No. 10-10318

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSEPH SILVA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF BAIL / DETENTION STATUS

Defendant Joseph Silva was sentenced on July 1, 2010, to 18 months' imprisonment. Pursuant to Circuit Rule 28-2.4, I state that, according to the Federal Bureau of Prisons inmate locator database, defendant Joseph Silva is currently confined and has an actual or projected release date of January 18, 2012.

s/ Angela M. Miller
ANGELA M. MILLER
Attorney

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

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JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a criminal case. The court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant on July 1, 2010. Defendant is considered to have filed a timely notice of appeal that same date.[1] This Court has jurisdiction under 28 U.S.C. 1291.

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[1] Defendant originally filed his notice of appeal on June 29, 2010. Pursuant to Federal Rule of Appellate Procedure 4(b)(2), a notice of appeal that is filed after the court announces a sentence but before the entry of judgment is "treated as filed on the date of and after the entry" of the judgment from which the defendant appeals.

(continued…)

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by admitting evidence of other acts by defendant, pursuant to Federal Rule of Evidence 404(b), to establish defendant's motive and intent.

2. Whether the district court abused its discretion by refusing to admit evidence of the prior state court proceeding against defendant, which was based upon the same conduct that gave rise to the federal charges.

STATEMENT OF THE CASE

On October 22, 2009, a federal grand jury returned a 2-count superseding indictment charging Joseph Silva and his wife, Georgia, with violating federal law. E.R. 1-4.[2] The indictment charged the Silvas with two counts of interfering with a victim's federally protected activities on account of the victim's race, causing bodily injury, in violation of 18 U.S.C. 245(b)(2)(B).[3]

Before trial, the government filed notice of its intent to introduce eight "other

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(... continued)
Fed. R. App. P. 4(b)(2).

[2] Citations to "E.R. __" refer to pages in appellant's Excerpts of Record filed with appellant's opening brief. Citations to "S.E.R. __" refer to pages in appellee's Supplemental Excerpts of Record filed with this brief. Citations to "J. Silva Br. __" refer to pages in appellant's opening brief.

[3] Count 1 was based upon defendants' actions toward Vishal Wadhwa; Count 2 was based upon defendants' actions toward Ayesha Mathews. E.R. 1-2.

crimes, wrongs and acts" by defendants as evidence of their "motive, intent, preparation, plan, and absence of mistake or accident in connection with the charged offenses," pursuant to Rule 404(b) of the Federal Rules of Evidence. E.R. 5-8. Defendants filed a joint motion to preclude the admission of that evidence. E.R. 17-21. The district court held a hearing on March 8, 2010, to consider the parties' arguments, E.R. 22-37, and ruled that the government could introduce three of the eight incidents identified in the government's motion, E.R. 36-37.[4] At trial, the government introduced evidence of just two of the incidents.

The government also filed, before trial, a motion *in limine* to exclude evidence of defendants' state court proceedings, including their pleas of *nolo contendere*, which resulted from the same conduct that gave rise to their federal prosecution. E.R. 9-14. Defendants jointly opposed the motion. E.R. 15-16. After hearing argument from the parties, E.R. 38-41, the district court granted the government's motion, E.R. 41.

The trial began on March 9, 2010. On March 11, 2010, the jury found defendants guilty on count one and not guilty on count two. S.E.R. 90. The district court sentenced both defendants to 18 months' imprisonment. E.R. 76-81;

[4] The government informed the district court during the hearing that it did not intend to introduce one of the eight incidents set forth in its motion. E.R. 26.

S.E.R. 93-99. This appeal followed. E.R. 75.

STATEMENT OF FACTS

The July 14, 2007 Incident

In the early evening of July 14, 2007, Vishal Wadhwa, his fiancée, Ayesha Mathews, and Mathews's cousin, Marianna Abraham, visited El Dorado Beach in South Lake Tahoe, California. S.E.R. 4-5, 18-19, 33-34. Wadhwa, Mathews and Abraham are of Indian descent. S.E.R. 4, 16-17, 32-33. Wadhwa and Abraham are United States citizens, S.E.R. 4, 32; Mathews holds a green card, S.E.R. 17.

