UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 3:22-CR-84-RGJ
	)	
	)	18 U.S.C. § 242
BRETT HANKISON,	)	
	)	
Defendant.	)	

UNITED STATES' NOTICE AND MOTION TO INTRODUCE OTHER ACTS EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 404(b)

The United States respectfully provides notice of its intent to introduce other acts evidence at trial, specifically evidence of the defendant's aggressive, reckless conduct during the execution of two search warrants that were served approximately three years before the shooting charged in the Indictment in this case. The defendant stands accused of willfully using constitutionally excessive force by blindly firing 10 shots into the covered windows of Breonna Taylor's home as officers executed a search warrant shortly after midnight on March 13, 2020. In both prior both incidents, as in the incident charged in the Indictment, the defendant faced an unexpected provocation during the execution of a search warrant, responded in an overly aggressive manner with his weapon drawn, disregarded his training, recklessly injected himself into a confrontation in an attempt to address a suspect on his own terms, and endangered his fellow officers and civilians by needlessly escalating the law enforcement response. The defendant was reprimanded for these prior actions, underscoring that, by the time of the shooting at Ms. Taylor's apartment, he was aware that such conduct was unacceptable.

Evidence of the defendant's prior acts is admissible under Federal Rule of Evidence 404(b) for several non-propensity purposes—including to show his intent, motive, knowledge, and lack

of mistake or accident—that are central to proving that the defendant acted willfully when he fired 10 shots into Ms. Taylor's home, an essential element the government must prove for both counts of the Indictment.

Evidence of the defendant's two prior acts is particularly relevant in light of the arguments the defendant advanced during the first trial in this matter, where he claimed that he made a good faith mistake and lacked any illicit intent or motive for shooting into Ms. Taylor's home. The defendant's conduct in the two prior incidents—and the reprimands he received afterwards—belies his claims about his mental state and will help the jury in the upcoming retrial fairly assess the defendant's mens rea at the time of his shooting. Accordingly, the United States moves the Court for a pretrial order admitting evidence of the two prior incidents.

BACKGROUND

A. The defendant fired his weapon without legal justification during a search warrant execution on March 13, 2020.

The defendant, former Louisville Metro Police Department (LMPD) Detective Brett Hankison, is charged with two counts of violating 18 U.S.C. § 242 for willfully using constitutionally excessive force against Breonna Taylor; Ms. Taylor's boyfriend, K.W.; her neighbors, C.N. and C.E.; and the neighbors' young child, by shooting blindly through the windows of Ms. Taylor's apartment during the execution of a search warrant on March 13, 2020. Indictment, ECF No. 1. As the defendant and six other officers breached the door to Ms. Taylor's apartment to execute a warrant shortly after 12:30 a.m., her boyfriend, believing the police were intruders, fired one shot at the door, striking an officer in the leg. Two officers immediately returned fire through the open doorway, and one of their shots hit Ms. Taylor and killed her. When the shooting in the doorway began, the defendant ran out of Ms. Taylor's breezeway and then fired 10 shots through two windows along the side of her home that were covered by blinds

and curtains, sending bullets over the heads of Ms. Taylor and her boyfriend and through the wall of Ms. Taylor's home, narrowly missing her neighbors. Evidence introduced at the first trial in this case showed that several of the defendant's shots also came within several feet of where his fellow officers were standing in Ms. Taylor's doorway.

B. Two prior incidents are relevant under Rule 404(b).

On at least two occasions prior to the shooting at Ms. Taylor's apartment, the defendant placed his fellow officers and civilians at risk by responding aggressively and recklessly to unexpected developments during search warrant operations, disregarding his training and policy, and injecting himself into the middle of an unfolding incident with his weapon drawn in an attempt to address a suspect. After these prior incidents, the defendant's supervisor reprimanded and counseled him about his need to follow policy and procedures and refrain from taking overly aggressive actions.

The two incidents are outlined below. The United States produced summaries of both incidents to the defense in February and October 2023 and tendered a small amount of supplemental information together with this notice.

