to expose the genitalia of the young girl, or that she filmed him actually exposing the girl's genitalia. And she pointedly denied, too, that it was her "voice on the videos."

The Rule 404(b) ruling allowing proof that Ms. Bycroft recorded up the skirts or dresses of adult women

Before trial, the prosecution sought permission to introduce, under Federal Rule of Evidence 404(b), evidence of what it described as "video voyeurism," and what the case agent would describe at trial as "Peeping Tom" videos. Both Jason and Heather Bycroft could be seen in the videos,

which were made in store settings. They were shot with a device that Ms. Bycroft had in a bag or purse, which she would maneuver to record up the skirt or dress of a nearby woman.

The prosecution's motion acknowledged that the Peeping Tom videos did not involve children. But the motion insisted the Peeping Tom videos were similar to the pornographic pool video, as they too were "sexual in nature." The motion described the pornographic pool video and the Peeping Tom videos as both reflecting what it called "a prurient sexual interest" or a "deviant sexual interest."

In response, Ms. Bycroft stressed the difference between production of child pornography and video voyeurism of adult women. As defense counsel put it at one point, "[v]ideos of up skirting of adults does not demonstrate motive to commit sexual exploitation of a child alleged in this matter."

At the Rule 404(b) hearing, the prosecution reiterated the position that the conduct of making voyeuristic videos was similar to the making of the pool video that was the basis for the prosecution. It reasoned the both involved the "filming of female genitalia" and that both were done "to

satisfy some sexual prurient interest.” Ms. Bycroft’s counsel again invoked the difference between adult women and girls, relying in part on the argument of Jason Bycroft’s attorney that the Peeping Tom videos were of “adults as opposed to children. Obviously, that’s a different kind of sexual prurient interest, as the government puts it.” Ms. Bycroft’s counsel contended that the voyeuristic videos were character evidence and that their admission would be overwhelmingly prejudicial, encouraging the jury to convict because Ms. Bycroft was a bad person, even if it were not fully convinced of her guilt. Id.

The district court stated that the prosecution’s motive and intent theories seemed “to be getting pretty close to propensity evidence, the very thing that is precluded by Rule 404.” Nevertheless, in a brief written order, the district court held the prosecution could introduce the Peeping Tom videos it considered to be the most relevant, rather than the five or ten it sought to admit, which the court considered excessive. A12. In allowing the admission of Peeping Tom videos, the court reasoned that they helped show identity because Ms. Bycroft’s face could be seen in them, but not in the pool videos, and that they went to a lack of mistake or accident. A11.

The jury convicted Ms. Bycroft of the production and related possession count. The district court sentenced Ms. Bycroft to fifteen years in prison, the mandatory minimum sentence for the production count. The court stated that it would have “go[ne] lower” if it could and that it “t[ook] no joy” in imposing the fifteen-year prison term.

The appeal to the Tenth Circuit

Ms. Bycroft’s appeal to the Tenth Circuit challenged the admission, under Rule 404(b), of the upskirting videos. The appeal was based largely on the difference in the nature of what was recorded. Ms. Bycroft argued that actions taken in the hope of recording the genitalia of adult women (in the upskirting videos) was categorically different than recording the genitalia of a little girl (in the pool video).

In the district court, the prosecution had argued that, in both cases, the recordings were done to satisfy a prurient or deviant sexual interest. Ms. Bycroft stressed on appeal that there was a stark difference between sexual interest in the genitalia of adults and sexual interest in the genitalia of a six-year-old girl.

The Tenth Circuit recognized that, under this Court's decision in Huddleston v. United States, 485 U.S. 681 (1988), the upskirt videos had to be relevant to what occurred at the pool. A5. The circuit court also recognized that this turned on the similarity of the acts. "[T]he lynchpin of Huddleston relevancy is similarity.'" A6 (quotation omitted).

But the Tenth Circuit rejected the argument that the recordings were borne of a sexual interest, and that the dissimilarity of sexual interest in adults as opposed to young children, showed there was not the similarity needed for relevancy. In doing so, the court was unwilling even to accept the premise that the two sexual interests were categorically different. Instead, dismissing any such difference, it reasoned that the acts were similar because both instances involved surreptitious and non-consensual recording of "female genitalia":

[Ms.] Bycroft states that a sexual interest in adult women cannot be equated to a sexual interest in children and, therefore, the acts are entirely dissimilar. Without agreeing that a sexual interest in an adult female's genitalia is "entirely dissimilar" from an interest in a minor female's genitalia, we note that [Ms.] Bycroft was not charged for having a sexual interest in the girl in the pool video; she was charged for surreptitiously recording the girl's genitalia. Nor were the Peeping Tom videos admitted to show her sexual interest in adult women; they were admitted to show [Ms.] Bycroft

operated a camera for the purpose of recording unsuspecting female's genitalia. The critical aspect of the conduct, surreptitiously and non-consensually recording female genitalia, was identical.

Id.

REASONS FOR GRANTING THE WRIT

This case offers a good opportunity for this Court to give guidance on an important aspect of the admission of other-acts evidence under Federal Rule of Evidence 404(b), a frequently used rule in criminal prosecutions that this Court has not addressed in decades.

This Court has not meaningfully addressed Federal Rule of Evidence 404(b) in nearly four decades, since its 1988 decision in Huddleston v. United States, 485 U.S. 681 (1988). This case provides the opportunity for this Court to give guidance on the threshold requirement for admission of evidence under the rule -- namely, that the evidence be relevant to the charged crime -- which went unexplored in Huddleston. The Tenth Circuit defined that relevancy at a high level of generality, ignoring the reasons why one would engage in the conduct charged and in the other-acts evidence. This view of relevancy distorts the proper application of Rule 404(b), a rule very frequently used in federal criminal prosecutions.