The three accessed the beach via stairs that led from a grassy area near the parking lot to the beach below. S.E.R. 6-7, 21, 36. Mathews and Abraham walked along the beach near the water, while Wadhwa, who was talking on his cell phone, remained near the stairs. S.E.R. 7, 20, 35-36.

As Mathews and Abraham began walking back toward the stairs to leave, they passed by Georgia and Joseph Silva, who were sitting on the beach. S.E.R. 7-10. Georgia called Mathews and Abraham "Indian sluts." S.E.R. 8, 22-23. As Mathews and Abraham continued walking toward the stairs, they heard Georgia say "fat Indian asses" or "fat asses." S.E.R. 11, 24. When the two women reached Wadhwa, they told him what happened. S.E.R. 11, 25.

Wadhwa approached the Silvas to ask them why they had verbally attacked

Mathews and Abraham. S.E.R. 11, 26, 37-39. The Silvas immediately stood up, S.E.R. 39-40, and became "aggressive really fast," S.E.R. 11. The Silvas mocked Wadhwa's accent, S.E.R. 11, 40-41, and Joseph called Wadhwa an "Indian fuck," S.E.R. 11, "Indian piece of shit," S.E.R. 40; see also S.E.R. 27, and "Arab asshole," S.E.R. 27, in an aggressive tone, S.E.R. 27. Joseph also told Wadhwa: "I'm gonna take you down." S.E.R. 40. Georgia called Wadhwa, Mathews and Abraham "relatives of Osama bin Laden," and told them to "get out of this country." S.E.R. 40; see also S.E.R. 11, 27. Wadhwa told the Silvas he was going to call the police, to which Georgia responded: "Yes, go ahead and call the American cops." S.E.R. 40.

Wadhwa called 911 because he felt "threatened." S.E.R. 41. He walked away from the Silvas and headed up the stairs to provide the police with his specific location, S.E.R. 43; Mathews and Abraham followed behind him, S.E.R. 43; see also S.E.R. 12, 27. The Silvas followed the group up the stairs. S.E.R. 13, 28.

When the Silvas reached the grassy area at the top of the stairs, Wadhwa was still on the phone with the police. S.E.R. 29. Georgia appeared to intentionally bump into Wadhwa and say "oops."[5] S.E.R. 13, 29, 44. Georgia told Mathews

[5] Wadhwa's call to 911, which was played for the jury, includes Georgia in the background saying "oops," and Joseph calling Wadhwa an "Indian piece of

(continued…)

and Wadhwa to "go back where you came from," S.E.R. 54; see also S.E.R. 58-59, and began hitting Mathews and Wadhwa with sandals she had been carrying,[6] S.E.R. 13, 29, 45. During this assault, both Georgia and Joseph continued to utter racial slurs, S.E.R. 13, 46, and Joseph threatened to "take [Wadhwa] down," S.E.R. 46.

Georgia then ran toward Wadhwa and "kind of plowed him to the ground." S.E.R. 13, 47. As Georgia and Wadhwa were on the ground "flailing * * * at each other," S.E.R. 60, Joseph approached Wadhwa and kicked him in the face, S.E.R. 14, 30, 48, 55, 61, 68-69, 74, breaking Wadhwa's cheekbone, S.E.R. 64.

Bystanders were eventually able to separate Georgia and Wadhwa. S.E.R. 15, 31, 49. One bystander, who is of Indian descent, S.E.R. 73, overheard Georgia say "fucking Hindus" as he was trying to separate her from Wadhwa, S.E.R. 75. Once separated, Georgia continued to move toward Wadhwa. S.E.R. 76. That same bystander stepped in to keep Georgia from Wadhwa. S.E.R. 76. As he did so, Georgia told him: "You must be Chinese. You seem like a nice person."

