[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-17076
Non-Argument Calendar

D.C. Docket No. 2:15-cr-00044-JES-CM-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NICHOLAS JAKIMER,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(May 10, 2019)

Before WILLIAM PRYOR, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

Nicholas Jakimer appeals his conviction for conspiracy to possess with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(vii), and 846. Jakimer argues that the district court erred in admitting into evidence a recording of a conversation he had with a witness who testified at his trial. According to Jakimer, the district court should have excluded the recording on the ground that it contained character evidence prohibited under Federal Rule of Evidence 404(b). We disagree. Rule 404(b) could not have applied to exclude the entire recording because it contained evidence of Jakimer's guilt of the charged crime. And Jakimer has failed to argue that any specific portion of the recording violated Rule 404(b). We therefore affirm the district court's admission of the recording into evidence.

I. BACKGROUND

Jakimer was indicted by a federal grand jury on one count of conspiracy to possess with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(vii), and 846. He pleaded not guilty.

At trial, the government called as a witness Brandon Eldridge, a trooper in the Florida Highway Patrol and a member of the Highway Patrol's Criminal Interdiction Team. He testified that before trial he received a tip that "a possible target" was traveling through the area carrying either a large sum of money or

narcotics. Doc. 111 at 41-42.[1] Based on other information provided in the tip, Eldridge began looking for a tow truck and a Chevrolet pickup truck. Eldridge testified that when he and another trooper discovered the vehicles and pulled them over in a traffic stop, the two officers found James Britzke driving the tow truck and Michael Gorman driving the pickup truck. Eldridge noticed an odd compartment located within the tow truck's bed. He searched the compartment and found five bundles of money totaling $100,000 wrapped in plastic wrap. Eldridge also discovered a bag containing $7,800 in the pickup truck. The officers seized the trucks and the money.

Britzke, who was allegedly part of the charged conspiracy, testified that Gorman had asked him to drive a truck with money in it to Arizona, where he would purchase marijuana before returning to Florida. He stated that he made similar trips to Arizona with Gorman approximately 23 or 24 times. Britzke testified that before they traveled to Arizona Gorman would pick up money from Jakimer that they would wrap in plastic and secure in the tow truck. Britzke confirmed that he was apprehended by Eldridge while carrying $100,000 in the tow truck.

Gorman, who also was allegedly part of the charged conspiracy, testified that for many years he had been importing marijuana from Arizona to Florida. He

[1] Citations in the form "Doc #" refer to the numbered entries on the district court's docket.

testified that after he first met Jakimer, they made plans to buy and sell marijuana with Britzke and others. He stated that the law enforcement officers who stopped him while he was on his way to Arizona seized $7,800 from his pickup truck. He testified that the money belonged to Jakimer.

Gorman also testified that he had agreed to cooperate with the government by recording his conversations with Jakimer. He recorded two of their conversations, which were respectively marked as the government's Exhibits 6A and 6B. When the government moved to admit the recordings into evidence, Jakimer objected to the admission of both exhibits under Federal Rule of Evidence 404(b). The court denied the objection as to Exhibit 6A but sustained it as to Exhibit 6B.

The government entered Exhibit 6A into evidence. On the recording, Gorman and Jakimer discussed law enforcement's seizure of the trucks and the money. Jakimer asked Gorman, "[H]ow do you think they knew right away about that truck?" to which Gorman responded that "it was a drug interdiction point." Doc. 107 at 19. In an apparent reference to the funds seized during the traffic stop, Jakimer stated that "[e]verybody took a fall here" but that "it's really correctly all mine in the truck." *Id.* at 22. Jakimer also said that "[t]hey don't have nothing on me dude." *Id*. at 12. When Gorman asked Jakimer whether a third party was getting "[hydro]" from California, Jakimer answered in the affirmative. *Id*. at 23.

Gorman explained during his testimony that the term "hydro" referred to hydroponic marijuana.

After hearing testimony from other witnesses, the jury found Jakimer guilty of the charged conspiracy. The district court sentenced him to 60 months' imprisonment. This is Jakimer's appeal.

II. STANDARD OF REVIEW

We review for abuse of discretion a district court's decision to admit evidence under Federal Rule of Evidence 404(b). *United States v. Ellisor*, 522 F.3d 1255, 1267 (11th Cir. 2008).[2]

III. DISCUSSION

Jakimer argues that the district court abused its discretion on two grounds when it admitted Exhibit 6A into evidence. First, Jakimer argues that the recording was inadmissible because the conversation occurred roughly seven months after the alleged drug conspiracy occurred. Second, he argues that the recording was character evidence inadmissible under Rule 404(b) because the government used the recording only for the purpose of demonstrating his criminal propensity.

