

No. 08-2257

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

VS.

BRIAN COMMANCHE  
Defendant-Appellant.

On Appeal from the United States District Court  
For the District of New Mexico, the Honorable John Edwards Conway  
District Court Criminal No CR 06-496 JC

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APPELLANT'S BRIEF-IN-CHIEF

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Oral Argument is Requested  
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Pursuant to 10th Circuit General Order filed August 10, 2007 there are attachments to this Brief in Chief that are digitally submitted and they are attached to the original and 7 copies of the Brief filed with the Court.

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**STATEMENT REGARDING PRIOR OR RELATED APPEALS**

Pursuant to Rule 28.2(C)(1) of the Rules of the Court of Appeals for the Tenth Circuit, Appellant states that there have been no prior or related appeals to this court.

**JURISDICTIONAL STATEMENT**

This is an appeal by Defendant-Appellant, Bryan Commanche



(“Commanche”) from his conviction and sentence on two (2) counts of Assault With Great Bodily Injury, contrary to 18 U.S.C. §§ 1153 and 113(a)(6) superceding indictment. October 15, 2008, the district court signed and filed the judgment and sentence. (Att. A; Doc. 57)<sup>1</sup> Mr. Commanche filed a timely notice of appeal on October 24, 2008. See, Fed. R. App. P. 23(a)(4). (Doc. 62)

The district court had jurisdiction under 18 USC § 3231. This Court has jurisdiction pursuant to 28 USC §1291, 18 USC § 3742(a)(1) and (2) and Rule 4(b)(1)(A)(i) of the Federal Rules of Appellate Procedure.

#### **ISSUES PRESENTED FOR REVIEW**

**I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY ADMITTING UNDER RULE 404(b) EVIDENCE THAT MR. COMMANCHE PLEAD GUILTY TO AGGRAVATED BATTERY WITH GREAT BODILY HARM WITH A SHARP CUTTING INSTRUMENT AND THAT MR. COMMANCHE PLEAD GUILTY TO ARMED ROBBERY AND AGGRAVATED BATTERY WITH A DEADLY WEAPON, TO WIT A BOX CUTTER.**

**II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY PERMITTING THE GOVERNMENT TO CROSS-EXAMINE THE DEFENDANT BEYOND THE SCOPE OF RULE 609(a).**

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<sup>1</sup> Att. refers to Attachment and Doc. refers to Docket Number.

**III. CONSIDERED CUMULATIVELY, THE DISTRICT COURT'S ERRORS IN THIS CASE WERE NOT HARMLESS.**

**STATEMENT OF THE CASE**

Mr. Commanche was charged with on two (2) counts of Assault With Great Bodily Injury, contrary to 18 U.S.C. §§ 1153 and 113(a)(6) and two (2) counts of Assault With a Dangerous Weapon, contrary to 18 U.S.C. §§ 1153 and 113(a)(3). (Doc. 1) Prior to trial the United States filed its Government's Notice of Rule 404(b) Evidence and Motion in Limine. (Att. B; Doc.35) Mr. Commanche filed his Motion In Limine to Exclude Defendant's Prior Conviction. (Att. C; Doc. 38) And the United States filed its Government's Response to Defendant's Motion in Limine to Exclude Prior Convictions. (Att. D; Doc. 40) The District Court heard argument by counsel on the admission of Mr. Commanche's convictions and their use under Rule 404(b) and Rule 609 prior to trial. The District Court ruled the bad acts were admissible under Rule 404(b) because they were more probative than prejudicial, and that they were not offered to show propensity, rather they were offered to show means and manner of the crimes committed. (Att. E; Doc. 53; Tr. 7-8)<sup>2</sup>

When the government called its first witness to testify regarding Mr.

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<sup>2</sup> Tr. refers to Partial Transcript of Jury Trial, June 17, 2008.

Commanche's bad acts under Rule 404(b), the District Court, relying on United States v. Birch, 39 F.3d 1089 (10<sup>th</sup> Cir. 1994), required the government to specifically articulate the hypothesis under which the bad acts were admissible.