(... continued)
crap." S.E.R. 42-43.

[6] This incident, to the extent it was directed at Mathews, formed the basis of Count 2 of the indictment. See E.R. 2. Both Georgia and Joseph were acquitted on Count 2.

S.E.R. 76. Several eyewitnesses testified under cross-examination that the Silvas appeared to be intoxicated. S.E.R. 56-57, 63, 77, 78.

Police and paramedics arrived soon thereafter. S.E.R. 15, 31, 50, 55, 66-67, 72. As Wadhwa was led to the ambulance, Georgia called Wadhwa a terrorist and again told him to "get out of this country." S.E.R. 50; see also S.E.R. 62.

Joseph initially told a police officer that his wife had been in a fight with Wadhwa and that he (Joseph) had to protect her. S.E.R. 79. Joseph denied participating in the fight. S.E.R. 79. Joseph eventually admitted hitting Wadhwa, but explained to the police officer that he did so only after Wadhwa hit him. S.E.R. 80. After interviewing additional witnesses, the officer returned to Joseph, who spontaneously told the officer: "Those fucking Indians are liars. We did nothing wrong." S.E.R. 81. When the officer told Joseph that he had spoken with other witnesses who had seen the incident, Joseph responded: "Yeah, well, they're all probably fucking Indian." S.E.R. 81-82.

"Other Act" Evidence

Pursuant to Federal Rule of Evidence 404(b), the government introduced evidence of two incidents to establish the Silvas' motive and intent at the time of the offense against Wadhwa. Tanvir Hussain testified that he and his wife were walking down the stairs from the grassy area to the beach at the same time the Silvas

were climbing up the stairs. E.R. 43. Hussain, who is a United States citizen, is of Indian descent, E.R. 42-43; his wife was dressed in a traditional Indian sari, E.R. 43. As Hussain walked down the stairs, he noticed Georgia Silva, whom he described as "drunk," coming up the stairs. E.R. 43-44. Georgia spit at Hussain and called him a "fucking Indian" as they passed each other on the stairs. E.R. 44; see also S.E.R. 28, 70-71.

The government also introduced testimony from the Silvas' next-door neighbors about a similar incident that occurred in 2005. Ashley Kelly testified that in October 2005, when she was approximately 17 years old, she pulled up in front of her house with her boyfriend. E.R. 53. Kelly, who is of Mexican and Italian descent, noticed Joseph looking at them "strangely." E.R. 53. Joseph told Kelly and her boyfriend that he had "a fucking problem." E.R. 54. Kelly went inside her house to get her stepfather, Gregory Parnow. E.R. 54. When Kelly and Parnow came outside, Joseph was holding a baseball bat, E.R. 54, 64, and was arguing with Kelly's boyfriend, E.R. 64. Parnow asked Joseph what his "problem" was, E.R. 64, to which Joseph responded: "I have a problem with this fucking beaner right here,"[7] E.R. 65. Parnow attempted to diffuse the situation; Joseph, however,

[7] Both Kelly and Parnow testified that they considered the term "beaner" to be a derogatory reference to people of Mexican descent. E.R. 54-55, 66.

continued to refer to Kelly, as well as Parnow's wife, as "beaner[s]." E.R. 65. The two men began arguing, and Joseph hit Parnow in the side of the neck with the baseball bat. E.R. 55, 66. Parnow was able to get the bat away from Joseph, but the two men continued to fight until shortly before police arrived. E.R. 56, 67-70.

On cross-examination, Parnow acknowledged that the origin of the problem between his family and the Silvas was the number of cats the Silvas have and the number of cars they have parked in front of their house. E.R. 71. Parnow also testified that the Silvas are often intoxicated, and that Joseph was intoxicated the night of the October 2005 incident. E.R. 73-74.