1. October 19, 2016, warrant execution and arrest of Alfonzo Johnson

On October 19, 2016, LMPD narcotics detectives—including the defendant—and SWAT officers staged near a property on Hale Avenue in Louisville to observe a controlled delivery of a suspected narcotics package and then execute search and arrest warrants. Standard procedures called for SWAT to make the arrest while the defendant and other narcotics detectives controlled the perimeter. Upon the delivery of the narcotics package, a suspect, A.J., walked from the neighboring house, took the package, and returned with it to the property on Hale Avenue. SWAT officers then approached A.J., who fled into the back of the property, locked the back door,

and climbed onto the roof of the building. At that point, SWAT officers with rifles drawn began to secure and surround the scene until they could safely make entry or convince A.J. to surrender.

LMPD procedures and training called for the defendant and other narcotics officers to maintain a perimeter, not interfere with SWAT, and allow SWAT to secure the suspect. The defendant ignored these protocols, drew his handgun, yelled "he's on the roof!" and ran between the suspect and the SWAT officers who had their rifles drawn. Fortunately, the defendant's actions did not trigger crossfire, and SWAT officers eventually took A.J. into custody without anyone sustaining injuries. Nonetheless, SWAT officers on the scene remembered the incident even years later and told the United States that the defendant's actions (1) interfered with SWAT's processes and broke their operational security, placing officers at greater risk; (2) diverted SWAT officers' attention away from addressing and arresting the suspect; and (3) placed everyone present—officers, the suspect, and any innocent civilians inside the home or nearby—at greater risk by injecting chaos into the situation and creating a risk of crossfire. A SWAT commander recounted that the defendant's actions were "reckless" and explained that the defendant's conduct was especially concerning because it so clearly violated policy and procedure; the commander stated that "everybody knows not to interfere with [SWAT]" when they are making an arrest. To ensure that the defendant's reckless and overly aggressive conduct did not recur, the SWAT commander spoke with the defendant's supervisor after the incident, and his concerns were relayed to the defendant shortly thereafter.

2. May 31, 2017, search warrant execution at Miller Tyme barbershop

In a second incident, the defendant again ignored training and protocol, recklessly inserted himself into a search warrant execution, and endangered his fellow officers and civilians. On May 31, 2017, SWAT officers were executing a search warrant at a barbershop on the east side of

Dixie Highway. SWAT officers hid on the side of the building, waiting for all the customers to leave the barbershop, which would make the search warrant execution safer for innocent third parties, officers, and suspects. Rather than allowing the SWAT operation to proceed according to this plan, however, the defendant aggressively entered the scene. As one customer left the barbershop, the defendant sped the wrong way down Dixie Highway in his police vehicle, driving southbound in the northbound lanes toward the barbershop. With his gun pointed out of his open car window, the defendant cut in front of the customer, blocking him in, and yelled and cursed at the customer. The defendant's actions exposed SWAT's covert operation, revealing that officers were surrounding the barbershop. Once the defendant exposed their position, SWAT officers were forced to make entry into the building while multiple people remained inside. Additionally, the defendant's reckless and aggressive conduct caused SWAT to escalate their tactics, including by using explosive flash bang devices inside a business that was open to the public with civilians inside, contrary to SWAT's plan to let innocent patrons leave the barbershop before entering.

The defendant's reckless actions caused at least one SWAT officer to again approach the defendant's supervisor after the warrant execution and tell the supervisor that he needed to "reel [the defendant] in." The supervisor recounted that he then "ripped [the defendant's] ass" and emphasized to the defendant the importance of slowing down during dangerous incidents and not going "a million miles a minute."