“Evidence is admissible under Rule 404(b) only if it is relevant.” Id. at 689. As the Tenth Circuit rightly recognized, the admission of other-act evidence addressed by Rule 404(b) requires similarity between the charged crime and the other acts. A5-6. The similarity ensures the other-act evidence bears on a matter of consequence, see Fed. R. Evid. 404(b)(2)

(identifying permissible purposes for other-act evidence), as to the crime for which the defendant is on trial. See United States v. Cadet, 664 F.3d 27, 32-33 (2d Cir. 2011) (similarity of other act and charged crime provides a “reasonable basis” for inferring a legitimate purpose like knowledge or intent for admitting the other-act evidence); United States v. Haywood, 280 F.3d 715, 721 (6th Cir. 2003) (other-act evidence probative of intent if other act is “substantially similar,” and reasonably close in time, to charged crime); see also, e.g., United States v. Cowden, 882 F.3d 464, 472 (4th Cir. 2018) (other act must be relevant to an element of charged offense, and the more similar the prior act to the charged offense the more relevant it is).

Here, there is no obvious way in which the other-act evidence is not at all similar to the charged offenses of producing child pornography, and then immediately possessing the child pornography that was produced. It is that the other acts involved adult women, whereas the charged crime involved a six-year-old girl. An interest in viewing or recording images of genitalia of an adult woman simply cannot be equated with an interest in viewing or recording images of the genitalia of a little girl.

An interest in the genitalia of such a young girl shows “abnormal sexual attraction.” United States v. Reynolds, 720 F.3d 665, 670 (8th Cir. 2013) (discussing receipt and production of child pornography); see also United States v. Brand, 467 F.3d 179, 198 (2d Cir. 2006) (same; possession of child pornography); United States v. Byrd, 31 F.3d 1329, 1336 n.9 (5th Cir. 1994) (same; ordering child pornography). An interest in the genitalia of an adult woman does not. So, the fact that a person has an interest in explicit images of adult women is not proof that the person has an interest in explicit images of young girls. See Holley v. Yarborough, 568 F.3d 1091, 1101 n.2 (9th Cir. 2009).

The Tenth Circuit brushed aside this distinction in finding there to be a similarity between the making of the pool video and the making of the upskirt videos. It was not even willing to agree that there is a profound difference between a sexual interest in the genitalia of women and a sexual interest in the genitalia of a six-year-old girl (whom it described merely as “a minor,” A6). See id. (expressly declining to agree the interests are “entirely dissimilar”).

Instead, the Tenth Circuit thought it enough for the acts to be similar that each involved the “surreptitious[] and non-consensual[] reecording [of] female genitalia.” Id. It was of no moment, on the Tenth Circuit’s view, that in one setting the female genitalia was of a woman, and in the other setting it was of a six-year-old girl.

The Tenth Circuit justified this result by noting that Ms. Bycroft was not charged with having a sexual interest in the six-year-old girl and that the Peeping Tom videos were not introduced to show she was sexually interested in adult women. But even the prosecution argued for admission of the upskirt videos on the theory that they, like the pool video, were done for a “sexual interest,” which it termed “prurient” or “deviant.” See supra at 7-8.

Indeed, unless the jury were to credit Ms. Bycroft’s testimony that she took the upskirt videos under duress from an abusive husband -- which was, needless to say, not the prosecution’s theory and not the theory of admission or affirmance -- it would defy reality to suggest there was not a sexual interest in both contexts. There was no claim or evidence at Ms. Bycroft’s trial that either the pool video or the upskirt videos were made

for anything other than the personal interests of those involved. There was, for example, no suggestion or proof that either type of video was made to turn a profit. The personal interest, in each case, could only have been a sexual interest in what was recorded (the genitalia of a little girl in the pool video), or what was sought to be recorded (the genitalia of adult women in the upskirting videos). Why else would one make either type of recording?

For the upskirting videos to say something about who operated the recording device in the pool video, they would need to be similar enough so that the upskirting videos could provide an inference that the same person worked with Jason Bycroft in the making of the pool video. The Tenth Circuit implicitly recognized this to be so. It relied on the belief that what was recorded -- female genitalia -- was the same in each context. Id. at 818. But given the obvious difference between adults and children, why the recording was made in each context was what really mattered. And the why -- absent, as here, any reason to suggest otherwise -- could only have been a sexual interest in what was recorded. With no basis to believe that one who has a sexual interest in the genitalia of adult women also has

a sexual interest in the genitalia of six-year-old girls, the fact that Ms. Bycroft recorded the upskirt videos does not say anything about whether she would participate in the recording of the little girl at the pool.

Of course, it might be otherwise were there something unique about the recording in the two settings that could point to the same person as working with Jason Bycroft. But there was not. There was only that Jason Bycroft worked with another person in each context and that the recording was done in a way (self-evidently as to the upskirt videos, and presumably as to the pool video) to avoid detection. That hardly identifies the same person as having worked with Jason Bycroft in each context.

To be sure, one who is sexually interested in adult women can also be sexually interested in young girls. That is the case with Jason Bycroft. But just knowing that a person has a sexual interest in adult women does not allow for a rational inference that the person also has a sexual interest in young girls. The fact that sexual interest in young girls is considered to be abnormal -- and that harsh criminal penalties attach to child pornography, in this case calling for a minimum term of fifteen years in prison -- also cuts sharply against the rationality of such an inference. The

normal reaction of one whose assistance is sought in making a video that qualifies as child pornography would be shock and revulsion. The fact that a person years later participated in making Peeping Tom videos of adult women would not change this. It would not support the inference the prosecution needed here: that the upskirting recordings of adult women bore on whether Ms. Bycroft was the one who recorded the genitalia of a six-year-old girl.