SUMMARY OF THE ARGUMENT

1. The district court did not abuse its discretion in permitting the government to introduce "other act" evidence pursuant to Federal Rule of Evidence 404(b). Evidence of the specific incidents was introduced to establish defendant's motive and intent, and was relevant to demonstrate defendant's racial animosity. This Court and others have held that evidence of prior racially-charged incidents is relevant to establish a defendant's motive and intent where, as here, the government must prove that the defendant took his actions "because of" the race of the victim. Both incidents were recent enough in time to support their intended purpose, and sufficient evidence supported each incident. Moreover, each incident was

sufficiently similar to the crime charged to warrant its admission. Finally, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice. The district court repeatedly instructed the jury that the "other act" evidence was only to be considered for the limited purpose of establishing defendant's motive and intent.

2. The district court did not abuse its discretion in excluding testimony about defendant's prior state court proceedings. First, defendant fails to show how his prior state court proceeding was relevant to any fact of consequence in the federal proceeding. Second, even if such evidence was relevant, any probative value that evidence might have had was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b)

A. Standard Of Review

This court reviews a district court's decision to admit evidence for an abuse of discretion. *United States v. Estrada*, 453 F.3d 1208, 1213 (9th Cir. 2006). This court reviews *de novo* whether evidence admitted pursuant to Rule 404(b) is relevant to the crime charged. *United States v. Jackson*, 84 F.3d 1154, 1158-1159 (9th Cir. 1996).

B. The District Court Properly Exercised Its Discretion In Admitting Defendant's "Other Acts" To Show Evidence Of His Motive And Intent

The district court properly exercised its discretion in admitting evidence of defendant's other acts pursuant to Rule 404(b). Rule 404(b) provides that 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." Fed. R. Evid. 404(b). Such evidence, however, may be admitted for other purposes, such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." *Ibid.*; see also *Huddleston v. United States*, 485 U.S. 681, 685 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to a

disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct."). Rule 404(b) is thus a "rule of inclusion." *United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995) (quotation marks omitted); see also *United States v. Calhoun*, 604 F.2d 1216, 1217 (9th Cir. 1979) (characterizing Rule 404(b) as "a so-called 'inclusionary' rule"). Such evidence is admissible unless it "tends to prove *only* criminal disposition." *United States v. Ayers*, 924 F.2d 1468, 1473 (9th Cir. 1991) (internal quotation marks and citation omitted); see also *Meling*, 47 F.3d at 1557 ("[E]vidence is admissible under Rule 404(b) if it is relevant to an issue in the case other than [the] defendant's criminal propensity.") (internal quotation marks and citation omitted). The government introduced two incidents pursuant to Rule 404(b): (1) Georgia Silva's spitting at Mr. Hussain, a man of Indian descent, and calling him a "fucking Indian" shortly before the attack on Vishal Wadhwa; and (2) Joseph Silva's verbal and physical attack on Gregory Parnow.

To determine whether other acts evidence was properly admitted, this Court considers whether the evidence (1) tends to prove a material point, (2) is not too remote in time, (3) is based upon sufficient evidence, and (4) is similar to the offense charged. *United States v. Banks*, 514 F.3d 959, 976 (9th Cir. 2008). Considering

all of these factors, both the incident involving Mr. Hussain and the incident involving Mr. Parnow was properly admitted.