[2] The government argues that we should apply plain-error review because Jakimer failed to preserve his objection to the admission of Exhibit 6A. Although Jakimer objected in the district court to the admission of Exhibit 6A on Rule 404(b) grounds, the government argues that Jakimer's trial counsel conceded that the recording was admissible under Rule 404(b) by stating that the recording was "mostly about the seizure" and that it was "not really 404(b)." Appellee's Br. at 15. But it was the government's attorney, not Jakimer's trial counsel, who stated that Exhibit 6A was "not really 404(b)." Doc. 111 at 7. And we decline to conclude that Jakimer waived his Rule 404(b) objection when his trial counsel stated that the recording was "mostly about the seizure." *Id.*

According to Jakimer, the recording contained no discussion relating to the charged conspiracy.

The government responds that the district court did not abuse its discretion in admitting the recording into evidence because most of Jakimer's statements in the recording concerned the crime for which he was being tried. The government further argues that even if the court abused its discretion, such error was harmless in light of the substantial evidence that Jakimer was guilty of the charged crime. The government has the better side of this argument.

Rule 404(b) provides that: "Evidence of a crime, wrong, or other 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." Fed. R. Evid. 404(b)(1). The rule nevertheless allows a court to admit such evidence for other purposes; these purposes include but are not limited to "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Rule 404(b) applies only to extrinsic evidence and thus does not apply to exclude evidence of conduct that is part of the charged crime. *See United States v. Saintil*, 753 F.2d 984, 987 (11th Cir. 1985) ("Rule 404(b) applies only to evidence of crimes and acts extrinsic to the charged offense."); *United States v. Krezdorn*, 639 F.2d 1327, 1332 n.8 (5th Cir. Unit A

Mar. 1981) ("Since it is part of the charged crime and not a separate crime, Rule 404(b) does not apply to exclude it.").[3]

We conclude that Jakimer has abandoned his first argument—that Exhibit 6A was inadmissible because it was recorded approximately seven months after the alleged conspiracy. Jakimer raises this argument only in passing in his brief and fails to provide any supporting argument or cite any supporting authority (other than Rule 404(b)). He has therefore abandoned it. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").[4]

We reject Jakimer's second argument—that the district court should have excluded under Rule 404(b) Exhibit 6A in its entirety. Most of the statements contained in the recording related to the charged conspiracy, therefore they were not extrinsic evidence. Gorman and Jakimer repeatedly discussed on the recording law enforcement's seizure of the money and the trucks. As an example, Jakimer

[3] "[D]ecisions of the United States Court of Appeals for the Fifth Circuit . . . , as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit . . . ." *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981). *Krezdorn* was decided on March 19, 1981. *Krezdorn*, 639 F.2d at 1327.

[4] We note, nevertheless, that this Court has held that extrinsic evidence of an event occurring more than fifteen months after a charged offense may be admitted under Rule 404(b). *United States v. Terebecki*, 692 F.2d 1345, 1349 (11th Cir. 1982) ("Extrinsic offenses more remote than fifteen months have been held properly admitted.").

expressed his surprise that the police had found the compartment storing the money in the tow truck so quickly. He also said that "[e]verybody took a fall here" but that "it's really correctly all mine in the truck." Doc. 107 at 22. He further stated that the police "ha[d] nothing on [him]" and that he had thrown in a fire a phone that Gorman said could incriminate him. *Id.* at 12. Because this evidence was intrinsic to the charged conspiracy offense, we cannot say that the entire recording consisted of "[e]vidence of a crime, wrong, or other act" within the scope of Rule 404(b).[5] *See Saintil*, 753 F.2d at 987; *Krezdorn*, 639 F.2d at 1332 n.8. And Jakimer does not argue on appeal that any specific portion of the recording should have been redacted and excluded under Rule 404(b).[6] The

[5] We note that the statements contained in Exhibit 6A that we identified above also could be probative of Jakimer's intent to engage in the charged conspiracy; Jakimer placed his intent into dispute by pleading not guilty. *See United States v. Zapata*, 139 F.3d 1355, 1358 (11th Cir. 1998) ("A defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying Rule 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue."). Thus, to the extent these statements constituted "[e]vidence of a crime, wrong, or other act," Fed. R. Evid. 404(b)(1), the district court would not have abused its discretion in admitting them into evidence.

[6] Jakimer discusses in his brief one particular exchange between the prosecutor and Gorman in which Gorman explained what he and Jakimer meant when using the term "hydro." Appellant's Br. at 13-14. On the recording, Gorman asked Jakimer whether someone named Scott had been getting "[hydro]" from California, and Jakimer answered in the affirmative. Doc. 107 at 23. Jakimer argues that this reference to someone obtaining hydroponic marijuana—which Gorman acknowledged was a different type of marijuana than he and Jakimer were involved in—concerned prospective criminal activity and showed that the government used the recording for the purpose of showing his criminal propensity. We disagree because Jakimer and Gorman's discussion of efforts by someone named Scott to obtain hydroponic marijuana failed to implicate Jakimer in the transaction. This portion of the recording therefore did not concern Jakimer's prospective criminal activity.

district court did not, therefore, abuse its discretion in admitting under Rule 404(b) Exhibit 6A in its entirety.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court.

AFFIRMED.