

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA)	
)	
v.)	CRIMINAL NO: 00-10-B-S
)	
JONATHAN BLUMBERG,)	
)	
Defendant)	
)	

ORDER ON DEFENDANT’S POST-TRIAL MOTION

Following a jury verdict finding Defendant Jonathan Blumberg (“Defendant”) guilty of three counts of making interstate threatening communications, Defendant filed a motion seeking a judgment of acquittal pursuant to Fed. R. Crim P. 29 (c) and a new trial pursuant to Fed. R. Crim P. 33. (Def.’s Mot. for Acquittal and for New Trial (Docket #43).) For the reasons laid out below, the Court DENIES Defendant’s Motion.

As the basis for his motion, Defendant argues that this Court made repeated errors in its handling of his case. Specifically, Defendant alleges errors in the jury instructions and evidentiary rulings. Defendant also claims that his pretrial motion to dismiss for vindictive prosecution was improperly denied. Additionally, Defendant alleges prosecutorial misconduct as well as juror misconduct. The Court addresses each of these allegations in turn.

- I. The Jury Instructions
- A. Failure to Define Reasonable Doubt

Assuming for the moment that Defendant did, in fact, object to the Court’s failure to define “reasonable doubt” for the jury, the Supreme Court has ruled that “the

Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.” Victor v. Nebraska, 511 U.S. 1, 5 (1994). In this case, neither the Defendant nor the Government proposed a definition of reasonable doubt for the Court to use in its charge to the jury. In the absence of any such requested instruction, the Court instructed the jury, in relevant part, that:

It is a cardinal principle of our system of justice that every person accused of a crime is presumed to be innocent unless and until guilt is established beyond a reasonable doubt. The presumption is not a mere formality. It is a matter of the most important substance. The Defendant before you, Mr. Blumberg, has the benefit of that presumption throughout the trial and you are not to convict the Defendant unless you are persuaded of his guilt beyond a reasonable doubt.

The presumption of innocence until proven guilty beyond a reasonable doubt means that the burden of proof is always on the Government to satisfy you that the Defendant is guilty of the crime with which he is charged, beyond a reasonable doubt. This burden never shifts to the Defendant. It is always the Government’s burden to prove each of the elements of the crimes charged beyond a reasonable doubt by the evidence and the reasonable inferences to be drawn from that evidence. The Defendant has the right to rely upon the failure or inability of the Government to establish beyond a reasonable doubt any essential element of the crimes charged against him.

As I have previously indicated, the Government has the burden of proving the Defendant’s guilt beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the Government’s proof is subject to a higher standard. It must be beyond a reasonable doubt.

The Court’s decision not to offer any further definition of reasonable doubt, even after the Government noted the absence of such a definition at side bar, reflected the Court’s awareness of the First Circuit’s repeated suggestions that reasonable doubt “does not easily lend itself to refinement or definition.” United States v. Vavlitis, 9 F.3d 206, 212 (1st Cir. 1993); see also First Circuit Pattern Jury Instructions: Criminal § 3.02 cmts. (1)-(3) (1998). Nonetheless, taken as a whole, the instruction given, along with the

Court's other references to reasonable doubt throughout its charge to the jury, correctly conveyed the concept and importance of reasonable doubt to the jury. See Victor, 511 U.S. at 5.

B. Failure to Instruct Jury to Consider Each Count Separately

In his motion, Defendant also claims that the Court did not properly instruct the jury to consider each count separately. First, the Court notes that Defendant did not request such an instruction at any time nor did the Defendant object to the lack of instruction on this subject prior to the jury's deliberations.

In relevant part, the Court did instruct the jury:

The Government charges Mr. Blumberg with three separate incidents of transmitting interstate threatening communications. . . . In order to convict, you must find that the Government has proven each of the[] elements beyond a reasonable doubt for each count of the indictment.

You must agree unanimously in you conclusion that either Mr. Blumberg is guilty or not guilty on each count of the indictment.

In addition to these instructions, the Court went over the verdict form provided to the jury. The verdict form listed each of the counts separately and required the foreperson to write either guilty or not guilty for each of the three counts.