First, the incidents were material because they are evidence of defendants' motive and intent. E.R. 6, 8, 26. To establish a felony conviction under 18 U.S.C. 245(b)(2)(B), the government must prove that a defendant acted *because of* the victim's "race, color, religion or national origin." 18 U.S.C. 245(b)(2). Courts – including this Court – have routinely held that evidence of past racial animosity is relevant when the government is required to establish that a crime was committed on account of a victim's race. For example, in *United States v. Skillman*, 922 F.2d 1370 (9th Cir. 1991), the government charged the defendant with intimidating a family on account of their race in the free exercise and enjoyment of their right to occupy a dwelling, in violation of 42 U.S.C. 3631, by burning a cross outside the family's home. The government argued that evidence the defendant had earlier sought to attend a "skinhead" picnic was relevant to show that the defendant's actions were committed on account of the "race" or "color" of his victims. See 42 U.S.C. 3631. This Court agreed, explaining that such evidence was relevant to establish the defendant's racial animus. *Skillman*, 922 F.2d at 1374. Other courts have reached similar conclusions. See, *e.g.*, *United States v. Seale*, 600 F.3d 473, 495 (5th Cir.) (holding, in prosecution for conspiracy to commit kidnapping, that

evidence of defendant's racial animus and membership in the KKK was relevant to show defendant's motive and intent and membership in the conspiracy, where co-conspirator's testimony made clear that victims were kidnapped because of their race), cert. denied, No. 09-11229, 2010 WL 2300603 (Oct. 4, 2010); *United States v. Woodlee*, 136 F.3d 1399, 1410 (10th Cir. 1998) (holding, in 18 U.S.C. 245(b)(2)(F) prosecution, that evidence of past racial animosity "falls squarely within the motive and intent purposes delineated in 404(b)"); *United States v. Dunnaway*, 88 F.3d 617, 618 (8th Cir. 1996) (holding, in 18 U.S.C. 245(b)(2)(B) prosecution, that evidence of defendant's status as a "skinhead" "did more than show [defendant's] bad character" at trial for attacking an African-American man in a park, because the crime involved "elements of racial hatred"); *United States v. Franklin*, 704 F.2d 1183, 1188 (10th Cir. 1983) (holding, in 18 U.S.C. 245(b)(2)(B) prosecution, that evidence defendant had previously sprayed an interracial couple with mace was relevant to defendant's motive at trial for killing two African-American men who were jogging with two Caucasian women).

Here, Georgia Silva's physical and verbal assault on Mr. Hussain was relevant to *both* defendants' motive and intent. The evidence clearly demonstrated that Georgia and Joseph were acting in concert on the day of the attack on Mr. Wadhwa, as they expressed a shared hostility for members of a minority race or

ethnicity. For example, witnesses testified that *both* defendants referenced Mr. Wadhwa's, Ms. Mathews's and Ms. Abraham's obvious race (or perceived ethnicity) when they became verbally aggressive and began hurling insults. S.E.R. 11, 27, 40. For this reason, it was not error for the district court to have admitted Georgia's conduct on the stairs as an "other act" of defendant.[8] Moreover, defendant's expressed racial animosity toward Mr. Parnow's family was directly relevant to show defendant's animosity toward racial minorities. See, *e.g.*, *Skillman*, 922 F.2d at 1374.

Second, neither incident was so remote in time as to render it irrelevant to the issue of defendant's motive and intent in the present case. *Banks*, 514 F.3d at 976. The incident on the stairs, where Georgia Silva spat at Mr. Hussain and called him a "fucking Indian," took place shortly after the verbal confrontation on the beach and mere minutes before the physical attack on Mr. Wadhwa. S.E.R. 27-29; E.R. 44-45.

The incident involving Mr. Parnow took place just two years before the attack

[8] Even if the district court erred in admitting the incident involving Mr. Hussain against defendant, the resulting error was harmless, as the evidence of defendant's racial animosity was overwhelming, and the district court instructed the jury to decide the case of each defendant "on each crime charged against that defendant separately." S.E.R. 88; see *United States v. Mayo*, 646 F.2d 369, 373 (9th Cir. 1981).

on Mr. Wadhwa. E.R. 53, 63. In *United States v. Estrada*, this Court noted that it had permitted 404(b) evidence to be admitted "where ten years or longer periods of time have passed." 453 F.3d 1208, 1213 (9th Cir. 2006) (citing *United States v. Martinez*, 182 F.3d 1107, 1110-1111 (9th Cir. 1999) (ten years); *United States v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989) (thirteen years); *United States v. Spillone*, 879 F.2d 514, 519 (9th Cir. 1989) (ten years)); see also *Banks*, 514 F.3d at 976 (explaining that an incident occurring four years before defendant's crime was "not remote in time"); *Franklin*, 704 F.2d at 1189 (holding that racially-motivated incident occurring four years before the racially-motivated incident giving rise to defendants' 18 U.S.C. 245(b)(2)(B) charge was not too remote to render previous incident irrelevant under 404(b)) .