The government argued that Mr. Commanche's use of a box cutter and knife in his other cases demonstrated Mr. Commanche's intent to commit the assaults in this case as well as being relevant to rebutting Mr. Commanche's claim of self-defense.

Mr. Commanche argued the acts were highly prejudicial and of little probative value. The District Court permitted testimony regarding Mr. Commanche's bad acts under Rule 404(b) and Rule 609. (Att. E; Doc. 53) When the District Court admitted evidence of Mr. Commanche's first conviction it gave the jury a limiting instruction. When the District Court admitted evidence of Mr. Commanche's second conviction it gave no limiting instruction. Limiting instructions regarding Rule 404(b) evidence and Rule 609 evidence were given to the jury. (Att. F; Att. G; Doc. 50; Tr. 119)

The jury convicted Mr. Commanche on two (2) counts of Assault With Great Bodily Injury, contrary to 18 U.S.C. §§ 1153 and 113(a)(6) and found him not guilty on two (2) counts of Assault With a Dangerous Weapon, contrary to 18 U.S.C. §§ 1153 and 113(a)(3).

The United States Probation Office, in its Pre-sentence Report calculated

Mr. Commanche's adjusted Guideline Offense Level at 26, with a criminal history category at level IV, a base level of 14, and increase of 4 levels for the use of a deadly weapon, an increase of 6 levels for life threatening bodily injury, and an increase of 2 levels for there being two victims. The District Court sentenced Mr. Commanche to 92 months imprisonment, the low end of the guidelines. (Att. A; Doc. 57)

### **STATEMENT OF THE FACTS**

This case arose from a fight between Mr. Commanche and others attending a feast on the Mescalero Indian Reservation. The government's case included testimony by the investigating officer, the alleged victims, eye witnesses, a treating physician and evidence of Mr. Commanche's bad acts admitted under Rule 404(b). Mr. Commanche admitted he cut both victims and testified that he acted in self-defense.

The government's first witness, Sergeant Joel Chino, investigated the crime scene and interviewed witnesses. He described the lacerations to Cullen Kaydahzinne ("Cullen") and Irwin Apachito ("Irwin"). (Tr. 26-30) His investigation lead him to the Salt Well area where a feast had taken place and where he found several small pools of blood and blood soaked paper towels on the ground. (Tr. 30-31) On cross-examination, Sergeant Chino testified that he found

beer cans in the field and that many of the people he spoke with during his investigation were intoxicated. (Tr. 36-37)

The government's second witness, Anjuanan Enjady identified Mr. Commanche as a friend of her cousin with whom she went out with on and off for a couple of weeks in 2004. (Tr. 37-38) She went to the feast with her parents and two brothers and there she met her cousin, Irwin, and her boyfriend, Cullen. (Tr. 39-40) Cullen became jealous because she was standing next to Mr. Commanche. They had all been drinking. She heard Cullen and Mr. Commanche call each other names and she saw them pushing each other by Irwin's truck. She saw Cullen hit Mr. Commanche first. She heard Cullen say he was quitting and didn't want to fight anymore as he was sliding off Irwin's truck. She saw Irwin try to pull Mr. Commanche off Cullen and fight with Mr. Commanche. When the fighting stopped, she walked off with Mr. Commanche. She did not see anyone stabbed. (Tr. 41-45)

Ms. Enjady said that she walked with Mr. Commanche to her house and that he would run up the hill whenever a car passed. She said that he gave her his shirt. When the police came to her house she saw blood on the shirt and on her arm and hands. (Tr. 46-48) She did not see any injuries to Mr. Commanche or a weapon on anybody socializing in the group. (Tr. 49-50)

On cross-examination, Ms. Enjady testified that her relationship with Mr. Commanche took place about six months before the incident. She denied that Mr. Commanche was trying to get away from her when they met, rather she said that they were standing together when Cullen came up to them. She affirmed that Cullen hit Mr. Commanche first. She described Cullen as being a lot bigger than Mr. Commanche, and that he was a lot drunker than Mr. Commanche. (Tr. 53-55)