ARGUMENT

The Court should admit evidence of the defendant's prior acts at the upcoming retrial. Both prior incidents are highly relevant to establishing the defendant's motive, intent, knowledge, absence of mistake, and lack of accident—permissible purposes under Federal Rule of Evidence 404(b) that are central to proving that the defendant acted willfully—and pose little, if any, risk of

unfair prejudice. Indeed, the relevance (and lack of unfair prejudice) from the other acts evidence is underscored by the arguments the defendant advanced in the first trial, where he claimed that he made a good faith mistake on the night of the shooting and lacked any ill intent or motive when shooting into Ms. Taylor's home. The Court should admit the other acts evidence to ensure that the jury can fairly assess the defendant's mental state in the upcoming retrial.[1]

I. The proffered evidence is admissible as evidence of the defendant's motive, intent, knowledge, absence of mistake, and lack of accident.

The proffered other acts evidence is admissible because it is highly relevant to several permissible purposes under Rule 404(b) and is not unfairly prejudicial. As the Sixth Circuit has repeatedly observed, Rule 404(b) is "a rule of inclusion rather than exclusion, since only one use is forbidden and several permissible uses of such evidence are identified." *United States v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985); *see also, e.g.*, *United States v. LaVictor*, 848 F.3d 428, 446 (6th Cir. 2017). In fact, the Rule "prohibits only the introduction of acts that are offered

[1] The United States' Rule 404(b) notice is timely. Federal Rule of Evidence 404(b)(3) requires "reasonable notice . . . so that the defendant has a fair opportunity to meet it." Fed. R. Evid. 404(b)(3) (describing reasonable notice requirements). The United States is providing formal notice of its intent to present this evidence in advance of the Court's deadline for filing pretrial motions "requiring a pretrial hearing," ECF No. 148, which is more than six weeks before trial. Federal courts have repeatedly held that "'reasonable notice' under Rule 404(b) is in the range of seven to ten days or one to two weeks prior to trial." *United States v. Morales*, 2023 WL 2818730, at *8 (M.D. Tenn. Apr. 6, 2023); *see also United States v. Paul*, 57 F. App'x 597, 607 (6th Cir. 2003) (affirming admission of Rule 404(b) evidence where "the government gave notice of its intention to include [Rule 404(b)] information in a brief filed one week before trial"); *United States v. French*, 974 F.2d 687, 694–95 (6th Cir. 1992) (affirming admission of Rule 404(b) evidence that was disclosed one week before trial); *United States v. Kern*, 12 F.3d 122, 124 (8th Cir. 1993) (approving admission of Rule 404(b) evidence disclosed two weeks before trial); *United States v. Agrawal*, 2022 WL 1109427, at *5 (E.D. Ky. Apr. 13, 2022) (finding that formal notice provided seven days before trial was timely); *United States v. Strong*, 2018 WL 405667, at *1 (W.D. Ky. Jan. 12, 2018) (stating that "time periods less than one month fall within the realm of what constitutes 'reasonable notice' under Rule 404(b)"). Additionally, the government provided information about both Rule 404(b) incidents in a discovery production in February 2023 and in October 2023, supplemented by additional information provided with this notice.

to show criminal propensity or a conformity with past criminal activity. If the evidence has an independent purpose, Rule 404(b) does not prohibit its admission." *United States v. Childress*, 12 F. App'x 272, 275 (6th Cir. 2001) (citation omitted); *see also United States v. Eckhardt*, 466 F.3d 938, 946 (11th Cir. 2006) ("[Rule] 404(b) is a rule of inclusion.").

To admit evidence under Rule 404(b), the Court must: (1) "make a preliminary determination that enough evidence exists that the prior act actually occurred"; (2) "determine whether the other acts evidence is being offered for a proper purpose under Rule 404(b)"; and (3) determine whether the probative value of the evidence is substantially outweighed by unfair prejudice under Federal Rule of Evidence 403. *United States v. Ramer*, 883 F.3d 659, 669 (6th Cir. 2018). The other acts evidence meets each of these requirements.