Third, the other acts were supported by sufficient evidence. *Banks*, 514 F.3d at 976. In fact, defendant does not challenge the admission of the other acts evidence on this ground; nor could he. Both Mr. Hussain and Ms. Mathews described the incident on the stairs, S.E.R. 28; E.R. 44, and Ms. Mathews identified Georgia Silva at trial as the woman involved in that incident, S.E.R. 24. Both Ms. Kelly and Mr. Parnow described the incident outside their home, E.R. 53-56, 64-68, and both witnesses identified defendant at trial as the man involved in that incident, E.R. 55, 63.

Fourth, the other acts were sufficiently similar to the offense charged to be relevant to defendant's motive. *Banks*, 514 F.3d at 976. As the district court noted, the incident on the stairs was "a similar act that involves actually someone of Indian descent." E.R. 37. Indeed, the incident on the stairs, like the offense against Mr. Wadhwa, involved a physical assault and verbal attack on a person of Indian descent. As for the incident involving Mr. Parnow, defendant's attempt (J. Silva Br. 12) to distinguish it as a simple dispute among neighbors is unpersuasive. Animosity between defendant and his neighbor may have been building over time because of "illegally parked cars and the number of the [Silvas'] cats," J. Silva Br. 12, but the specific incident introduced at trial, like the offense against Mr. Wadhwa, involved a physical assault on a victim immediately following a verbal attack directed at the race and ethnicity of the victim's family. The incident involving Mr. Parnow is thus similar to the incident charged in the present case. The district court was therefore correct in ruling that the Parnow incident "seem[ed] similar enough to the act at issue in this case." E.R. 37.

In addition, the government introduced the incident involving Mr. Hussain for another purpose – as an act intrinsic to the crime itself. Thus, defendant's argument (J. Silva Br. 11) that it was error to admit this incident against him can be easily rejected. To be sure, it was Georgia Silva, and not defendant, who spat at Mr.

Hussain and called him a "fucking Indian." The government explained at the pre-trial hearing, however, that it included the act against Mr. Hussain in its Rule 404(b) motion "out of an abundance of caution." E.R. 26. The Court admitted the incident involving Mr. Hussain under Rule 404(b), reasoning that it was an incident that occurred "the same day" and was a "similar act" involving a victim of Indian descent. E.R. 37.

The evidence at trial made clear that the incident with Mr. Wadhwa began on the beach, continued as the Silvas followed him up the stairs, and concluded when they assaulted him on the grassy area at the top of the stairs. S.E.R. 28-29; E.R. 44-46. Thus, the incident on the stairs involving Mr. Hussain cannot be separated from the crime charged; doing so would have provided the jury with an incomplete narrative of the Silvas' actions during the events giving rise to the crime charged. This Court has previously held that evidence of prior bad acts may be admitted "for the purpose of providing the context in which the charged crime occurred." *United States v. Collins*, 90 F.3d 1420, 1428 (9th Cir. 1996). That is, "[e]vidence should not be treated as 'other crimes' evidence when 'the evidence concerning the ["other"] act and the evidence concerning the crime charged are inextricably intertwined.'" *United States v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994) (citation omitted). Evidence is considered "inextricably intertwined" if it "constitutes a part

of the transaction that serves as a basis for the criminal charge," or "was necessary to * * * permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime." *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012-1013 (9th Cir. 1995). Such was the case here.