Cullen Kaydahzinne then testified that he did not know Mr. Commanche before meeting him at the feast, and that he was bothered by Mr. Commanche standing with Ms Enjady. He began arguing and fighting with Mr. Commanche. He recalled trying to push Mr. Commanche and using his arms to block his face when Mr. Commanche was cutting him. He said that Irwin then pushed Mr. Commanche over, and that Irwin and Mr. Commanche began fighting. He said that when the fight stopped, Irwin's girlfriend got paper towels to press on his cuts and then she drove them to the hospital in Ruidoso. (Tr. 67-70) Cullen testified that he was cut with an orange box cutter. He said it took months for him to be able to close his hands, and that he lost feeling in his fingers and arms. (Tr. 70-73)

On cross-examination Cullen admitted he was "buzzed" the night of the fight. When he told Mr. Commanche to get away from Ms. Enjady, Mr. Commanche replied that she was his. Cullen then hit Mr. Commanche hard and it

knocked him back. He testified that when the fight began, Irwin was just watching. (Tr. 77-78)

Lavonica Apachito, Irwin's sister testified that she saw Cullen and Mr. Commanche arguing and fighting. She saw Cullen with his arms up and heard someone yell "Cullen's cut." (Tr. 85) She said Cullen fell against the truck and that her bother, Irwin went to help Cullen. She saw Mr. Commanche and Irwin fight, and when they stopped, she noticed Irwin was bleeding. She testified that neither Cullen or Irwin had a weapon. (Tr. 85-88)

Irwin Apachito testified that he saw Cullen and Mr. Commanche fighting. He saw Cullen was against his truck trying to pull away from Mr. Commanche when Cullen said he got cut. He went to break up the fight and Mr. Commanche swung at him. He remembered fighting with Mr. Commanche. He recalled that when they separated he saw Mr. Commanche leave with his cousin, Ms. Enjady. (Tr. 99-100) Irwin described the cuts to his face and chest and identified photographs of his scars. (Tr. 101-103) On cross-examination Irwin testified that he had given Mr. Commanche a ride earlier to buy beer in Ruidoso. (Tr. 105)

Janice Schryer from the 12<sup>th</sup> Judicial District District Attorney's Office testified, over defense counsel's objection, to her having prosecuted Mr. Commanche for aggravated battery with great bodily harm from an incident on

September 12, 2005. She stated that the victim's injuries were consistent with being cut with a sharp cutting instrument. (Tr. 117-118) Following Ms. Schryer's testimony, the District Court directed the jury:

You have heard evidence of other crimes engaged in by the defendant. You may consider the evidence only as it bears on the defendant's intent and for no other purpose. Of course, the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the act charged in this case. (Tr. 119)

Captain Doug Kennedy from the Farmington Police Department testified that Mr. Commanche plead guilty to aggravated battery with a deadly weapon and armed robbery on December 5, 2005. He testified that the victim was stabbed several times with a box cutter that was found at the crime scene. He identified the box cutter that was taken into evidence in that case. (Tr. 120-122)

The government's final witness, Stephen Buse, MD treated Cullen and Irwin at the Lincoln County Hospital in Ruidoso, New Mexico. He repaired two lacerations of Irwin, and he testified that given the location of the injuries there was a substantial risk of death associated with the lacerations. (Tr. 126-127) Dr. Buse also testified about the lacerations to Cullen: one full thickness laceration on each arm and his chest, and superficial lacerations to his wrist, chest and nose. He testified the severity of the lacerations were such that he could only stabilize them in the emergency room. He testified that the lacerations to both men would lead to



obvious disfigurement. (Tr. 127-129)

Mr. Commanche testified that he acted in self-defense. He had just gotten off work when he heard there was a feast at Salt Creek. Mr. Commanche, a Navajo, went to the feast to observe and learn something new. It was dark when he arrived and he looked for some friends from Mescalero, but they were not there. (Tr. 133-134) He said Irwin asked him for a cigarette and they talked. He then rode with Irwin to buy some beer. (Tr. 135-137) He remembered Irwin introducing him to people when they returned to the feast, but he felt nervous because he did not know the people. He recognized Ms. Enjady with whom he had had a one night stand. He testified that he was not interested in her, but that she kept trying to hold onto him. He was pushing her away when Cullen appeared. He said Cullen became aggressive and punched him. He hit the ground so hard that he saw stars. At that point he began fighting with Cullen, and he saw Irwin approaching. Mr. Commanche testified that he was scared because of the odds against him. He felt like he was facing death. He testified that he pulled out a box cutter swung it. He remembered fighting with Irwin and Ms. Enjady getting between them. He said that after the fight he took off his shirt and threw it down and Mr. Enjady picked it up. He testified that he left the feast alone. (Tr. 138-139)