This Court said very little in Huddleston about what makes other-act evidence relevant to proof of the charged crime. It stated that Rule 404(b) evidence must be relevant and that relevancy is a function “‘of a relation between an item evidence and a matter properly provable in the case.’” Huddleston, 485 U.S. at 689 (quoting Advisory Committee note). Apart from this, the Court focused on the question at issue in Huddleston of whether a trial court must make a preliminary finding that the prosecution has proved the other acts by a preponderance. Id. at 689-90; see also id. at 683 (defining question presented).

By granting review in this case, this Court can give meaningful guidance, not provided in Huddleston, on what makes evidence of other

acts or crimes relevant to proof of a charged crime. This Court can give content to what marks the other acts or crimes as similar enough to the charged crime to say something meaningful about a proper purpose for their admission under Rule 404(b). Here, for example, was it permissible for the Tenth Circuit to consider the issue at the level of generality that it did, treating any effort to record female genitalia the same, whether the effort involved adult women or a little girl? Or must other-act evidence bear a real similarity to the other acts, a standard that would not allow the equation of a sexual interest in adult women with the abnormal sexual interest in little girls?

This type of guidance is particularly warranted given the powerful effect Rule 404(b) evidence can have. This Court noted in Huddleston its “concern that unduly prejudicial evidence might be introduced under Rule 404(b).” Id. at 691 (citing Michelson v. United States, 335 U.S. 469, 475-76 (1948)). One way this Court thought such harm could be avoided was through the requirement that the Rule 404(b) evidence be relevant. Id. Accepting this case for review will allow this Court to ensure the relevancy

requirement is a meaningful one and that it operates to protect against the admission of unduly prejudicial evidence under Rule 404(b).

CONCLUSION

This Court should grant Ms. Bycroft a writ of certiorari.

Respectfully submitted,

MATTHEW K. BELCHER
Interim Federal Public Defender

/s/ Howard A. Pincus
HOWARD A. PINCUS
Assistant Federal Public Defender
Counsel of Record
633 17th Street, Suite 1000
Denver, Colorado 80202
(303) 294-7002

APPENDIX

174 F.4th 814

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff - Appellee,

v.

Heather Nicole BYCROFT, Defendant - Appellant.

No. 24-7069

|

FILED May 5, 2026

Synopsis

Background: Following grant of government's motion to admit other-act evidence, [2022 WL 808691](#), defendant was convicted in the United States District Court for the Eastern District of Oklahoma, [Timothy D. DeGiusti, J.](#), of sexual exploitation of a child/use of a child to produce a visual depiction and possession of certain material involving the sexual exploitation of a minor. Defendant appealed.

Holdings: The Court of Appeals, [Ebel](#), Circuit Judge, held that:

[1] evidence that defendant had recorded illicit pornographic videos of adult females in public locations, such as store dressing rooms, was relevant;

[2] other-act evidence served proper purpose to establish defendant's identity;

[3] district court did not abuse its discretion in failing to excise videos; and

[4] other-act evidence served proper purpose to prove absence of mistake or accident.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (17)

[1] **Criminal Law** 🔑 **Purposes for Admitting Evidence of Other Misconduct**

Criminal Law 🔑 **Limiting effect of evidence of other offenses**

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General

110k368.3 Purposes for Admitting Evidence of Other Misconduct

110k368.4 In general

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k673 Effect of Admission

110k673(5) Limiting effect of evidence of other offenses

To be admissible, district court must find that other-act evidence is relevant, that its probative value is not substantially outweighed by potential for unfair prejudice, that it was introduced for proper purpose, and district court must give jury instruction regarding proper purposes of evidence if requested. [Fed. R. Evid. 404\(b\)\(2\)](#).

[2] **Criminal Law** 🔑 **Reception and Admissibility of Evidence**

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1153 Reception and Admissibility of Evidence

110k1153.1 In general

Court of Appeals reviews evidentiary decisions for abuse of discretion.

[3] **Criminal Law** 🔑 **Reception and Admissibility of Evidence**

110 Criminal Law

110XXIV Review

110XXIV(N) Discretion of Lower Court

110k1153 Reception and Admissibility of Evidence

110k1153.1 In general

District court abuses its discretion in admitting evidence if that admission represents clear error of judgment or exceeds bounds of permissible choice in circumstances.

[4] Criminal Law 🔑 Sex offenses, incest, and prostitution

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)2 Admissibility in Prosecutions for Particular Offenses in General

110k368.37 Sex offenses, incest, and prostitution

Evidence that defendant had recorded illicit pornographic videos of adult females in public locations, such as store dressing rooms, was relevant, in prosecution for sexual exploitation of a child/use of a child to produce a visual depiction and possession of certain material involving the sexual exploitation of a minor; evidence made it more probable that defendant was camera operator in pool videos, which were basis of charged crimes, and evidence suggested that defendant and her husband in both sets of videos sought to record unwitting females' genitalia surreptitiously. *Fed. R. Evid.* 404(b)(2).

[More cases on this issue](#)

[5] Criminal Law 🔑 Relevancy

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General

110k368.7 Factors Affecting Admissibility

110k368.9 Relevancy

Other-act evidence is “relevant” if it makes the existence of any fact at issue more or less probable. *Fed. R. Evid.* 404(b)(2).

[6] Criminal Law 🔑 Similarity to Crime Charged

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)12 Nature and Circumstances of Other Misconduct Affecting Admissibility

110k373.7 Similarity to Crime Charged

110k373.8 In general

Lynchpin of relevance of other-act evidence is similarity. *Fed. R. Evid.* 404(b)(2).

[7] Criminal Law 🔑 Similarity to Crime Charged

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)12 Nature and Circumstances of Other Misconduct Affecting Admissibility

110k373.7 Similarity to Crime Charged

110k373.8 In general

To be relevant, other-act and charged offense need not be identical, just similar. *Fed. R. Evid.* 404(b)(2).