A. There is sufficient evidence that the prior acts occurred.

There is ample evidence that would allow a reasonable jury to conclude that the defendant committed the two prior acts. That evidence includes sworn grand jury testimony from a 20-year veteran law enforcement officer, statements that multiple officers made to the FBI under penalty of prosecution for false statements, and written reports about the incidents in question. *See United States v. Carney*, 387 F.3d 436, 452 (6th Cir. 2004) ("[T]he government need not prove probative 'other acts' beyond a reasonable doubt; rather, that proof must merely be sufficiently compelling such that the jury can reasonably conclude that the act occurred and that the defendant was the actor.") (internal quotation marks omitted); *United States v. Hardy*, 643 F.3d 143, 150 (6th Cir. 2011) (finding that testimony of two drug purchasers was sufficient for reasonable jury to conclude that Rule 404(b) acts had occurred); *United States v. Johnson*, 458 F. App'x 464, 470 (6th Cir. 2012) ("[T]he testimony of a single witness is sufficient for a reasonable jury to conclude that the defendant committed the prior acts, even where the witness is less than completely

reliable."). While the defendant is free to dispute the characterizations of his conduct or argue that he acted appropriately during the previous incidents, such arguments go to the weight, rather than the admissibility, of the evidence. There is no doubt that the above-described incidents occurred.

It is worth noting that this evidence will not take up a significant amount of time at trial. Although Rule 404(b) does not contain any limitation on the quantity of evidence the United States may seek to admit under the rule, the United States is cognizant of the need for judicial economy. The United States is prepared to prove the above incidents largely through the testimony of one or two officer-witnesses, and at least one of those officers will also offer testimony that is directly relevant to the incident charged in the Indictment. In other words, few, if any, additional witnesses are necessary to prove the other acts. The additional time needed for these witnesses to testify about these relatively simple events is minimal.

B. The evidence is offered for proper purposes under Rule 404(b).

The evidence of the defendant's two prior acts is admissible for several permissible purposes. The Sixth Circuit does not require the proponent of other-acts evidence to provide "hypertechnicality" in enumerating every proper purpose but rather to link that evidence with "a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove." *United States v. Merriweather*, 78 F.3d 1070, 1076–77 (6th Cir. 1996).

Here, evidence of the defendant's two prior acts is relevant for the purposes of showing the defendant's intent, motive, knowledge, and lack of mistake—all of which are central to proving the statutory element that the defendant acted willfully when he fired into Ms. Taylor's home. The prior acts evidence is particularly relevant in this case because the defendant has placed his

mental state at issue by arguing at the first trial in this matter that he had no chance to consider his training before shooting; that he acted in good faith; that he had no intent to harm anyone; and that he mistakenly believed that his fellow officers were still being fired upon when he shot through Ms. Taylor's covered windows. The two prior incidents are highly relevant to refuting these claims. The United States specifies below how the other acts evidence applies to the relevant categories recognized by Rule 404(b).

1. Intent

Evidence of the two prior acts is admissible to prove the defendant's intent, which is an element of the 18 U.S.C. § 242 offenses charged in the Indictment and a permissible purpose under Rule 404(b). *See United States v. Boyland*, 979 F.2d 851 (6th Cir. 1992) (noting that "proof tending to show a defendant's intent is relevant" to prosecutions under § 242, including other acts evidence); *LaVictor*, 848 F.3d at 446 ("[T]he admission of other acts evidence is permitted to show intent when the defendant is charged with a crime containing a specific intent element."); *United States v. Johnson*, 27 F.3d 1186, 1192 (6th Cir. 1994) ("[W]here the crime charged is one requiring specific intent, the prosecutor may use 404(b) evidence to prove that the defendant acted with the specific intent notwithstanding any defense the defendant might raise."). To prove each § 242 offense in the Indictment, the United States must show that the defendant acted with specific intent, *i.e.*, that he acted "willfully." 18 U.S.C. § 242; *see also United States v. Lanier*, 520 U.S. 259, 264 (1997). In other words, the government must prove that the defendant knew that shooting into Ms. Taylor's covered windows was wrong and chose to do it anyway. Evidence of the two prior incidents is strongly probative of this intent.