Consequently, the Court concludes that it did adequately charge the jury to consider the counts separately and further finds that the Defendant waived this objection by not raising it during trial.

C. Failure to Properly Define "Threat" in the Jury Instructions

Defendant also argues that the Court should have instructed the jury that "conditional threats are not threats." (Def. Mot. for Acquittal and for New Trial at 3 (Docket #43).) Defendant suggests that if the Court had given such an instruction, the

jury would have concluded that Mr. Blumberg's statements were "general statements in the context of expression explaining his situation and not [threats]." (Id.)

At trial, Defendant proposed a variety of instructions relating to the definition of "threat." For example, Defendant proposed that the following language be included in the charge:

When words are used because of mistake, inadvertence or other innocent reasons, such words are not threats even when conveyed with the apparent intent to injure.

The threat must be a true threat and not idle talk or gesture. True threat means a serious and real threat as distinguished from words such as a mere political argument, idle talk or jest.

The threat is a serious expression of intent to inflict injury and not merely a vehement or emotional outburst, a political opinion, hyperbole or argument against government or school officials.

(Def.'s Proposed Jury Instructions 1-3.)

The Court ultimately instructed the jury that:

A "threat" is a serious statement expressing an intent to inflict bodily harm on someone, which under the circumstances would cause apprehension in a reasonable person. A threat is more than mere idle or careless talk, exaggeration, or something said in a joking manner.

Whether a communication is a "threat" is determined objectively by you, as the jury, from all of the surrounding facts and circumstances. This means you should consider the statement in light of its entire factual context, including the surrounding events, reactions of the listener, and the manner and tone in which it is made. In order to convict the Defendant for making a threat, you must find, based on the evidence, that the Defendant should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it was made.

This definition of "threat" allowed the jury to consider Mr. Blumberg's statements in context and incorporated the definition of threat endorsed by the First Circuit. See United States v. Freeman, 176 F.3d 575, 578 (1st Cir. 1999); United States v. Whiffen, 121 F.3d 18, 21, 23-24 (1st Cir. 1997); United States v. Fulmer, 108 F.3d 1486, 1491-95

(1st Cir. 1997). Therefore, the Court finds that Defendant's objection regarding the definition of "threat" is without merit.

D. Allowing the Indictment to Go to the Jury

Although the Defendant did not raise his objection at trial, Defendant now argues that the Court erred in allowing the indictment to go to the jury. Because the indictment included the dates and phone calls that served as the factual basis for each count, the Court allowed the indictment to go to the jury to assist in the separate consideration of each count. However, the Court specifically warned the jury that:

The indictment is not evidence. This case, like most criminal cases, began with an indictment. You will have that indictment before you in the course of your deliberations in the jury room. That indictment was returned by a grand jury, which heard only the Government's side of the case. I caution you, as I have before, that the fact that this Defendant had an indictment filed against him is no evidence whatsoever of his guilt. It is the means by which the allegations and charges of the Government are brought before this Court. The indictment proves nothing.

With this covering instruction, it was within the Court's discretion to give the indictment to the jury to assist them in their deliberations. See United States v. Medina, 761 F.2d 12, 21 (1st Cir. 1985).

II. The Evidentiary Rulings

A. The Redacted Criminal Complaint (Gov't Ex. 3)

During the trial, Special Agent Merkle Dennison, who arrested Mr. Blumberg on March 10, 2000, testified. Specifically, Agent Dennison testified that Mr. Blumberg was shown the criminal complaint following his arrest. She went on to testify Mr. Blumberg was read his Miranda rights, waived them and stated that the statements attributed to him

in the criminal complaint were accurate. In this context, the criminal complaint containing those statements was both relevant and probative.¹

In order to minimize any prejudicial effect, the Court ordered that statements allegedly made by the Defendant, which did not serve as part of the basis for the indictment, be redacted from the complaint. With these redactions, the probative value of the criminal complaint outweighed any prejudicial effect. See F.R.E. 403.