Finally, the evidence's probative value was not substantially outweighed by the danger of unfair prejudice to defendant. See Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."). The Supreme Court has identified four factors that, when present, protect against unfair prejudice from other acts evidence: (1) whether the evidence is offered for a proper purpose, as it was here (*i.e.*, to establish defendant's motive and intent, see Fed. R. Evid. 404(b)); (2) whether the evidence is relevant to that purpose, as it was here, see, *e.g.*, *Skillman*, 922 F.2d at 1374; *Woodlee*, 136 F.3d at 1410; *Dunnaway*, 88 F.3d at 619; *Franklin*, 704 F.2d at 1188; *Seale*, 600 F.3d at 495; (3) whether the trial court weighed the evidence's probative value against its potential for unfair prejudice, as the trial court did here, see E.R. 36-37 (rejecting all but three of the eight incidents originally proposed by the government to be introduced pursuant to Rule 404(b)); and (4) whether the trial court provided the jury with a limiting instruction explaining that the other acts

evidence is to be considered only for the proper purpose for which it was admitted, as it did here, see *infra*. *Huddleston*, 485 U.S. at 691.

Immediately before Mr. Hussain testified, the district court gave the jury the following limiting instruction:

> Ladies and gentlemen, you're about to see and hear evidence offered for a limited purpose. The evidence is not part of the charges against the defendants in the indictment. The testimony of this witness is being offered for the limited purpose of proving the defendants' intent, motive, and willfulness in the offenses charged in this case. You may consider it only as it bears on the defendants' intent, [motive], and willfulness in the offenses charged in this case, and for no other purpose.

S.E.R. 65. The district court repeated this instruction immediately before Ms. Kelly testified, S.E.R. 83, and again before Mr. Parnow testified, S.E.R. 84. The district court also included a similar instruction in its final instructions to the jury. S.E.R. 89. The jury is presumed to follow the trial court's instructions. *United States v. Heredia*, 483 F.3d 913, 923 (9th Cir. 2007). Under these circumstances, the district court did not abuse its discretion in admitting the other act evidence pursuant to Rule 404(b).

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING EVIDENCE OF DEFENDANT'S PRIOR STATE COURT PROSECUTION

A. Standard Of Review

This Court reviews a district court's decision to admit or exclude evidence for abuse of discretion. *United States v. Chang Da Liu*, 538 F.3d 1078, 1085 (9th Cir. 2008). This Court will reverse a district court's decision to exclude evidence only if it is more likely than not that the error affected the verdict. *Ibid.*

B. The District Court Properly Excluded Evidence Of Defendant's Prior State Court Prosecution

The district court properly excluded evidence of defendant's prior *nolo contendere* plea to a state misdemeanor charge of battery and his resulting conviction and jail sentence. The district court correctly ruled that such evidence would likely "cause a whole lot of confusion among the jurors," and that it was not relevant to the federal prosecution. E.R. 39. The district court was also correct that admitting evidence of the Silvas' prior convictions "might encourage jury nullification" in the federal prosecution. E.R. 39.

To be admissible, evidence must be (1) relevant, and (2) not unduly prejudicial. See Fed. R. Evid. 401, 403. Evidence of appellant's state court prosecution is neither. First, Rule 401 defines relevant evidence as "evidence

having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Defendant, however, fails to explain why the fact he pleaded *nolo contendere* to a state misdemeanor battery charge is relevant to his federal prosecution for interfering with Mr. Wadhwa's federally protected activities. Rather, defendant merely states (J. Silva Br. 14) that an "accused may choose to introduce evidence of a prior prosecution and conviction." While perhaps true, defendant's bare assertion does nothing to establish the evidence's relevance.