On cross-examination Mr. Commanche admitted he used a box cutter in the

fight and that he threw it into a dumpster after the fight. He was also questioned about doing the same with the box cutter he had used in Farmington. Defense counsel objected, and the District Court overruled the objection. Mr. Commache was asked to identify the box cutter that was used in the Farmington case and the box cutter was admitted into evidence. Mr. Commanche was then questioned about the similarity between the exhibit and the box cutter he used in this case. (Tr. 155-157) At the close of the case the District Court gave the jury limiting instructions on the use of the Rule 404(b) and Rule 609 evidence. (Att. F; Att. G Doc. 50)

### **SUMMARY OF THE ARGUMENT**

The District Court admitted evidence of Mr. Commanche's two convictions for similar acts of assault with a weapon under Rule 404(b) and Rule 609. Mr. Commanche argues this was error because the use under Rule 404(b) related to intent was improper once Mr. Commanche raised the issue of self-defense. In addition, Mr. Commanche argues it was error to permit the government to cross-examine him beyond the scope of Rule 609.

## ARGUMENT

### **I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY ADMITTING UNDER RULE 404(b) EVIDENCE THAT MR. COMMANCHE PLEAD GUILTY TO AGGRAVATED BATTERY WITH GREAT BODILY HARM WITH A SHARP CUTTING INSTRUMENT AND THAT MR. COMMANCHE PLEAD GUILTY TO ARMED ROBBERY AND AGGRAVATED BATTERY WITH A DEADLY WEAPON, TO WIT A BOX CUTTER.**

Standard of Review: Issues concerning the scope of evidence rules present questions of law. United States v. Hernandez, 913 F.2d 1506, 1512 (10<sup>th</sup> Cir.), cert. denied, 499 U.S. 908 (1991). Decisions to admit or exclude evidence under Fed. R. Evid. 404(b) are reviewed for abuse of discretion. United States v. Arney, 248 F.3d 984, 991 (10<sup>th</sup> Cir. 2001); United States v. Birch, 39 F.3d 1089 (10<sup>th</sup> Cir. 1994). A district court abuses its discretion when it makes an error of law; an abuse of discretion standard includes review to determine whether the court's discretion was guided by erroneous legal conclusions. Koon v. United States, 581 U.S. 81, 100 (1996); United States v. Tan, 254 F.3d 1204, 1207 (10<sup>th</sup> Cir. 2001); United States v. Cherry, 217 F.3d 811, 814 (10<sup>th</sup> Cir. 2000).

The government gave notice that it would seek admission of two criminal convictions of defendant under Rule 404(b): a conviction for aggravated battery with a deadly weapon in which defendant cut his victim with a knife or sharp object and a conviction for aggravated battery with a deadly weapon and robbery

using a box cutter. (Att. B; Doc. 35)

Prior to hearing testimony the District Court heard argument from counsel and held the convictions were admissible in the governments case in chief. Counsel renewed his objection at trial and the District Court again ruled to admit the convictions. However, when the government called its first witness to testify regarding Mr. Commanche's first conviction, the District Court required the government to articulate specific reasons for the convictions falling within one of the exceptions under Rule 404(b). The District Court noted its reliance upon United States v. Birch, 39 F.3d 1089 (10<sup>th</sup> Cir. 1994).

The government presented its theory of how the bad acts were relevant to show Mr. Commanche's intent:

MR. TORREZ: Your Honor, I think in view of the defendant's defense, which is a justifiable excuse under the criminal law, that he did not have the intent to commit this, that he was forced into it, I think the fact that we show that there have been two other assaults where in fact this similar sharp instrument was used by this defendant, where no issue of self-defense is involved, and in our view there is no issue of self-defense here, that it goes to show his intent in this particular case.

...