[8] Criminal Law 🔑 Similarity to Crime Charged

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)12 Nature and Circumstances of Other Misconduct Affecting Admissibility

110k373.7 Similarity to Crime Charged

110k373.8 In general

For purposes of relevance of other-act evidence, similarity of prior act with charged offense can be demonstrated through physical similarity of the acts or through the defendant's indulging herself in the same state of mind. *Fed. R. Evid.* 404(b)(2).

[9] Criminal Law 🔑 Close temporal proximity

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)12 Nature and Circumstances of Other Misconduct Affecting Admissibility

110k373.18 Temporal Relation of Events

110k373.20 Close temporal proximity

Court considers whether other acts evidence is sufficiently close in time to the charged offense when determining their similarity. *Fed. R. Evid.* 404(b)(2).

[10] Criminal Law 🔑 Sex offenses, incest, and prostitution

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)10 Other Misconduct Showing Identity

110k372.49 Sex offenses, incest, and prostitution

Evidence that defendant had recorded illicit pornographic videos of adult females in public locations, such as store dressing rooms, served proper purpose to establish defendant's identity in pool videos, which were basis of charged crimes, in prosecution for sexual exploitation of a child/use of a child to produce a visual depiction and possession of certain material involving the sexual exploitation of a minor; pool videos contained only camera operator's voice, and dressing room videos contained camera operator's voice and physically identifiable features of defendant, including her face, wedding ring, and leg tattoo. [Fed. R. Evid. 404\(b\)\(2\)](#).

[More cases on this issue](#)

[11] **Criminal Law** 🔑 Similar means or method; modus operandi

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)12 Nature and Circumstances of Other Misconduct Affecting Admissibility

110k373.7 Similarity to Crime Charged

110k373.15 Similar means or method; modus operandi

When more direct evidence is available to prove defendant's identity, there is no need to consider whether other-act evidence bears signature quality. [Fed. R. Evid. 404\(b\)\(2\)](#).

[12] **Criminal Law** 🔑 Purposes for Admitting Evidence of Other Misconduct

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)1 Other Misconduct as Evidence of Offense Charged in General

110k368.3 Purposes for Admitting Evidence of Other Misconduct

110k368.4 In general

Very function of other-act evidence is to allow a party to attempt to prove, and the jury to find if they are persuaded, that the charged offense occurred based on the prior acts. [Fed. R. Evid. 404\(b\)\(2\)](#).

[13] **Criminal Law** 🔑 Other Misconduct Showing Identity

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)10 Other Misconduct Showing Identity

110k372.28 In general

Fact that a party can submit other-act evidence for the purpose of proving the defendant's identity does not mean the defendant's identity has been proven, just that the evidence is admissible to attempt to prove identity. [Fed. R. Evid. 404\(b\)\(2\)](#).

[14] **Criminal Law** 🔑 Introduction of documentary and demonstrative evidence

110 Criminal Law

110XX Trial

110XX(C) Reception of Evidence

110k663 Introduction of documentary and demonstrative evidence

District court did not abuse its discretion in failing to excise illicit pornographic videos of adult females in public locations, such as store dressing rooms, recorded by defendant, in prosecution for sexual exploitation of a child/use of a child to produce a visual depiction and possession of certain material involving the sexual exploitation of a minor; defendant did not request that district court excise videos at trial, and district court exercised its discretion to restrict government to showing only three of the videos, but to play those three videos in their entirety. [Fed. R. Evid. 404\(b\)\(2\)](#).

[More cases on this issue](#)

[15] **Criminal Law** 🔑 Introduction of documentary and demonstrative evidence

110 Criminal Law

110XX Trial
 110XX(C) Reception of Evidence
 110k663 Introduction of documentary and demonstrative evidence
 Decision to excise other-act evidence is entrusted to the district court's discretion. [Fed. R. Evid. 404\(b\)\(2\)](#).

prosecution for sexual exploitation of a child/ use of a child to produce a visual depiction and possession of certain material involving the sexual exploitation of a minor; evidence was admissible to prove defendant's identity and absence of mistake or accident. [Fed. R. Evid. 404\(b\)\(2\)](#).

[More cases on this issue](#)

[16] Criminal Law 🔑 Sex offenses, incest, and prostitution

110 Criminal Law
 110XVII Evidence
 110XVII(F) Other Misconduct by Accused
 110XVII(F)9 Other Misconduct Showing Absence of Mistake or Accident
 110k372.23 Sex offenses, incest, and prostitution
 Evidence that defendant had recorded illicit pornographic videos of adult females in public locations, such as store dressing rooms, served proper purpose to prove absence of mistake or accident in creation of pool videos, which were basis of charged crimes, in prosecution for sexual exploitation of a child/use of a child to produce a visual depiction and possession of certain material involving the sexual exploitation of a minor; evidence could have rebutted defendant's arguments that she did not know her husband's intention was to expose minor's genitalia because it showed defendant at other times worked with husband to record female genitalia, and evidence could have rebutted defendant's argument that she unintentionally recorded pool videos. [Fed. R. Evid. 404\(b\)\(2\)](#).

[More cases on this issue](#)

[17] Criminal Law 🔑 Evidence of other offenses and misconduct

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1169 Admission of Evidence
 110k1169.11 Evidence of other offenses and misconduct
 District court's error, if any, in admitting evidence that defendant had recorded illicit pornographic videos of adult females in public locations, such as store dressing rooms, to show existence of prearranged plan was harmless, in

Appeal from the United States District Court for the Eastern District of Oklahoma (D.C. No. 6:21-CR-00325-TDD-2)

Attorneys and Law Firms

[Howard A. Pincus](#), Assistant Federal Public Defender, Denver, Colorado (Virginia, [L. Grady](#), Federal Public Defender, with him on the briefs) for Defendant-Appellant.

