

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division—Misdemeanor Branch

UNITED STATES OF AMERICA

v.

DAVID ROSS
JOHN PARKER
JERE BROWER
ANDREW JOHNSON
WILLIAM LEARY

Defendants.

Case Nos.

2021 CMD 000167
2021 CMD 000171
2021 CMD 000182
2021 CMD 000191
2021 CMD 000194

Hon. Neal Kravitz

TRH: February 10, 2023

GOVERNMENT’S NOTICE OF INTENT TO
INTRODUCE EVIDENCE OF DEFENDANTS’ PRIOR BAD ACTS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby gives notice of its intent to introduce evidence under the principles espoused in *Johnson v. United States*, 683 A.2d 1087 (D.C. 1996) (*en banc*), *cert. denied*, 520 U.S. 1148 (1997), *Toliver v. United States*, 468 A.2d 958, 961 (D.C. 1983), and *Drew v. United States*, 118 U.S. D.C. 11, 14-16, 331 F.2d 85 (D.C. Cir. 1964).

BACKGROUND

On January 6, 2021, as a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election, members of a large crowd that had gathered outside forced entry into the U.S. Capitol, including by breaking windows and by assaulting members of law enforcement, as others in the crowd encouraged and assisted those acts. Scores of individuals entered the U.S. Capitol without authority to be there. As a result, the Joint Session and the entire official proceeding of the Congress was halted until the Capitol Police, the Metropolitan Police

Department, and other law enforcement agencies from the city and surrounding region were able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

Defendants Brower and Ross were among those who marched on the U.S. Capitol building and interrupted the certification of the 2020 election. As evidenced below, Defendant Brower and Ross marched onto the U.S. Capitol building during the period of time when the Capitol had been overrun by rioters.

Defendant Brower

Images from Defendant Brower's phone indicate that he was present on Capitol grounds and Capitol steps as protestors overwhelmed law enforcement and breached the building.





Additional images show Mr. Brower feet away from law enforcement as they attempted to clear rioters off of U.S. Capitol Grounds.





Defendant Ross

Images and videos from Defendant Ross' phone likewise reflect that he was present on the U.S. Capitol Building as rioters were physically present in the building.

In one video, Ross films as a line of law enforcement officers stand securing a stairway onto the Capitol building.



Individuals in the crowd around Mr. Ross scream at the law enforcement officers "SHAME," "DO WHAT YOU'RE TOLD" and "PUSSIES." Rioters are visible climbing on walls and scaffolding surrounding the Capitol building.

In another video, Defendant Ross appears to be walking toward the Western Terrace with tear gas visibly deployed in front of him.



Defendant Ross comments to another protestor “flash bangs” in apparent reference to the deployment of flash bang grenades. Moments later an explosion is visible:



As the crowd around him reacts to the explosions, Ross shouts “FLASH BANGS DON’T HURT, PUSH BACK.” Defendant Ross later states to another rioter: “They forced us back out. We should just re-surround them and take it back. They can’t use lethal measures.” One rioter then turns to Defendant Ross and states “they say curfew is at 6PM.” Defendant Ross responds: “Good Luck.” Additional explosions are then visible as Defendant Ross comments on the deployment of tear gas.



As tear gas spreads through the area, Defendant Ross begins to walk away.

In another video, Defendant Ross stands in front of a different Capitol terrace.



As a law enforcement officer aims what appears to be a tear gas launcher, Defendant Ross shouts “GO AHEAD, FUCKING FIRE.” Rioters around Mr. Ross can be seen throwing objects at the law enforcement officers. At one point Mr. Ross encourages a rioter to throw an object at law enforcement: “Fucking lob it at ‘em guy.”

Ultimately Defendants Brower and Ross were pushed off the Capitol Building, and moved by lines of law enforcement officers to the portion of Capitol Grounds on Pennsylvania Avenue between First and Third Street NW. As these officers moved rioters down the Grounds they shouted commands to move.