All of it shows his criminal intent. And he is basing his defense on the fact that he had a mens rea that justified what he did. And there are two other instances where he used the same type of weapon.

And I think that is shows that this is the kind of individual that intends to use the knife; he intended to use the knife in this situation; and that in addition to that , that it shows the plan that he always carries the knife. (Tr. 111-112)

The District Court permitted testimony on Mr. Commanche's first conviction and then admonished the jury to only consider the evidence in so far as it pertains to Mr. Commanche's intent and for no other purpose. (Tr. 119)

The government then produced testimony regarding Mr. Commanche's second conviction. However, the District Court failed to admonish the jury regarding their limit on applying the evidence when the evidence was presented. The District Court gave the jury a limiting instruction on the Rule 404(b) evidence before deliberation. (Att. F; Doc.50)

The Rule 404(b) evidence was improperly admitted: In pertinent part, Fed.

R. Evid. 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .

Evidence of extrinsic acts is admissible if the evidence is offered for a proper purpose under Rule 404(b), is relevant under Rule 401, its probative value is not substantially outweighed by its potential for unfair prejudice under Rule 403, and the district court instructs the jury to consider the evidence only for the purpose for which it was admitted. United States v. Tan, 254 F.3d at 1207 (citing United States v. Becker, 230 F.3d 1224 (10<sup>th</sup> Cir. 2000), cert. denied, 121 S.Ct. 1666 (2001), and Huddleston v. United States, 485 U.S. 681, 691-92 (1988)).

Rule 404(b) requires a narrow threshold inquiry of whether evidence is offered for a purpose other than to prove criminal propensity. Tan, 254 F.3d at 1208. The American criminal justice system has long circumscribed the use of prior crimes evidence, recognizing that it presents an extreme danger of prejudice to the accused. United States v. Sullivan, 919 F.2d 1403, 1416 (10<sup>th</sup> Cir. 1990). “Showing that a man is generally bad has never been under our system allowable.” United States v. Hogue, 827 F.2d 660, 662 (10<sup>th</sup> Cir. 1987). “Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant’s evil character to establish the probability of guilt.” Michelson v. United States, 335 U.S. 469, 475 (1948).

When the government offers evidence under Rule 404(b), it bears the burden of showing that the proffered evidence is relevant to an issue other than character.

United States v. Youts, 229 F.3d 1312, 1317 (10<sup>th</sup> Cir. 2000). The government must precisely articulate the permissible purpose of the proffered evidence and the inferences to be drawn therefrom. Id.; United States v. Segien, 114 F.3d 1014, 1023 (10<sup>th</sup> Cir.), cert. denied, 523 U.S. 1024 (1998); United States v. Kendall, 766 F.2d 1426 (10<sup>th</sup> Cir.), cert. denied, 474 U.S. 1081 (1986).

The District Court finding that Mr. Commanche's prior convictions were admissible pertaining to the issue of intent was error because Mr. Commanche raised the issue of self-defense. When a defendant raises self-defense, his intent as to committing the crime is no longer an issue. United States v. Sanders, 964 F.2d 295, 298-99 (4<sup>th</sup> Cir. 1991). In Sanders, the Fourth Circuit Court of Appeals found:

Here, evidence of Sanders' prior convictions for assault and possession of contraband is a prime example of evidence "which proves only criminal disposition." Since Sanders admitted the stabbing and claimed only that in doing so he acted in self-defense, the only factual issue in the case was whether that was the reason for the admitted act. The fact that Sanders had committed an assault on another prisoner and possessed contraband one year earlier had nothing to do with his reason for--his intent in--stabbing Jenkins. All that the evidence of the prior conviction of assault could possibly show was Sanders' propensity to commit assaults on other prisoners or his general propensity to commit violent crimes. The total lack of any probative value in the contraband possession conviction, except to show general criminal disposition, is even more stark. This is exactly the kind of propensity inference that Rule 404(b)'s built-in limitation was designed to prevent.

Similarly, since Mr. Commanche's admitted he cut the victims and raised the issue

of self-defense the only factual issue was whether he acted reasonably in response to his perceived threat. His use of a box cutter and knife in his prior convictions, as in Sanders, could only show his propensity to commit violent acts. An impermissible use of Rule 404(b).