Lisa C. Williams, Special Assistant United States Attorney, Muskogee, Oklahoma (Christopher J. Wilson, United States Attorney, with her on the briefs) for Plaintiff-Appellee.

Before [HOLMES](#), Chief Judge, [EBEL](#), and [CARSON](#), Circuit Judges.

Opinion

[EBEL](#), Circuit Judge.

*816 In this direct criminal appeal, defendant Heather Nicole Bycroft argues the district court abused its discretion by admitting evidence that she had recorded illicit pornographic videos of adult females as “other acts” evidence pursuant to [Federal Rule of Evidence 404\(b\)](#) at her trial for producing child pornography. Specifically, she argues the other acts evidence was irrelevant and did not serve a proper purpose. To the contrary, we agree with the district court that the evidence was relevant because of the substantial similarity between the acts and because there were at least two proper purposes for which this evidence was admitted pursuant to [Rule 404\(b\)](#): to prove Bycroft's identity and the absence of mistake or accident. Exercising jurisdiction under [28 U.S.C. § 1291](#), we AFFIRM Bycroft's conviction.

I. BACKGROUND

Bycroft, along with her husband Jason, was charged on the basis of three videos (“the pool videos”) located on Jason’s Dropbox account, an online storage service. These videos depict Jason in a pool with a six-year-old girl at a Fourth of July family gathering in 2015. In the first video, Jason is touching the girl’s upper leg and torso and then throws the girl into the air. In the second video, Jason moves the girl’s shorts and underwear, thus showing part of her groin and upper thigh. In the third video, Jason moves the girl’s shorts and underwear, thus exposing her genitalia to the camera.

Bycroft herself is not visibly present in any of the videos. There is, however, a female voice evidently coming from the camera operator in the first and third videos. Bycroft denied that this was her voice. Meanwhile, four witnesses—Bycroft’s mother-in-law, Bycroft’s sister-in-law, a family friend, and the investigating sergeant—testified that they did believe the voice was Bycroft’s. Bycroft was ultimately charged with Sexual Exploitation of a Child/Use of a Child to Produce a Visual Depiction pursuant to 18 U.S.C. §§ 2251(a), *817 (e) & 2 and Possession of Certain Material Involving the Sexual Exploitation of a Minor pursuant to 18 U.S.C. § 2252(a)(4) (B) & (b)(2).

At Bycroft’s trial, the government introduced “other acts” evidence under Rule 404(b). The other acts evidence here constituted several videos that Bycroft and Jason recorded in public locations, such as store dressing rooms, in which they intentionally positioned the camera to see up women’s skirts—“the Peeping Tom videos.” There is some confusion as to when these videos were recorded, but the parties’ best estimation is that they were recorded in 2017 and 2018. In these videos, Bycroft is visibly identifiable by her wedding ring, her leg tattoo, and at times her face. Bycroft’s voice is also audible on these recordings. Though she later admitted to filming the Peeping Tom videos intentionally, Bycroft initially claimed that she did not intentionally record them and that her phone at times spontaneously turned on and started recording.

[1] To be admissible under Rule 404(b), the district court must find that the evidence is relevant, that its probative value is not substantially outweighed by the potential for unfair prejudice, that it was introduced for a proper purpose, and the district court must give a jury instruction regarding the proper purposes of the evidence if requested. *Huddleston v. United States*, 485 U.S. 681, 691–92, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). The government asserted, and the district court agreed, that this evidence was admissible under

Rule 404(b) for the proper purposes of 1) proving Bycroft’s identity, 2) proving the absence of a mistake or accident, and 3) proving a common scheme or plan between the other acts and the charged acts. The district court did, however, limit the government to three Peeping Tom videos, as opposed to their intended five to ten videos. In addition to arguing that the Peeping Tom videos served none of these purposes, Bycroft also argues that the Peeping Tom videos are dissimilar from the pool videos, and thus irrelevant to her trial, for two reasons: the difference in age of the recorded subjects and the “glaring difference” between moving the girl’s suit to expose her genitalia and hiding a camera to see up a woman’s skirt. (Aplt. Br. 15.) We disagree. The Peeping Tom videos were highly relevant and served multiple proper purposes.

II. STANDARD OF REVIEW

[2] [3] We review evidentiary decisions for an abuse of discretion. See, e.g., *United States v. Iverson*, 818 F.3d 1015, 1019 (10th Cir. 2016). A district court abuses its discretion in admitting evidence if that admission represents “a clear error of judgment or exceed[s] the bounds of permissible choice in the circumstances.” *Gilbert v. Cosco, Inc.*, 989 F.2d 399, 402 (10th Cir. 1993) (internal quotation omitted).

III. DISCUSSION

Bycroft argues on appeal that the district court abused its discretion by admitting other acts evidence via Rule 404(b). Bycroft challenges the district court’s findings on two of the aforementioned *Huddleston* factors, arguing that 1) the other acts evidence was irrelevant to the charged act, and 2) the other acts evidence was not admitted for a proper purpose. We will address each in turn.

A. The Peeping Tom videos were relevant to the charged act

[4] [5] Federal Rule of Evidence 404(b) permits the admission of evidence of “any other crime, wrong, or act” in certain limited circumstances. FED. R. EVID. 404(b)(1)–(2). One of the criteria for admission *818 is that the evidence meets the relevancy requirement of Rule 402. *Huddleston*, 485 U.S. at 691, 108 S.Ct. 1496. Evidence is relevant if it “makes the existence of any fact at issue more or less probable.” *Id.* at 687, 108 S.Ct. 1496. Here, the district court did not abuse its discretion in determining that Bycroft’s

participation in recording the Peeping Tom videos made it more probable that she was the camera operator in the pool videos.