Once there, MPD issued three amplified warnings. The first warning sounded at 7:17 PM and stated: “You’re in violation of a curfew of the United States Capitol and the District of Columbia . . . You’re in violation of a curfew. If you do not leave the area you will be arrested. This is your first warning.” The second warning sounded at 7:18 PM and stated: “Attention,

attention . . . it is 19:18 hours, 7:18 PM. You're in violation of both the United States Capitol curfew and the city curfew effective at 1800 hours or 6:00 PM. If you do not leave you are subject to immediate arrest." The final warning sounded at 7:19 PM and stated: "This is your last and final warning. You're in violation of a curfew in the 100 Block of Pennsylvania Avenue NW. You are subject to immediate arrest if you do not disperse." Following these warnings, a line of National Guard troops began pushing forward with riot shields and MPD officers fanned through and around the crowd, directing them to leave. Defendants Brower, Leary, Parker, Ross, and Johnson failed to leave.

On January 7, 2021, each defendant was charged with Unlawful Entry (Public Property), in violation of 22 D.C. Code, Section 3302(b) and released on their own recognizance.

ARGUMENT

Other crimes evidence—commonly known as prior bad act evidence—can be of two different kinds: *Johnson* and *Drew* evidence. *Johnson* evidence is evidence that could theoretically support additional charges and is further: (1) direct and substantial proof of the charged crime, (2) closely intertwined with the evidence of the charged crime, or (3) necessary to place the charged crime in an understandable context. *Johnson*, 683 A.2d at 1101 (holding that evidence of killings of two boys within hour of the charged murder, with the same gun, was direct proof of the defendant's guilt of charged crime).

By contrast, *Drew* evidence is evidence of crimes independent of the charged crime. *Drew*, 331 F.2d at 90-91 (ruling joinder of robbery and attempted robbery charges was inappropriate where there was little factual similarity between the two crimes). *Drew* evidence is admissible when relevant to show (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) identity. *Drew*, 331 F.2d at 90. Before *Drew* evidence may

be admitted at trial, the Government generally must satisfy the following test: (1) there must be clear and convincing evidence linking the defendant to the other crimes; (2) the evidence must be logically relevant to an issue in the case, such as identity or intent, and not merely evidence of a “criminal propensity”; and, finally, (3) the probative value of the evidence must not be substantially outweighed by its potential for undue prejudice.

**I. DEFENDANTS’ STORMING OF THE U.S. CAPITOL IS ADMISSIBLE
JOHNSON EVIDENCE.**

Evidence concerning Defendants’ storming of the U.S. Capitol prior to their arrests is admissible under *Johnson*. That is, the limitations of *Drew* do not apply here. In *Johnson*, the D.C. Court of Appeals articulated three situations in which *Drew*’s bar on other crimes evidence did not apply. See 683 A.2d at 1096. *First*, *Drew* does not apply where evidence of other bad acts “is direct and substantial proof of the charged crime.” *Id.* at 1098. *Second*, *Drew* only applies where two offenses are actually independent of each other. *Id.* Where two offenses are “inextricably intertwined,” *Drew* does not apply. *Id.* at 1097 (quoting *Lee v. United States*, 471 A.2d 683, 686 (D.C. 1984)). Indeed, as the *Drew* court expressly noted, when “the two crimes arose out of a continuing transaction or the same set of events” the danger of admitting evidence of both in one trial is minimal. 331 F.2d at 90. *Third*, *Drew* does not apply when evidence is offered “to explain the immediate circumstances surrounding the offense charged.” *Johnson*, 683 A.2d at 1097-1098. This non-*Drew* category applies to “events so closely related to the charged offense in time and place that they are necessary to complete the story of the crime . . . by placing it in context of nearby and nearly contemporaneous happenings.” *Id.* at 1098 (internal quotations and citations omitted). The offenses at issue qualify under all three *Johnson* categories.

First, evidence that each of these defendants marched on the U.S. Capitol “is direct and substantial proof” of the charge Unlawful Entry (Public Property). Specifically, this evidence is relevant to the intent element of this offense, which requires that the Government prove that each defendant knew or should have known that they were remaining against the will of the person lawfully in charge of U.S. Capitol Grounds. Evidence that these individuals directly observed the violent assault on the U.S. Capitol, including as officers attempted to push back the violent mob, is relevant to their knowledge that they should not have remained on U.S. Capitol Grounds. Additionally, the fact that these individuals observed or experienced the efforts law enforcement officers took to drive rioters off the Capitol including amplified warnings, the deployment of chemical spray and tear gas, and the use of force, would put an individual on notice that their presence was against the will of the individual lawfully in charge of property.