B. Statements Made by Defendant During Custodial Interrogation

Defendant also repeats his argument that his statements to Special Agent Dennison should have been excluded because they were the product of improper custodial interrogation. Defendant previously raised this argument in his pre-trial Motion to Suppress Statements (Docket #14). This motion was referred to the Magistrate Judge who, after an evidentiary hearing, filed a recommended decision denying the motion. (See Recommended Decision on Def.'s Mot. to Suppress Statements (May 15, 2000) (Docket #21).) After conducting a de novo review, the Court affirmed the Magistrate's conclusion that Mr. Blumberg did not invoke his right to counsel by requesting to speak with Mr. Emery, an assistant U.S. Attorney who had dealt with Mr. Blumberg on a separate civil case. (See Order Affirming Recommended Decision of the Magistrate Judge (June 22, 2000) (Docket #28).) Because the Court concluded that Mr. Blumberg did not invoke his right to counsel, Special Agent Dennison's questioning of Blumberg after he signed a written waiver of his Miranda rights did not violate his constitutional rights. Therefore, Mr. Blumberg's statements during the questioning were admissible.

¹ Defendant argues that "[w]hen the jury requested a readback of the testimony of Merkle Dennison improper weight was given to Government's exhibit #3." (Def.'s Mot. for Acquittal and for New Trial at 4.) The Court declines to speculate as to why the jury requested the readback of the testimony or what weight it was given. Regardless, the jury, as the finder of fact was entitled to give this testimony whatever weight it deemed appropriate.

The Court hereby incorporates the discussion found in the Recommended Decision and the Court's Order Affirming the Recommended Decision and concludes that Defendant's objection to the admission of statements made by Mr. Blumberg during custodial interrogation is without merit.

III. Denial of Motion to Dismiss

Similarly, Defendant argues that his pre-trial Motion to Dismiss for selective and vindictive prosecution (Docket #13) was improperly denied. This Motion was considered along with Defendant's Motion to Suppress (Docket #14). The Recommended Decision (Docket # 22), which was affirmed by the Court after de novo review (Docket # 28), adequately addresses the grounds for denying Defendant's Motion to Dismiss and the Court hereby incorporates that discussion as the basis for finding that the denial of Defendant's Motion to Dismiss was proper.

IV. Prosecutorial Misconduct

The Court interprets Defendant's Motion as raising two separate allegations of prosecutorial misconduct. First, Defendant claims the Government violated Brady v. Maryland, 373 U.S. 83 (1963), by not disclosing "evidence fundamentally necessary to prove the selective/vindictive prosecution and investigation." (Def.'s Mot. for Acquittal and for New Trial at 2.) Second, Defendant argues the Government violated the Jencks Act by failing to provide the Defendant with prior statements of government witnesses that the government had in its possession and related to the subject matter of the witness's testimony. See 18 U.S.C. § 3500(b).

As to the first allegation, the Court previously determined that Defendant had not demonstrated a discriminatory effect or a discriminatory purpose to support his claim of

selective prosecution. (See Recommended Decision on Def.’s Mot. to Dismiss at 4 (May 15, 2000) (Docket #22) (adopted by the Court after de novo review on June 22, 2000 (Docket #28).) The Court also determined that Defendant had failed to allege facts that raised the likelihood of vindictiveness as is necessary to justify an evidentiary hearing on a claim of vindictive prosecution. (See id. at 5.)

Notwithstanding these determinations that Defendant failed to meet his burden to go forward on these claims and assuming, for the moment, that the Government knew when it responded to Defendant’s request for Brady materials that Defendant was investigating the possibility of selective or vindictive prosecution, Brady does not require the Government to produce materials involving matters of prosecutorial discretion. Brady only applies to evidence that is “material either to guilt or to punishment.” Id. at 104. Evidence suggesting that the decision to prosecute a given defendant was selective or vindictive is collateral and, thus, is not material to the defendant’s guilt and does not provide a basis for a reduced punishment. See United States v. Blackley, 986 F. Supp. 600, 603 (D.D.C. 1997) (refusing to compel production of materials supporting defendant’s claim of selective prosecution under Brady). Therefore, the Court concludes that there is no factual or legal basis for Defendant’s claim of failure to disclose Brady materials.