[6] [7] [8] “[T]he lynchpin of [Huddleston](#) relevance is similarity.” [United States v. Henthorn](#), 864 F.3d 1241, 1249 (10th Cir. 2017). Importantly, the two acts “need not be identical,” just “similar.” [United States v. Zamora](#), 222 F.3d 756, 762 (10th Cir. 2000). Similarity can be demonstrated through “physical similarity of the acts or through the defendant’s indulging [her]self in the same state of mind.” [Id.](#) (internal quotation omitted). In [Zamora](#), we found that two acts were similar when both involved the same two perpetrators, the same desired outcome and motive, and similar actions to carry out the crimes. [Id.](#) at 762–63. The same can be said here: the evidence suggests that Bycroft and her husband Jason in both sets of videos sought to record unwitting females’ genitalia surreptitiously. And that “common characteristic” of illicitly recording pornographic content “is the significant one for the purpose of the inquiry at hand.” [United States v. Beechum](#), 582 F.2d 898, 911 (5th Cir. 1978) (quoting Julius Stone, [The Rule of Exclusion of Similar Fact Evidence: England](#), 46 HARV. L. REV. 954, 955 (1933)). Therefore, the significant characteristics in common between the Peeping Tom videos and the pool videos help demonstrate Bycroft’s involvement in the charged offense.

Bycroft argues that the other acts evidence was not sufficiently similar because the two sets of videos were “not at all alike.” (Aplt. Reply Br. 1.) The differences that Bycroft claim render the Peeping Tom videos irrelevant are that 1) the victim of the pool videos was a child, while the victims of the Peeping Tom videos were adults, and 2) in the pool video, Jason maneuvered the girl’s clothes to expose her genitalia, which he did not do in the Peeping Tom videos. Neither of these differences are as “stark” as Bycroft suggests. ([Contra](#) Aplt. Br. 15.)

Bycroft first attempts to differentiate between the two videos by highlighting the age difference in the victims: the Peeping Tom videos depict adults whereas the pool videos depict a child. Bycroft states that a sexual interest in adult women cannot be equated to a sexual interest in children and, therefore, the acts are entirely dissimilar. Without agreeing that a sexual interest in an adult female’s genitalia is “entirely dissimilar” from an interest in a minor female’s genitalia, we note that Bycroft was not charged for having a sexual interest in the girl in the pool videos; she was charged for surreptitiously recording the

girl’s genitalia. Nor were the Peeping Tom videos admitted to show her sexual interest in adult women; they were admitted to show Bycroft operated a camera for the purpose of recording unsuspecting female’s genitalia. The critical aspect of the conduct, surreptitiously and non-consensually recording female genitalia, was identical.

The other difference in the pool videos that Bycroft asserts is “without parallel” is that Jason maneuvered the girl’s clothes to expose her genitalia. (Aplt. Reply Br. 6.) Whereas in the Peeping Tom videos he did not. But this is simply a product of the circumstances and does not render the Peeping Tom videos irrelevant. In the pool videos, moving the girl’s swimsuit was both achievable and necessary to expose her *819 genitalia, and filming at a family gathering was unlikely to raise suspicion. In a store dressing room, when the subjects were strangers, Jason could not have maneuvered the subjects’ clothes and Bycroft could not have openly filmed them without raising alarm. So, instead of maneuvering the subjects’ clothes to expose their genitalia, Bycroft maneuvered the camera to see up the subjects’ skirts, thereby attempting to achieve the same objective of exposing their genitalia. Just because the two scenarios called for different means to achieve their desired ends, it does not follow that the acts are not substantially similar. [See, e.g., Henthorn](#), 864 F.3d at 1246–47, 1249–51 (describing suspicious death of first wife “pinned under a vehicle” and suspicious injury of second wife “struck in the back of the neck ... with a large wooden beam” as “extraordinarily similar” to suspicious death of second wife “after falling more than 100 feet from a cliff”).

[9] Additionally, Bycroft argues that the difference in time between the recording of the two sets of videos renders them irrelevant. It is true that we consider whether other acts evidence is “sufficiently close in time” to the charged offense when determining their similarity. [Zamora](#), 222 F.3d at 762. But we have repeatedly admitted evidence that involved a significantly larger time lapse, even including multiple decades. [See Henthorn](#), 864 F.3d at 1251 & n.7 (collecting cases). Here, the Peeping Tom videos were taken two to three years after the pool videos, if indeed even that long after. This temporal gap is not enough to override the relevance of the other acts evidence.

Therefore, the district court did not abuse its discretion when it concluded that the Peeping Tom videos were relevant to the charged acts.

B. The Peeping Tom videos served multiple proper purposes

District courts cannot admit “other acts” evidence to prove “a person’s character in order to show that on a particular occasion the person acted in accordance with the character.” [FED. R. EVID. 404\(b\)\(1\)](#). But “[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” [FED. R. EVID. 404\(b\)\(2\)](#). Here, the Peeping Tom videos served at least two proper purposes: to establish Bycroft’s identity in the pool videos and to prove the absence of a mistake or accident in recording the pool videos.

1. The Peeping Tom videos help establish Bycroft’s identity in the pool videos

[10] The first purpose for which the district court admitted the other acts evidence was to prove identity. The pool videos contain only the camera operator’s voice, which multiple government witnesses believed to be Bycroft’s, but she herself denied was her voice. However, the Peeping Tom videos contain the camera operator’s voice and physically identifiable features of Bycroft, including her face, wedding ring, and leg tattoo, thus establishing that the camera operator’s voice was Bycroft’s. The central issue at trial, as Bycroft admits, was whether the voice on the pool videos belonged to her. Therefore, the jury could have compared the voice in the pool videos to Bycroft’s voice in the Peeping Tom videos to answer that question.

