IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 1:19-cr-00257-WJM

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. ERIC KING,

Defendant.

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE [ECF 117]

The pertinent facts of this case are set forth in detail in the government's responses to defendant's motion to suppress and motion to dismiss for outrageous government conduct. ECF 120, 124. As relevant here, defendant filed a motion in limine seeking rulings from the Court on a variety of issues. For the reasons set forth below, the defendant's motion should be denied in part and granted in part.

A. The government's proposed 404(b) evidence is highly probative of defendant's intent, motive, hostility, and bias.[1]

Evidence of a person's other bad acts are inadmissible to prove a person's propensity to behave a certain way, but such evidence is admissible for other purposes, such as proving motive or bias. *See* Fed. R. Evid. 404(b). Defendant seeks to preclude all but one of the government's proffered pieces of 404(b) evidence, *see* Ex. 1, but each

[1] The parties agree that defendant's email, sent to his significant other on August 17, 2018, prior to the alleged assault, should be admitted. Accordingly, no further discussion of that email is necessary.

of these pieces of evidence is being offered for the proper purposes of showing motive and bias. This portion of defendant's motion in limine should therefore be denied.

While other violent acts of a defendant cannot typically be introduced for the sole purpose of rebutting a self-defense claim, *see United States v. Commanche*, 577 F.3d 1261, 1268 (10th Cir. 2009), such evidence is admissible to show motive. For example, in *United States v. Garcia-Meza*, the defendant Severo Garcia-Meza was convicted of murdering his wife. 403 F.3d 364, 365-67 (6th Cir. 2005). The trial court permitted the prosecution to introduce evidence that Garcia-Meza assaulted his wife five months before the charged murder. *Id.* at 367-68. The Sixth Circuit found no abuse of discretion, noting that "the assault, like the murder, was a product of [Garcia-Meza's] jealousy" arising from his wife's communications with other men. *Id.* at 368.

Here, defendant's statement at his sentencing is highly probative of his desire to do harm to the government by destroying government buildings and "make sure that bubble of safety that prosecutors and FBI agents and judges feel [gets] shattered." Ex. 1, at 1. Similarly, when viewed in conjunction with defendant's email that he sent on the day of the assault, Ex. 1, at 2, the charged assault on Lieutenant Wilcox was also motivated by defendant's desire to do harm to the government and government agents, particularly correctional officers. Accordingly, defendant's statements at his sentencing are admissible to show that his motive to commit the assault.

Defendant's actions toward Officer Gustafson, see Ex. 1 at 3-4, are probative of defendant's motive for the same reason. Even though the conduct toward Officer Gustafson occurred after the charged assault, it is nonetheless probative of motive because it shows defendant's hatred of Bureau of Prisons officials. *See United States*

v. Mares, 441 F.3d 1152, 1157 (10th Cir. 2006) ("It is settled in the Tenth Circuit that evidence of 'other crimes, wrongs, or acts' may arise from conduct that occurs after the charged offense." (emphasis in original)).

These same acts are admissible to show defendant's bias against the federal government generally, and the Bureau of Bureau of Prisons in particular, in the event defendant testifies. *See United States v. Beck*, 625 F.3d 410, 419 (7th Cir. 2010) (approving of use of 404(b) evidence to show bias). Evidence of defendant's hatred of these entities is probative of his willingness to testify falsely to portray these entities in the most negative possible light.

B. The government does not intend to introduce evidence of other prior bad acts or disciplinary matters against defendant unless he opens the door.

At this juncture, the government does not intend to introduce evidence regarding any disciplinary proceedings related to a 2017 occurrence in Englewood. Regarding defendant's January 2019 disciplinary hearing at USP Leavenworth, the government has already indicated in its response to the motion to suppress that it will seek to use defendant's statements at that proceeding for impeachment and cross-examination purposes if defendant testifies, should the Court rule that those statements were voluntary. The government otherwise does not intend to introduce evidence of BOP disciplinary proceedings unless defendant opens the door.

C. Lieutenant Wilcox may properly testify regarding the actions he took on August 17, 2018, based on his own personal experience.

The government does not intend to elicit from Lieutenant Wilcox any opinions regarding prisoner mental health.

However, Wilcox should be permitted to testify about his observations as to his finger injury under Federal Rule of Evidence 701. Here, Wilcox will merely testify as to his observation, based on prior experience, that his finger injury appeared to be the result of a "grappling" motion as opposed to throwing a punch. This testimony is based on Wilcox's perception, will be helpful to the jury in understanding his testimony about what occurred on August 17, 2018, including the injuries he suffered, and is not technical or specialized such that he would need to be tendered as an expert witness. *See* Fed. R. Evid. 701. Indeed, such testimony is not even really an "opinion," but is rather a bare observation that his injury was similar to certain other injuries he received in the past.[2]

D. The government should be permitted use the words "threat" and "assault" at trial.

Without any supporting authority, defendant is seeking to preclude the government from using the words "threat" or "assault" to describe the events of August 17, 2018. This request is overbroad and would be unfairly prejudicial to the government. The word "threat" is a word in common usage in the English language to describe, among other things, "an expression of intention to inflict . . . injury" or "an indication of something impending." *See* merriam-webstr.com/dictionary/threat (last

[2] Moreover, this portion of defendant's motion "depend[s] for [its] resolution upon the context in which the evidence is offered." Practice Standards III.G.1, Honorable William J. Martinez, *available at* http://www.cod.uscourts.gov/Portals/0/Documents/Judges/WJM/WJM_Practice_Standards.pdf?ver=2020-12-01-103736-253 (last visited Sept. 27, 2021). To the extent that the Court is not inclined to deny this motion at the pretrial stage, this issue can appropriately be addressed during trial in the context of particular questions.

visited Sept. 27, 2021). The word "assault" is also in common usage and is even part of the title of the charge in the indictment, "assaulting a federal officer."

Preventing the government and its witnesses from using these words to describe what occurred on August 17, 2018, would require government witnesses to engage in unnecessary verbal gymnastics. Moreover, the jury will be instructed by the Court on the relevant legal definitions for this case and will be instructed that the Court is the sole source of those definitions. Defendant has not provided authority to show that the government cannot use these terms during an assault trial, and this portion of his motion should be denied. *See, e.g.*, *United States v. Christy*, 2019 WL 6048951, at *2 (M.D. Pa. Nov. 14, 2019) (unpublished) ("The Court declines to make an all-encompassing ruling as to the whether Government's counsel may use the word "threat," divorced from the circumstances where any actually-uttered question is being challenged.").

E. Other undisputed matters

Defendant seeks to preclude the government from doing several things it does not intend to do, as follows: (1) The government does not intend to describe Wilcox and a "victim; (2) The government does not intend to describe defendant as a "terrorist" at trial; and (3) The government does not intend to offer evidence of the facts of defendant's underlying conviction for which he is currently serving a prison sentence, unless defendant opens the door to such testimony.

CONCLUSION

For the reasons set forth above, the Court should deny in part and grant in part defendant's motion in limine.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2021, I electronically filed the foregoing **GOVERNMENT'S REPONSE TO DEFENDANT'S MOTION IN LIMINE** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record.

s/ Aaron Teitelbaum
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