The Sixth Circuit has instructed that, "[t]o determine if evidence of other acts is probative of intent, we look to whether the evidence relates to conduct that is substantially similar and

reasonably near in time to the specific intent offense at issue." *Hardy*, 643 F.3d at 151 (internal quotation marks omitted); *Carney*, 387 F.3d at 451 (finding that Rule 404(b) evidence was admissible where it consisted of "valuable probative instances of additional similar transactions"). The defendant's two prior acts meet this standard.

First, the proffered conduct is "substantially similar" to the conduct charged in the Indictment. *See LaVictor*, 848 F.3d at 447. Notably, there is no requirement that "the prior act must be 'identical in every detail to the charged offense.'" *Id*. (quoting *United States v. Alkufi*, 636 F. App'x 323, 332 (6th Cir. 2016). The evidence shows that—much like the offense charged in this case—the defendant on two prior occasions responded to unexpected events that occurred during warrant executions by recklessly injecting himself into a dangerous scene with his weapon drawn so that he could personally address a suspect. In both instances the defendant ignored his training and jeopardized a warrant execution so that he could brandish his weapon and personally confront a suspect, even though the safer course—and the rules established by his policy and training—called for restraint. Both times, as during the warrant execution at Ms. Taylor's home, the defendant's reckless intervention endangered his fellow officers and innocent civilians.

In the October 2016 arrest of A.J. , the defendant created a risk of crossfire by abandoning his assigned role and running aggressively—with his gun drawn—in front of SWAT officers who had rifles pointed at a dangerous suspect. In the May 2017 incident at the barbershop, the defendant recklessly drove into head-on traffic, brandished his weapon, and confronted a person leaving the barbershop, compelling SWAT officers to abandon their position of cover and force entry into a public building earlier than they had planned, while innocent civilians remained inside. Following these incidents, a supervisor reprimanded the defendant for his conduct and reminded him of the importance of following procedures—especially when faced with unexpected and

potentially threatening developments.

These prior incidents—and the counseling the defendant received after them—demonstrate that, by the time of the warrant execution at Ms. Taylor's home on March 13, 2020, the defendant knew that he could not disregard his training to place himself at the center of volatile situations that occur during warrant executions. Yet the defendant did precisely that. After the initial exchange of gunfire in Ms. Taylor's doorway—as the other officers who could not see into Ms. Taylor's home held their fire and helped evacuate Sergeant J.M., who had been shot—the defendant ignored his training and attempted to address the suspect on his own terms. He ran to the side of Ms. Taylor's home and—contrary to his extensive training on target identification and target isolation—fired 10 shots through windows covered with blinds and curtains, posing a grave danger to his fellow officers in Ms. Taylor's doorway and innocent civilians in the apartment building. The fact that the defendant took these actions even though he knew from his prior reprimands that he could not abandon his training is critical to proving the defendant's willfulness.

Indeed, federal courts have repeatedly upheld admission of other acts evidence in § 242 excessive force cases because, as here, it is often central to proving a defendant-officer's intent. *See*, *e.g.*, *United States v. Cowden*, 882 F.3d 464, 471–72 (4th Cir. 2018) (holding that other acts "evidence was probative of [defendant's] state of mind at the time he used excessive force, namely, of his intent to punish" the victim); *United States v. Boone*, 828 F.3d 705, 712 (8th Cir. 2016) (finding that prior incidents in which defendant used excessive force and then failed to report such force were admissible to show intent under Rule 404(b)); *United States v. Rodella*, 804 F.3d 1317, 1335 (10th Cir. 2015); *United States v. Brugman*, 364 F.3d 613, 620 (5th Cir. 2004); *United States v. Mohr*, 318 F.3d 613, 619 (4th Cir. 2003); *United States v. Taylor*, No. 22-CR-50 (RGJ), 2022 WL 4125101 (W.D. Ky. Sept. 9, 2022) (admitting prior Rule 404(b) incidents involving defendant

correctional officer as probative of his intent to use excessive force); *United States v. Mize*, 498 F. Supp. 3d 978, 983 (S.D. Ohio 2020) (finding that, in prosecutions under § 242, "intent is material and automatically at issue," so intent is a proper purpose for admitting Rule 404(b) evidence); *United States v. Hollingsworth*, 2010 WL 3385349 (E.D. Ky. Aug. 25, 2020) (admitting other acts evidence in § 242 prosecution as evidence of motive, intent, and plan).