Second, even assuming evidence of defendant's state court conviction is relevant, any probative value that evidence may have is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. For example, the jury may not understand that the law clearly permits a subsequent federal prosecution based upon the same acts that led to a state court conviction. See *Abbate v. United States*, 359 U.S. 187, 194-196 (1959). Moreover, the state statute to which defendant pleaded *nolo contendere* is substantially different from the federal statute at issue here. Defendant entered a plea to battery, which is defined as "any willful and unlawful use of force or violence upon the person of another." 8 Cal. Penal Code 242. That statute does not require

the government to prove that the victim was engaged in a federally protected activity, and certainly does not require the government to prove that the defendant acted because of the victim's race, as required by 18 U.S.C. 245(b)(2)(B). Given the different elements that apply to the two separate prosecutions, evidence relating to the state court conviction could have potentially misled the jury as to defendant's culpability on the federal charges. In addition, evidence of the state court conviction could have potentially led to jury nullification. If the jurors were aware of defendant's prior conviction and resulting jail sentence, they might be tempted to conclude that defendant's prior sentence vindicated the federal interest. Because the role of the federal jury was to assess the facts of the case and determine defendant's culpability on the *federal* charges as indicted, any consideration of the appropriateness or adequacy of the state court prosecution and punishment would have been improper. For these reasons, the risk of unfair prejudice and of confusing or misleading the jury substantially outweighed any probative value that the evidence of defendant's state court proceedings may have had.

This Court gives a district court "wide latitude" when it balances the prejudicial effect of proffered evidence against its probative value. *United States v. Spencer*, 1 F.3d 742, 744 (9th Cir. 1992) (citation omitted). The district court here did not abuse its broad discretion when excluding evidence of defendant's prior state

court conviction under Rule 403.

In an effort to bolster his argument, defendant points out (J. Silva Br. 13-14) that Rule 410, which prohibits admission *against a defendant* of a plea of *nolo contendere*, does not prohibit *a defendant* from introducing evidence of a state court plea in a subsequent federal trial. See Fed. R. Evid. 410. He further notes that a defendant may waive certain protections provided by procedural and evidentiary rules. See *United States v. Mezzanatto*, 513 U.S. 196, 201-203 (1995). Defendant, however, does not cite any case law directly addressing the question of whether a defendant may introduce evidence of his prior plea, conviction, or sentence.[9] And simply because Rule 410 does not *prohibit* a defendant from introducing evidence of his prior state court proceeding does not mean that such evidence *must* be admitted. As with any evidence a party proposes to introduce at trial, it must be relevant and

[9] The government is unaware of any case law directly addressing the issue. Several courts, however, have addressed the somewhat analogous question of whether a defendant may introduce evidence in a federal trial to prove that he was acquitted of the same charge in state court. The weight of authority in the federal courts of appeals is that evidence of a prior acquittal on state court charges is inadmissible in a subsequent federal prosecution because such evidence is irrelevant, hearsay, and otherwise inadmissible under Rule 403. See, *e.g.*, *United States v. Marrero-Ortiz*, 160 F.3d 768, 775 (1st Cir. 1998); *United States v. De La Rosa*, 171 F.3d 215, 219-220 (5th Cir. 1999); *United States v. Jones*, 808 F.2d 561, 566 (7th Cir. 1986); *Prince v. Lockhart*, 971 F.2d 118, 122 (8th Cir. 1992); *United States v. Thomas*, 114 F.3d 228, 249-250 (D.C. Cir. 1997); cf. *United States v. Irvin*, 787 F.2d 1506, 1516-1517 (11th Cir. 1986).

not unduly prejudicial. See Fed. R. Evid. 401, 403. As discussed *supra*, defendant's prior state court conviction is neither.

CONCLUSION

This Court should affirm defendant's conviction.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that *United States v. Georgia Silva,* No. 10-10330 (9th Cir.), is related to this appeal.

s/ Angela M. Miller
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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,411 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Angela M. Miller
ANGELA M. MILLER
Attorney

Dated: November 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Angela M. Miller
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