As to the second allegation, the Court first notes that during the course of the trial Defendant did not move for the production of any statement or report under the Jencks Act. Nonetheless, in this post-trial motion Defendant argues that this Court “erred by not requiring the Government to produce the entirety of the statements made to Darla Bernier and Andrew Beersworth.” (Def.’s Mot. for Acquittal or a New Trial at 3.) With regard to

Darla Bernier, a government witness who testified as to her phone conversation with Mr. Blumberg, Defendant claims that the Government violated the Jencks Act by only producing the Bernier's handwritten notes "shortly before trial." (Id.) According to the Government, Bernier's four pages of handwritten notes were delivered to the Defendant by mail on August 8, 2000 and by hand on August 11, 2000. Bernier testified on August 21, 2000. Section 3500 only requires that Bernier's notes be supplied to the Defendant after Bernier testified on direct examination. See 18 U.S.C. § 3500. Therefore, the Government surpassed the requirements of the Jencks Act when it supplied these notes to the Defendant shortly before trial. Additionally, Defendant requests that this Court order the Government to produce telephone records or data showing other calls Bernier took while she had Mr. Blumberg on hold. Such materials are not "statements" as defined in section 3500(e) and therefore not subject to disclosure under the Jencks Act.

Defendant also notes that Andrew Beersworth's handwritten notes taken during his conversation with Mr. Blumberg were destroyed. These notes are not subject to the Jencks Act because Mr. Beersworth's testimony at trial was that he, in fact, destroyed the handwritten notes after typing up notes of the conversation. Therefore, Beersworth's handwritten notes were never in the possession of the United States and not subject to disclosure under the Jencks Act. See 18 U.S.C. § 3500(b). Because the Jencks Act does not apply to any of the material cited by the Defendant, the Court finds Defendant's argument that he was prejudiced by the Government's failure to comply with the Jencks Act is without merit.

V. Juror Misconduct

Lastly, Defendant alleges that he is entitled to a new trial because of juror bias. Specifically, the Defendant now brings to the Court's attention that one of the jurors was employed by Blethen Papers, which apparently publishes the Kennebec Journal and the Central Maine Sentinel. These papers allegedly carried stories covering Mr. Blumberg's arrest, complaint and indictment. Consequently, Defendant suggests that the juror employed by Blethen Papers read those articles "in his professional capacity" but failed to disclose his knowledge of such pretrial publicity when the Court, during voir dire, asked if any prospective jurors had read any news reports regarding this case. (Def.'s Mot. for Acquittal or a New Trial at 5.)

The Court concludes that the Defendant has waived this frivolous allegation of juror misconduct. Counsel were both made aware of the fact that a potential juror was employed by Blethen Papers prior to the jury impanelment on August 14, 2000. Nonetheless, defense counsel neither moved to strike this juror nor requested further questioning of what this juror might have learned about the case in this professional capacity. Similarly, defense counsel did not raise the issue of potential juror bias any time prior to the jury beginning its deliberations of this case on August 22, 2000.

Thus, although defense counsel was aware of the alleged bias arising from one juror's employment status on August 14, 2000, defense counsel raised the issue of juror bias for the first time in his motion filed on August 30, 2000. By failing to raise this issue for approximately fifteen days, Defendant waived his objection. See United States v. Morris, 977 F.2d 677, 685 (1st Cir. 1992) (explaining that defense counsel who,

although aware of potential impropriety, did not raise objection until after the jury returned its verdict, waived the right to object).

Additionally, the Court notes that the jury in this case was polled thereby establishing prima facie evidence of the verdict's validity. See Morris, 977 F.2d at 689 (“A juror’s acceptance of the verdict upon polling constitutes prima facie evidence of his/her participation in deliberations, lack of irregularity therein, and concurrence in the outcome, and said verdict should not be disturbed absent extraordinary circumstances.”). Defendant’s unsupported allegations of bias arising from articles, which Defendant simply describes as reporting “Defendant’s arrest, complaint and indictment,” cannot overcome the prima facie evidence supporting the verdict’s validity. (Def.’s Mot. for Acquittal or a New Trial at 4.)

VI. Conclusion

For these reasons, Defendant’s Motion for Acquittal and a New Trial is hereby DENIED.

SO ORDERED.

George Z. Singal
District Judge

Dated on this 5th day of October, 2000.

JONATHAN BLUMBERG (1)
defendant

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