In addition to the important similarities between the defendant's two prior acts and the conduct charged in the Indictment, the timing of the prior acts further supports their probative value. Both incidents—and the defendant's reprimands—occurred before the offense charged in this case, demonstrating that the defendant was on notice that his actions at Ms. Taylor's home were wrong. The prior incidents were also relatively close in time to the offense in this case. The Miller Tyme Barbershop incident occurred only two years and nine months before the shooting at Ms. Taylor's home, and the arrest of A.J. on the roof of a suspected drug house occurred three years and five months earlier. The Sixth Circuit has regularly approved of admitting Rule 404(b) evidence with much larger temporal gaps. *See, e.g.*, *United States v. Love*, 254 F. App'x 511, 517 (6th Cir. 2007) (admitting Rule 404(b) evidence of drug transactions made 8 years before the charged transaction); *United States v. Jones*, 403 F.3d 817, 821 (6th Cir. 2005) ("Cases from this and other circuits have in fact affirmed the use of testimony relating to prior acts dating back much further than three years."); *United States v. Persinger*, 83 F. App'x 55, 59 (6th Cir. 2003) (8-year gap); *see also United States v. Matthews*, 431 F.3d 1296, 1312 (11th Cir. 2005) (affirming admission of Rule 404(b) evidence from 8 years before charged conduct); *United States v. Kreiser*, 15 F.3d 635 (7th Cir. 1994) (admitting evidence of 7-year-old Rule 404(b) incident); *United States v. Spillone*, 879 F.2d 514, 519 (9th Cir. 1989) (citing cases admitting prior acts that occurred 10 or more years before the charged offenses).

The relevance of the prior acts is further underscored by arguments the defendant made in the first trial of this matter. There, the defendant placed his mental state squarely at issue by claiming that he mistakenly believed that a shooter inside Ms. Taylor's apartment continued to fire at officers outside, that he acted in good faith with no ill intent, and that he did not have time to consider his department's use of force policy and training before he fired through Ms. Taylor's covered windows. *See*, e.g., Tr. Vol. 9-A, at 143. In closing argument, defense counsel likewise argued that "the only intent [the defendant] had on that night was to try to save his brother officers who he thought were trapped in a fatal funnel being executed." Tr. Vol. 10, at 205. The other acts evidence is highly relevant to refuting these claims and allowing the jury to fairly assess the defendant's intent. *See United States v. Boone*, 828 F.3d 705, 711–12 (8th Cir. 2016) ("By testifying that he did not intend to hurt [the victim] or kick him in the head, but was instead trying to assist his fellow officers in securing [the victim], [the defendant] placed his state of mind squarely at issue and rendered evidence of his prior use of unreasonable force probative of his intent, knowledge, motive, and absence of mistake in his use of force against" the victim).

The Court should therefore admit evidence of the two prior incidents to prove the defendant's intent.

2. Motive

For similar reasons, evidence of the two prior incidents is also admissible to show the defendant's motive. The two prior incidents involve evidence that (a) the defendant was motivated by anger and a desire to personally apprehend and punish suspects who he perceived to have wronged the police during warrant executions, and (b) that the defendant was reprimanded for doing so. The prior acts thus help prove that, on the night of March 13, 2020, the defendant was motivated by an improper purpose—to personally take down and punish the person who had

fired at officers from inside the apartment—rather than a legitimate law enforcement objective. The two prior incidents are thus admissible to prove that motive. *See, e.g.*, *United States v. Brown*, 250 F.3d 580, 585–86 (7th Cir. 2001) (admitting under Rule 404(b), in prosecution of two police officers for using excessive force, previous incident of force involving one of the officers because it was relevant to the officer's "intent to punish defiant individuals").