Limiting Instructions: In addition the District Court erred when it failed to admonish the jury regarding its use of Mr. Commanche's second conviction. Following the government presenting evidence of Mr. Commanche's conviction for assault with a deadly weapon the District Court properly admonished the jury, restricting the Rule 404(b) evidence to its proper use. In addition, the jury was instructed on the proper use of the Rule 404(b) evidence. However, the District Court failed to admonish the jury following the government presenting evidence of Mr. Commanche's second conviction for Assault with a Deadly Weapon.

Each time evidence is admitted under Rule 404(b) the District Court must give a limiting instruction:

If evidence is admitted solely under the authority of Rule 404(b) , the court must give a limiting instruction both at the time the evidence is admitted and in the general charge to minimize the danger that the jury might use the evidence as proof that the defendant acted in conformity with his past acts on the occasion for which he is being tried.

United States v. Rivera, 837 F.2d 906, 913 (10<sup>th</sup> Cir. 1988) (citing United States v. Brown, 770 F.2d 912, 914 (10<sup>th</sup> Cir. 1985), rev'd on other grounds, \_\_\_ U.S. \_\_\_,



107 S.Ct. 708, 93 L.Ed.2d 649 (1987); United States v. Merryman, 630 F.2d 780, 786 (10<sup>th</sup> Cir. 1980); United States v. Herbst, 565 F.2d 638, 642 (10<sup>th</sup> Cir. 1977)). See, United States v. Record, 873 F.2d 1363, 1373-74 (10<sup>th</sup> Cir. 1989).

In this case there was no safe guard to restrict the jury's use of the evidence of Mr. Commanche's conviction for Assault with a Deadly Weapon because no limiting instruction was given at the time the evidence was admitted. The District Court erred by not admonishing the jury and Mr. Commanche's conviction could rest on the jury's improper use of the Rule 404(b) evidence.

Rule 403 Balancing: The District Court found the prior convictions were more probative than prejudicial under the Rule 403 balancing test. The District Court found the similarity of the previous events and their proximity in time outweighed any prejudicial effect. (Att. E; Doc 53) Although the evidence had probative value, Mr. Commanche believes it was unfairly prejudicial. Unfair prejudice in the context of Rule 403 refers to the potential of some evidence "to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172 (1997) (citing 1. J. Weinstein, M. Berger, & J. Mclaughlin, Weinsteins's Evidence, § 403[03] 1996)). In this case the prejudice is clear that the jury could generalize from the convictions that Mr. Commanche's character and propensity was to commit

assaults with deadly weapons. Because there is a strong likelihood that Mr. Commanche was convicted on the basis of erroneously admitted evidence of bad acts, the Court should find that the District Court's errors were not harmless and reverse Mr. Commanche's convictions.

## **II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY PERMITTING THE GOVERNMENT TO CROSS-EXAMINE THE DEFENDANT BEYOND THE SCOPE OF RULE 609(a).**

Standard of Review: Issues concerning the scope of evidence rules present questions of law. Hernandez, 913 F.2d at 1512. Decisions to limit cross-examination of witnesses or to admit or exclude evidence are reviewed for abuse of discretion. Arney, 248 F.3d at 991. A district court abuses its discretion when it makes an error of law; an abuse of discretion standard includes review to determine whether the court's discretion was guided by erroneous legal conclusions. Koon, 581 U.S. at 100; Tan, 254 F.3d at 1207; Cherry, 217 F.3d at 814.

Mr. Commanche raised the issue in his Motion in Limine and argued the issue before evidence was presented at trial. At that time the District Court held Mr. Commanche's convictions were admissible both under Rule 609 and Rule 404(b). However, when the government cross-examined Mr. Commanche, defense counsel did not object to the questioning beyond the scope of Rule 609(a).

A pretrial motion in limine may preserve an objection where the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial ruling, and (3) is ruled upon without equivocation by the district court.

United States v. Nichols, 169 F.3d 1255, 1264 (10<sup>th</sup> Cir.), cert. denied, 528 U.S. 934 (1999); United States v. Mejia-Alarcon, 995 F.2d 982, 986 (10<sup>th</sup> Cir.), cert. denied, 510 U.S. 927 (1993). All three requirements are met in this case.