This evidence is also relevant to proving that these defendants lacked lawful authority to remain on U.S. Capitol Grounds. *See, e.g., Carson v. United States*, 419 A.2d 996, 998 (D.C. 1980) (“If the evidence at trial does not establish a defendant’s lack of lawful authority apart from an officer’s instruction that he must leave the public area, the evidence is insufficient and the conviction will be reversed.”) Courts have referred to this requirement as an “additional specific factor.” *Hasty* 669 A.2d at 135 (emphasis added). Here, the Government intends to rely on the overlapping D.C. Capitol Board order closing Capitol Grounds from 6:00 PM on January 6, 2021 to 6:00 AM on January 22, 2021, and Mayor Bowser’s curfew from 6:00 PM on January 6, 2021 until 6:00 am on January 7, 2021. Both orders were put in place to deal with the violent and unprecedented breach of the U.S. Capitol Building which interrupted the certification of the 2020 election and caused Congressional business to be interrupted. Specifically, these orders were put in place to allow law enforcement to secure and regain control of Capitol Buildings and

Grounds so that Congressional business could resume. The proffered evidence—which includes images of rioters including Defendants Brower and Ross on the U.S. Capitol Building—makes the purpose of these orders clear.

Second, Drew does not apply, because Defendants’ storming of the U.S. Capitol and later presence on Capitol Grounds “arose out of a continuing transaction or the same set of events.” *Drew*, 331 F.2d at 90. Here, their presence on Pennsylvania Avenue at 7:17 PM was the culmination of their march on the U.S. Capitol. These defendants never left U.S. Capitol Grounds from the moment they entered them until their arrest on U.S. Capitol Grounds. Evidence of their presence on the U.S. Capitol Building flows naturally into evidence that they were pushed down the grounds by law enforcement officers, and ultimately arrested on U.S. Capitol Grounds. Because these offenses arose out of a continuing transaction and the same events, *Drew* does not apply.

Third, Drew does not apply because the evidence is offered “to explain the immediate circumstances surrounding the offense charged.” *Johnson*, 683 A.2d at 1097-1098. Evidence of defendants’ entry onto U.S. Capitol Grounds and remaining there during the violent assault on the U.S. Capitol place their presence at the time of their arrest in understandable context. It explains how these individuals came to be there, why they decided to go there, and why they decided to remain there. Their presence on U.S. Capitol Grounds at the time of their arrest arose directly from their earlier entry onto U.S. Capitol Grounds and can only properly be understood in that context.

II. EVEN IF *DREW* APPLIED, THE STORMING OF THE U.S. CAPITOL BUILDING IS RELEVANT TO MOTIVE, INTENT, AND IDENTITY.

Even if *Drew* applied to the transaction at issue here, evidence of these transactions meets long-established *Drew* exceptions. That is, evidence of the Defendants’ storming of the U.S.

Capitol Building is offered for a “substantial, legitimate purpose”—specifically, as proof of knowledge, motive, and intent—and its probative value is not substantially outweighed by potential prejudice. *See Drew*, 331 F.2d at 90.

As discussed above, the fact that each of these defendants entered U.S. Capitol Grounds and stormed the U.S. Capitol Building—observing as the violent mob pulled down barriers, pushed through and assaulted law enforcement officers, and as tear gas and chemical spray was deployed—would put any reasonable person on notice that their presence was unwanted. The warnings these individuals would have received from officers as well as amplified warnings broadcast around the U.S. Capitol Building provided further notice. The fact that these defendants remained despite these clear signals to leave indicates that their intent was to remain regardless of any lawful order to disperse. And, as noted above, it is also relevant to proving the additional specific factor necessary to sustain a conviction for Unlawful Entry.

Clear and convincing evidence places these defendants on the U.S. Capitol Building earlier in the day. Videos, photos, and text messages from their phones make it clear that these individuals stormed the U.S. Capitol on January 6, 2021. In addition to the fact that these videos and photos came from their own phones, they can be matched to these images and videos based on their appearance and the sound of their voices.

Finally, the probative value of this evidence is not substantially outweighed by its potential for undue prejudice. The probative value of this evidence is significant. It is strongly indicative of these defendants’ intent, motive, and knowledge. And any prejudice can be dealt with by appropriate limiting instructions from the Court.

CONCLUSION

For all of the foregoing reasons, evidence related to Defendants’ storming of the U.S.

Capitol prior to their arrest on U.S. Capitol Grounds should be admissible during the Government's case-in-chief.

Respectfully submitted,

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