3. Knowledge and absence of mistake and accident

The other acts evidence is likewise admissible to show the defendant's knowledge and absence of mistake and accident. The defendant claimed during the first trial of this matter that, at the time he fired into Ms. Taylor's windows, he mistakenly believed that a person inside the apartment was still actively shooting out at officers standing in her doorway. The defendant further claimed that he mistook flashes of light that he supposedly saw through Ms. Taylor's covered windows as muzzle flashes coming from the suspect's gun as it fired at officers. Evidence of the two prior incidents combats this claim of a good faith mistake. In each prior incident, the defendant disregarded his training in response to a provocation that occurred during a warrant execution and aggressively injected himself, with his gun drawn, into potential deadly force situations—escalating each incident in ways that endangered civilians and law enforcement officers alike. The prior acts evidence (including evidence that the defendant had been counseled, reprimanded, and specifically told to change his behavior) helps demonstrate that the defendant did not act in good faith due to an honest mistake when he fired into Ms. Taylor's home. It shows instead that he fired as part of his pattern of ignoring his training and knowingly injecting himself into deadly force situations to punish suspects who he perceives to have wronged law enforcement. The prior acts are therefore probative of the defendant's knowledge and lack of mistake. *See Rodella*, 804 F.3d at 1329–35 (noting that district court held that "the government is tasked with

proving the high burden of willfulness, and evidence of these three prior incidents is probative to proving willfulness, if used for the proper purposes of showing motive, intent, plan, absence of mistake, and lack of accident").

C. The prior acts evidence is highly relevant and not unfairly prejudicial.

Under any theory of admissibility, the other acts evidence is highly probative and not unfairly prejudicial. "A prior bad act that complies with Rule 404(b) is admissible unless 'its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Love*, 254 F. App'x at 517 (emphasis added). "Unfair prejudice" means "the undue tendency to suggest a decision based on improper considerations; it does not mean the damage to a defendant's case that results from legitimate probative force of the evidence." *United States v. Bilderbeck*, 163 F.3d 971, 978 (6th Cir. 1999). The other acts evidence is admissible under these standards.

1. The other acts evidence is highly relevant.

The proffered evidence of the defendant's two prior acts is highly probative for three reasons: (1) the prior acts show the defendant's willfulness, a statutory element of the crimes charged; (2) the prior acts are relatively close in time and have key factual similarities to the charged conduct; and (3) the evidence directly refutes arguments that the defendant made during the first trial in this matter and will likely raise again during the retrial.

First, as explained above, prior acts showing the defendant's intent, motive, knowledge, and lack of mistake are a crucial component of proving that he acted willfully; that is, that he acted despite knowledge that his conduct was wrong. Evidence that the defendant had previously taken similar actions and been reprimanded is highly relevant to proving that, on the night of the charged offense, the defendant's conduct was not a tactical miscalculation undertaken in good faith, but

rather a willful act taken to punish someone who the defendant perceived had wronged the police. *See, e.g.*, *Mize*, 498 F. Supp. 3d at 983–84 (quoting *Johnson*, 27 F.3d at 1192) ("The Sixth Circuit has stated that 'in prosecuting specific intent crimes, prior acts evidence may often be the only method of proving intent.' This is especially true with regards to the 'willfulness' standard of 18 U.S.C. 242.").

Second, both prior acts are relatively close in time and bear important similarities to the conduct charged in the Indictment. Like the shooting at Ms. Taylor's apartment, both prior incidents involved (a) officers executing search warrants; (b) an unexpected provocation; (c) the defendant responding to the provocation by recklessly placing himself at the center of a law enforcement operation—with his weapon drawn and in defiance of training—to personally address the person he perceived to have wronged the police; and (d) the defendant endangering his fellow officers and civilians. Additionally, both prior acts occurred within roughly three years of the charged offense, while the defendant was a veteran, trained police officer—underscoring his continued willingness to disregard that training and endanger his fellow officers and civilians.