Defendant's Motion in Limine was argued and ruled upon prior to the government presenting evidence. The District Court ruled in its Memorandum Opinion and Order on the issue. Furthermore, improper questioning regarding a prior conviction is deemed so prejudicial that:

The rule that it is error to inquire about the details of prior criminal conduct is so well established that such error is cognizable despite the absence of any objection by defense counsel.

United States v. Hardey, 525 F.2d 84, 88-89 (7<sup>th</sup> Cir. 1975) (citing United States v. Dow, 457 F.2d 246, 250 (7<sup>th</sup> Cir. 1972); United States v. Mitchell, 427 F.2d 644, 647 (3<sup>rd</sup> Cir. 1970); United States v. Pennix, 313 F.2d 524, 531 (4<sup>th</sup> Cir. 1963)).

In its Memorandum Opinion and Order the District Court properly allowed Mr. Commanche's prior felony convictions to be used against him for impeachment purposes. As well, the jury was instructed to limit the Rule 609

evidence to its proper purpose. However, Mr. Commanche contends that the government's cross-examination exceeded the scope permissible under the rule.

Ordinarily the impeaching party is permitted to establish the name of the offense in question, the date of the conviction, and the sentence. In United States v. Albers, 93 F.3d 1469 (10<sup>th</sup> Cir. 1996), this Court recognized that Rule 609 ordinarily limits evidence of prior convictions to the fact of a conviction, its general nature, and punishment. Id. at 1480 (citing United States v. Wolfe, 561 F.2d 1376, 1381 (10<sup>th</sup> Cir. 1977)). The scope of the examination is limited and the government exceeded those limits when it asked Mr. Commanche to compare the box cutter used in his prior case to the one used in this case. The government then asked him to identify the actual box cutter from his other case and placed the box cutter into evidence in this case. This questioning clearly exceeds the limits placed on impeachment under Rule 609. Because the government's questioning exceeded the proper use of the rule, the jury may have considered the evidence for the improper purpose of convicting Mr. Commanche, rather than to call into question his credibility.

**III. CONSIDERED CUMULATIVELY, THE DISTRICT COURT'S ERRORS IN THIS CASE WERE NOT HARMLESS.**

Standard of Review: This Court reviews allegations of cumulative error under the harmless error standard. United States v. Hernandez-Muniz, 170 F.3d

1007, 1013 (10<sup>th</sup> Cir. 1999). “Cumulative error occurs where there are two or more actual errors. Moore v. Gibson, 195 F.3d 1152, 1175 (10<sup>th</sup> Cir. 1999)(internal quotations and citations omitted), cert. denied, 530 U.S. 1208 (2000).

Even if this Court holds the District Court’s errors in this case were individually harmless, their cumulative nature necessitates a new trial. Given Mr. Commanche raising self-defense, and the probability that the Rule 404(b) and Rule 609 evidence contributed to convicting Mr. Commanche, the errors are therefore not harmless.

### **CONCLUSION AND REMEDY SOUGHT**

For the reasons stated above, Defendant-Appellant, Bryan Commanche requests that this Court reverse his convictions and remand this case to the District Court for further proceedings.

### **REQUEST FOR ORAL ARGUMENT**

Appellant desires oral argument. Oral argument is necessary to clarify the issue of whether Rule 404(b) evidence related to intent is admissible when a defendant raises self-defense.

Respectfully Submitted,

/s/ Electronic Signature

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## CERTIFICATE OF SERVICE

I, P. Jeffery Jones, certify that the original and seven copies were sent by United States Express mail, overnight, and digitally via e-mail, to the Clerk of the Court of Appeals for the Tenth Circuit, Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado, 80257, [esubmission@ca10.uscourts.gov](mailto:esubmission@ca10.uscourts.gov), and submitted digitally via e-mail to Assistant United States Attorney David N. Williams, at [David.Williams4@usdoj.gov](mailto:David.Williams4@usdoj.gov), this 11<sup>th</sup> day of February, 2009.

/s/ Electronic Signature

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