[11] [12] [13] Bycroft does not respond to this line of reasoning because she mistakenly contends that “identity” evidence under [Rule 404\(b\)](#) can only come in the form of “signature quality,” or *modus operandi*, evidence. Thus, Bycroft’s arguments focus ***820** on whether there are sufficiently unique indicators in the two sets of videos to establish a signature quality, by which Bycroft can be identified. What Bycroft overlooks is that a signature quality is simply one way of proving a defendant’s identity. See [United States v. Mares](#), 441 F.3d 1152, 1159 n.3 (10th Cir. 2006). When more direct evidence is available to prove a defendant’s identity, such as their voice and face as is available here, there is no need to consider whether the evidence bears a signature quality. See, e.g., [United States v. Kimball](#), 73 F.3d 269, 272 (10th Cir. 1995) (affirming proper identity purpose for “evidence of defendant’s inmate number on [a] coffee pot,” “a tablet containing an imprint of the robbery demand note,” and “defendant’s clothing worn at the time of his release

from prison being identical to the clothing of the robber”). Relying on a signature quality is not necessary here because of the more straightforward method of proving identity: matching Bycroft’s voice to her face and other identifiable characteristics.¹

¹ Bycroft also seemingly argues that admitting this evidence to prove Bycroft’s identity in the pool videos was wrong because it “assumes what was sought to be proved”: that Bycroft was the camera operator in the pool videos. (Aplt. Br. 29.) But the very function of [Rule 404\(b\)](#) evidence is to allow a party to attempt to prove, and the jury to find if they are persuaded, that the charged offense occurred based on the prior acts. If [Rule 404\(b\)](#) evidence could only be introduced to prove identity or any other purpose after the defendant’s guilt was established, [Rule 404\(b\)](#) would be superfluous. The fact that a party can submit evidence for the purpose of proving the defendant’s identity does not mean the defendant’s identity has been proven, just that the evidence is admissible to attempt to prove identity.

[14] [15] Additionally, Bycroft now argues that the district court should have excised the Peeping Tom videos to show only enough to identify her. See [United States v. Kelley](#), 635 F.2d 778, 782 (10th Cir. 1980) (recognizing “duty to excise evidence of other uncharged wrongs if they can do so without destroying the relevancy of the evidence that addresses itself to the charges” (quoting [United States v. Lucero](#), 601 F.2d 1147, 1148–49 (10th Cir. 1979))). The district court was not required to excise the Peeping Tom videos here. First, Bycroft did not request that the district court excise the videos at trial. Second, the decision to excise evidence is entrusted to the district court’s discretion. See [id.](#) at 781–82 (finding that other acts evidence need not be excised when it “enabled the jury to consider the relationship between” defendants and declining to “limit the trial court’s broad discretion in admitting evidence, particularly evidence of other crimes”); [Lucero](#), 601 F.2d at 1148–49. Here, the district court exercised its discretion to restrict the government to showing only three of the Peeping Tom videos, but to play those three videos in their entirety. This was not an abuse of discretion, especially in the absence of any request from Bycroft to excise the videos further.

2. The Peeping Tom videos also helps prove the absence of mistake or accident in the creation of the pool videos

[16] The second purpose for which the district court admitted the Peeping Tom videos was to prove the absence of a mistake or accident in recording the pool videos. The government raised concerns that Bycroft could have claimed either not to have known Jason would expose the girl's genitalia in the swimming pool or not to have been recording intentionally. The latter concern is buttressed by Bycroft's initial claim that she did not intentionally record the Peeping Tom videos, and that *821 her phone at times spontaneously turned on and started recording. Therefore, the Peeping Tom videos could have been used by the jury to prove that Bycroft did not accidentally record the girl's genitalia: rather, this was another example of her intentional efforts to record female genitalia surreptitiously.

Bycroft does little to rebut this argument. Instead, she again relies on the differences between the two sets of videos—the age of the victim and the fact that Jason moved the girl's shorts but not the adult women's—to conclude that the Peeping Tom videos do not prove the absence of a mistake or accident. Again, however, Bycroft's attempts to portray the two sets of videos as critically different fall flat.

Bycroft asserts that the “disparate circumstances” between the two sets of videos “negate any possibility of directly using” the other acts evidence to prove absence of a mistake. [United States v. Commanche](#), 577 F.3d 1261, 1267 (10th Cir. 2009). In [Commanche](#), positing a hypothetical situation, we said that evidence that a defendant “slapped his wife” could not establish absence of mistake when that defendant later was accused of “murdering his wife using his car.” [Id.](#) Slapping someone could not demonstrate that the defendant later intentionally ran over that person, as opposed to running over them accidentally, because these two circumstances would be so disparate that the only possible value would be demonstrating the defendant's propensity or character for violence. [Id.](#) By contrast, the Peeping Tom videos could rebut Bycroft's arguments (1) that Bycroft did not know Jason's intention was to expose the girl's genitalia because it shows Bycroft at other times worked with Jason to record female

genitalia, and (2) Bycroft's argument that she unintentionally recorded the videos. The two circumstances at play here are not comparable to the disparate circumstances in the [Commanche](#) hypothetical.

The district court also could not have excised the “evidence of other uncharged wrongs” in the Peeping Tom videos “without destroying the relevancy” of the videos: the relevance of the Peeping Tom videos—the absence of mistake in recording the girl's genitalia in the pool videos—was demonstrated by Bycroft's attempts to record up women's skirts, so the jury needed to see these attempts. [Cf. United States v. Kelley](#), 635 F.2d 778, 782 (10th Cir. 1980). Excising the videos to eliminate the uncharged wrongs would thus nullify the very purpose of admitting the videos.

Therefore, the district court did not abuse its discretion in admitting the Peeping Tom videos for the proper purpose of proving the absence of mistake or accident.