Third, the prior acts evidence is especially relevant here, where it responds directly to arguments the defendant made in the first trial and will likely raise again at the retrial. *See, e.g.*, *Boone*, 828 F.3d at 711–12 ("By testifying that he did not intend to hurt [the victim] or kick him in the head, but was instead trying to assist his fellow officers in securing [the victim], [the defendant] placed his state of mind squarely at issue and rendered evidence of his prior use of unreasonable force probative of his intent, knowledge, motive, and absence of mistake in his use of force against" the victim).

2. The other acts evidence is not unfairly prejudicial.

The strong probative value of the defendant's prior acts clearly outweighs any minimal prejudice from admitting them. Prior acts are unfairly prejudicial only where they might "le[a]d the jury to convict [the] Defendant on an improper basis." *United States v. Mandoka*, 869 F.3d 448, 455 (6th Cir. 2017). The Sixth Circuit has repeatedly refused to find other acts evidence unfairly prejudicial where the other acts are no more inflammatory than the charged conduct. *See, e.g.*, *id.* at 455; *United States v. Rios*, 830 F.3d 403, 424 (6th Cir. 2016) (evidence of similar other-acts only "minimally" prejudicial because of similarity); *see also Taylor*, 2022 WL 4125101, at *4 (admitting four prior incidents in § 242 prosecution and explaining that "victims of those incidents were not as severely injured" as the victims in the charged count).

Here, the two prior incidents noticed by the government have substantially less emotional impact than the incident charged in this case, where the defendant fired 10 shots into a civilian apartment building during a police raid that left an officer wounded and an innocent woman dead. Unlike those tragic events, the defendant's two prior acts—through good fortune—did not involve the defendant firing his weapon and did not result in any injuries to officers or innocent civilians. The only possible source of prejudice from the two prior incidents is that the defendant disregarded his training and acted in a reckless manner that endangered others. That is no basis for exclusion, as it is well-established that "[e]vidence that is prejudicial only in the sense that it paints the defendant in a bad light is not unfairly prejudicial pursuant to Rule 403." *United States v. Chambers*, 441 F.3d 438, 456 (6th Cir. 2006).[2] Therefore, the Court should admit the highly relevant evidence of the defendant's two prior acts.

[2] Even if there were a risk that the jury could draw an impermissible character propensity reference from the offered 404(b) evidence, a limiting instruction requiring that the jury consider the evidence only for permissible purposes would "greatly reduce this problem." *United States v. Davis*, 707 F.2d 880, 884 (6th Cir. 1983). The United States has no objection to using such an instruction in the upcoming retrial.

CONCLUSION

For the foregoing reasons, the United States respectfully provides notice of its intent to introduce other acts evidence at trial and asks the Court to issue a pretrial order admitting this evidence.

Respectfully submitted,

KRISTEN CLARKE
Assistant Attorney General

/s Michael J. Songer
Michael J. Songer
Special Litigation Counsel
Criminal Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-3204
Michael.Songer@usdoj.gov

/s Anna Gotfryd
Anna Gotfryd
Trial Attorney
Criminal Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-3204
Anna.Gotfryd@usdoj.gov

Authority Conferred by 28 U.S.C. § 515

CERTIFICATE OF SERVICE

I hereby certify that, on August 29, 2024, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a Notice of Electronic Filing to all parties.

s/ Michael J. Songer
Michael J. Songer
Civil Rights Division

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 3:22-CR-84-RGJ
	)	
	)	18 U.S.C. § 242
BRETT HANKISON,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on the government's Notice and Motion to Introduce Other-Acts Evidence Under Federal Rule of Evidence 404(b), The Court has considered the record and being otherwise sufficiently advised,

IT IS THEREFORE ORDERED AND ADJUDGED that the government's Motion is **GRANTED**.

ENTERED: _____

_____
The Honorable Rebecca Grady Jennings
United States District Court