IV. CONCLUSION

[17] The district court did not abuse its discretion in admitting the Peeping Tom videos. This “other acts” evidence was highly relevant to the charged conduct and served at least two proper purposes: to prove Bycroft's identity and the absence of mistake or accident.² Therefore, we AFFIRM Bycroft's conviction.

2

Because we conclude that both identity and absence of mistake or accident were proper purposes to admit the other acts evidence, we need not reach the third proposed purpose: the existence of a prearranged plan. It is unclear whether admitting the videos under this third purpose would have been errant. Even if the district court did err in accepting this purpose, though, it would be a harmless error because the videos would have come in via the two proper purposes.

All Citations

174 F.4th 814

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,	)	
	)	
<i>Plaintiff,</i>	)	
v.	)	
	)	Case No. CR-21-325-TDD
	)	
JASON CORY BYCROFT	)	
HEATHER NICOLE BYCROFT,	)	
	)	
<i>Defendants.</i>	)	

ORDER

Before the Court is the government's Notice of Intent to Admit Evidence of Other Crimes, Wrongs, or Acts [[Doc. No. 63](#)] filed pursuant to [Fed. R. Evid. 404\(b\)](#). The government seeks to admit at trial a series of videos that are not part of the conduct charged in the Indictment [[Doc. No. 34](#)]. Defendants each responded in opposition, arguing the videos are inadmissible. [Doc. Nos. 65 and 82]. The Court held an evidentiary hearing on February 18, 2022, and the government submitted the videos to the Court for *in camera* review. Upon consideration of the Notice, the responses, the evidence presented, and the arguments of counsel, the Court issues its ruling.

The Indictment charges Defendants Jason Cory Bycroft and Heather Nicole Bycroft with sexual exploitation of a child/use of a child to produce a visual depiction and possession of certain material involving the sexual exploitation of a minor [[Doc. No. 34](#)]. In August 2021, investigators received a tip that child pornography was observed trafficked to an account on Dropbox, an internet file hosting site. That account belonged to an

individual using an email address and username containing Defendant Jason Bycroft's name. After obtaining a warrant to search the Dropbox account, investigators discovered a series of videos they allege depict Jason Bycroft intentionally exposing a six-year-old girl's vagina in a swimming pool. The individual holding the recording device, although she cannot be seen, can be heard speaking in the videos. Based on the videos' audio, investigators claim Defendant Heather Bycroft filmed some of the videos related to the charged conduct. Multiple witnesses, including relatives of Defendant, identify the individual speaking in the videos as Heather Bycroft. Investigators also recovered videos of Defendant Jason Bycroft telling a young girl he was going to "fix her bathing suit" and focusing the video on the child's "vaginal area." [[Doc. No. 63 at p.2](#)].

The subject of this 404(b) Notice are videos recovered from the Dropbox account that are not part of the conduct charged in the Indictment. The videos depict Defendants working together to secretly film up women's skirts in public places. Defendant Heather Bycroft's face can be seen in these videos, and the videos also capture her voice. The government submitted eight videos for the Court to review; by its Notice, the government seeks to enter five to ten of these videos at trial.

Rule 404(b) provides in relevant part:

(b) Other Crimes, Wrongs, or Acts.

(1) *Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

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

Four factors govern the admissibility of evidence of other crimes or wrongs under Rule 404(b): (1) the evidence must be offered for a proper purpose; (2) it must be relevant; (3) its probative value must not be substantially outweighed by its potential for unfair prejudice under Rule 403; and (4) the court must give a proper limiting instruction if it is requested by the defendant. *United States v. Moran*, [503 F.3d 1135, 1143](#) (10th Cir. 2007) (citing *Huddleston v. United States*, [485 U.S. 681, 691–92](#) (1988)).

1. Proper Purpose and Relevance

The Court finds the proposed evidence is offered for a proper purpose under Rule 404(b). The videos demonstrate Defendants’ common scheme or plan—specifically a common plan to work together to take illicit videos in secret. Further, the videos show the identity of the camera operator. Since Defendant Heather Bycroft’s face cannot be seen in the videos related to the conduct charged in the Indictment, the videos subject to this Notice that show her face are offered for the permissible purpose of proving the identity of the person operating the camera in connection with the conduct charged in this case. Finally, the videos tend to show the absence of mistake or accident. The Court also finds the evidence is relevant, especially regarding Defendant Heather Bycroft’s identity. These videos show her face and capture her voice and, thus, have some tendency to make the fact that she was the individual operating the camera in the videos related to the charged conduct more probable. See [Fed. R. Evid. 401](#).

2. Rule 403 Balancing

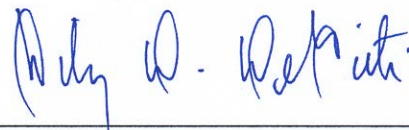
The Court further finds the probative value of the videos is not substantially outweighed by any of the dangers set forth in Rule 403. The issues relating to Defendant Heather Bycroft's identity render the videos highly probative, and any potential for unfair prejudice can be effectively mitigated by a limiting instruction. *See United States v. Hutchinson*, 573 F.3d 1011, 1030 (10th Cir. 2009) (holding that, where evidence admissible for only one purpose may "create the risk of an unfair trial[,] . . . such prejudice can usually be cured by limiting instructions to the jury").

The Court, therefore, finds the videos are admissible under Rule 404(b). However, the government's expressed intent to present five to ten such videos is excessive; the government is directed to limit the videos to the few it regards as most salient.

CONCLUSION

For the reasons set forth herein, the Court concludes that Defendants' objections to the government's intended use of the videos depicting Defendants secretly filming up women's skirts [Doc. Nos. 65 and 82] are **OVERRULED**.

IT IS SO ORDERED this 16th day of March, 2022.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE