No. 11-30251

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ZACHARY BECK,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF BAIL / DETENTION STATUS

Defendant Zachary Beck was sentenced on September 2, 2011, to 51 months' imprisonment. Pursuant to Circuit Rule 28-2.4, I state that, according to the Federal Bureau of Prisons inmate locator database, defendant Zachary Beck is currently confined and has an actual or projected release date of May 21, 2014.

s/ Holly A. Thomas
HOLLY A. THOMAS
Attorney

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STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. 3231. The court entered final judgment on September 2, 2011. E.R. 4.[1] Pursuant to Federal Rule of Appellate Procedure 4(b), the defendant filed a timely notice of appeal on September 8, 2011. E.R. 1. This Court has jurisdiction pursuant to 28 U.S.C. 1291 and 18 U.S.C. 3742.

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[1] "E.R. ___" refers to the page number in the excerpts of record submitted by the defendant. "S.E.R. ___" refers to the page number in the supplemental excerpts of record submitted with the United States' brief. "Def. Br. ___" refers to the page number in the defendant's opening brief.

STATEMENT OF THE ISSUES

1. Whether the defendant voluntarily, knowingly, and intelligently waived his right to a jury trial.

2. Whether the evidence is sufficient to sustain the defendant's conviction for conspiracy to violate civil rights.

STATEMENT OF THE CASE

On August 19, 2010, a federal grand jury returned a three-count indictment against the defendant, Zachary Beck, for his role in the January 7, 2010, racially-motivated assault on an African-American victim, John Spencer Currie. See E.R. 10-13. The indictment charged Beck with: (1) conspiracy to violate civil rights, in violation of 18 U.S.C. 241; (2) interference with a federally-protected right, in violation of 18 U.S.C. 245(b)(2)(F) and 18 U.S.C. 2; and (3) witness tampering, in violation of 18 U.S.C. 1512(b)(1) and 18 U.S.C. 1512(b)(2)(A). E.R. 10-13. After a five-day bench trial (see E.R. 15), the defendant was found guilty on all counts. E.R. 22-28. He was sentenced to 51 months' imprisonment, followed by a three-year period of supervised release, and a special assessment of $300. E.R. 5-6, 8.

STATEMENT OF FACTS

The evidence presented at trial showed that Beck conspired with two other men to interfere with John Currie's right to full and equal enjoyment of a public

accommodation – namely, a Vancouver, Washington, sports bar – on the basis of the victim's race.

1. The January 7, 2010, Assault On John Spencer Currie

On the evening of January 7, 2010, the victim, Currie, went to Captain's Bar & Grill (Captain's) to visit with some friends who were working there. E.R. 83-85. Upon his arrival at Captain's, Currie joined his friends Andreas Duby (A.J.), Dustin Zinda (Dusty), and Zinda's girlfriend, Emily, at the corner of the bar, and started talking with them. E.R. 85-86, 147, 153, 203. The bar was calm and almost entirely empty that evening, with only two or three customers present, in addition to several employees. E.R. 85. Aside from his group of friends, Currie noticed a man, Beck, sitting in the middle of the bar by himself. E.R. 87. Currie, who is African American, was the only minority individual in the bar at that time. E.R. 88. A short while after Currie's arrival, two other acquaintances, Ricardo Perez (Rick) and Andrew, also arrived at the bar and joined the group. E.R. 88, 260. Perez is of Hispanic descent. E.R. 88, 262.

Duby was working as the bartender that night. E.R. 89. As the group of friends was conversing, Beck gestured for Duby to come over and talk to him. E.R. 89. When Duby approached, Beck asked him to get his friends to leave the bar. E.R. 152. When Duby asked him why, Beck replied only that "they should probably leave." E.R. 154. Duby responded that he was not going to kick his

friends out of the bar for no reason. E.R. 154. Beck then called Duby over again and told him that "there was a few other people on the way and that if [Duby's] friends were still there, that things would happen." E.R. 154. At that point, Duby asked Beck to leave, and Beck stood up and left the bar, getting on his cell phone as he walked toward the door. E.R. 90, 155-156.

When Beck moved away, Duby returned to the group of friends and told them that Beck had stated that, "I need to tell my friends to leave otherwise there's going to be problems." E.R. 90. Currie testified that the group kind of "laughed it off," wondering why they would need to leave the bar. E.R. 91.

Ricardo Perez and Andrew also left the bar. E.R. 91, 267-269. Perez testified at trial that he decided to leave because he felt uncomfortable after he heard someone say that "the black guy had to leave," or the "dark skinned guy needs to leave." E.R. 267, 269. When he and Andrew walked out the door, Perez saw three white men talking; one of the men was the same man that Perez had earlier noticed sitting by himself at the bar. E.R. 269-271. Perez testified that as soon as the men saw him, they moved to stand in a row and block the sidewalk in the direction he was going, facing him with their chests out. E.R. 271. Perez testified that he felt intimidated, like the men were going to assault him. E.R. 272. One of the men asked him whether he had a problem. E.R. 272. Perez replied no, that it was cool, and looked down and kept walking, ultimately having to squeeze

between the men and the wall of the building to get by because they stood still, blocking his path. E.R. 272-273.

Beck's friend Christopher Meade also testified to the events outside of Captain's bar. Meade had made plans to meet up with Beck at Captain's that night, and drove down to Vancouver with several other friends. E.R. 332-333. As the group headed to the bar, Meade received a text message from Beck telling Meade that he "better be prepared to fight." E.R. 334. When Meade and his friends arrived at Captain's, Beck was standing in front of the bar with two men who Currie later identified as having been part of the assault. See E.R. 95-96, 334-336. Beck was talking to the men about wanting to get into a fight with a "nigger" inside the bar, saying that the man had been talking to or kissing some white girls. E.R. 337, 366. Beck offered Meade and his friends $100 if they would go beat the "nigger" up. E.R. 366.

Shortly after Ricardo Perez and Andrew left the bar, Beck returned, by himself. E.R. 91. Currie was still sitting on the same bar stool he had been on since his arrival at Captain's. E.R. 91. Beck came over and physically backed up against him, whispering "I told you to leave otherwise there's going to be problems." E.R. 91. Currie testified that Beck was "touching me with his back or his butt against like my right shoulder and right leg." E.R. 91-92. Currie apologized, telling Beck that he thought he had the wrong person; Currie had never

seen Beck before that night, and had never had any other dealings with him. E.R. 92. But shortly afterwards, three other white men also walked into the bar, and stood in a semicircle, facing him. E.R. 92, 94. Two of these men were later identified as Kory Boyd and Lawrence Silk. E.R. 97, 290. Both are known to the FBI as being involved in the Oxnard Skinheads white power group in Vancouver. E.R. 524.

After the other men surrounded him, Currie stood up off his bar stool. E.R. 93. Beck then said, "[W]e don't like you kissing our women." E.R. 93. All of the men stared at Currie, making eye contact. E.R. 94. Although Beck's back was towards him, Currie could see that the men were "all sort of gauged in on him, * * * waiting for something to happen." E.R. 94. Then one of the men nodded to Beck, and Beck turned around and threw a punch toward Currie's head. E.R. 94.

Currie saw the punch, and was able to duck under it. E.R. 94-95. As the other men also tried to attack him, Currie managed to grab Beck's sweatshirt, put him in a headlock, and drag him behind the bar to create a barricade between himself and the other men. E.R. 97-99. The men began throwing pint glasses at him and trying to hit him with beer bottles. E.R. 97-99. One of the men took a glass and shattered it on the bar top; Currie could feel it hitting the top of his head, his arms, and every other part of his body that was exposed. E.R. 99. The men began yelling, "I am going to fucking kill you, nigger. We will be back. I am

going to fucking kill you." E.R. 100. They kept reaching over the bar to grab things to throw at him. E.R. 101. Currie was extremely afraid. E.R. 101.

Currie eventually released Beck. E.R. 101. When he did so, the other men were still standing in front of the bar, saying, "we're going to fucking kill you," and calling him a "coon" and a "nigger." E.R. 102. They told him that they would be back, and that they were going to get him. E.R. 102. The men then ran from the bar. E.R. 102-103.

Currie dialed 911, but, along with another acquaintance, Chris Stipe, also went in pursuit of the men, not wanting to let them get away. E.R. 102-105. He was concerned because the men had said that they would be back to get him, and, since he lived in downtown Vancouver, he didn't think he would be difficult to find. E.R. 103. He wanted to get some sort of law enforcement help. E.R. 103.

When Currie and Stipe got to the end of the block, Currie heard one of the men say, "kill that nigger," then another of the men swung at them with a knife. E.R. 105; see also E.R. 105-107. Currie backed up into the street to give them room, and the men continued to run away. E.R. 107. At some point, the men split off from each other, and Currie and Stipe continued to follow the man with the knife, later identified as Silk. E.R. 107-108. After further pursuit, Currie and Stipe were able to catch up with Silk, who threw down his knife, and gave up. E.R. 107-110. Currie then again called 911, an officer arrived on the scene, and Silk was

arrested. E.R. 110-111. Currie noticed a Swastika on Silk's hand, as well as Aryan Brothers tattoos. E.R. 111.

Beck, on the other hand, was not immediately apprehended. Instead, he fled to the apartment of a woman named Heidi Von Marbod. E.R. 418. Von Marbod was dating Beck at the time. E.R. 408. She testified that, earlier on the evening of the assault at Captain's, Beck had begun to tell her about his criminal past and his affiliations with the Aryan Nation. E.R. 410-413. Von Marbod testified that he was boastful, bragging. E.R. 413. Beck told Von Marbod that he was of pure white descent, and that his goals were to start a multi-media corporation catering to the Aryan platform and to establish an apartment complex in Portland for white women to live and "appropriate [sic] the white race" by having white boyfriends or fathers of their children. E.R. 415. Von Marbod testified that all of this made her nervous. E.R. 416. Although Beck had asked her to come out with him to Captain's Sports Bar, she declined. E.R. 416.

Von Marbod testified that it was a couple of hours later when Beck called and asked if he and a friend, Meade, could come over. E.R. 418. Beck sounded like he was out of breath, as if he had been running. E.R. 418. When Beck and Meade arrived at her apartment, Von Marbod could hear sirens and see police lights. E.R. 419. Beck mentioned that they had been in a bar fight and that the commotion was because of them. E.R. 419. Beck then told her that, "if anybody

asks, you were with me all night." E.R. 419. After Meade left the apartment, Beck went into further specifics about what Von Marbod should say. E.R. 420. He told her that, if anybody asked, she should "say that he was with me all night," and that they had been watching a particular football game and movie. E.R. 420.

Beck was arrested on August 25, 2010. E.R. 525. At that time, he was already incarcerated in the Clark County Jail on a separate offense. E.R. 525. While Beck was incarcerated, Von Marbod received a letter from him. E.R. 433. The letter told her to tell Meade that if the police asked him about that night, Beck "wasn't there" and that it "had nothing to do with the dude's race," and to "tell Silk * * * [t]hat he needs to tell the truth that I wasn't there and that we never met before and that I [sic] didn't have to do with the dude's race." E.R. 435. The letter also reminded Von Marbod that she should "tell the truth, that I was with – at your place all night. Remember, we watched the BCS bowl game and the Bourne Identity movie." E.R. 435.

2. Beck's History Of White Supremacist Views

In addition to Von Marbod's testimony regarding Beck's discussion with her of his Aryan Nation affiliation and his goals in terms of the white race, the court also heard other testimony regarding Beck's white supremacist views:

- William Riley, the security threat group coordinator for the Washington Department of Corrections, testified that he had conducted an inmate screening with Beck in 2005, and that Beck had tattoos which evidenced an affiliation with the white supremacist

David Lane and the Aryan Nation. E.R. 469, 477-480. Beck also identified himself to Riley as being "straight Aryan Nation," which Riley understood to mean that Beck was part of the Aryan Nations from Hayden Lake, Idaho. E.R. 478; see also E.R. 479.

- Alex Perez, the chief of police for the city of Longview, Washington, testified that the mayor had received a letter from Beck regarding his application for a street permit to hold a march on the anniversary of Hitler's birthday, April 20, 2009. E.R. 318, 323. Beck also wrote a second letter to the mayor, beginning with the words "racial greetings, white man," and discussing his intention to run for public office in Longview, because "Longview is 90 percent white and ripe for a movement like this." E.R. 324.

- FBI Agent Michael Rollins testified that he had contacted Beck in October 2009 in an effort to determine whether Beck might be willing to serve as an informant on the white supremacist community. E.R. 514-517. Rollins felt that Beck's response to his question about how Beck identified himself was "odd": Beck told Rollins that he was "a violent white patriot." E.R. 518. Beck also demanded that, if he were to become a source, the FBI fund a white pride parade that would end at the federal building. E.R. 520. Rollins determined that Beck would not be a suitable source. E.R. 520-521.

- Trisha Mott testified that she began dating Beck in March or April 2010, and that Beck told her that he was sleeping with upwards of five to six women a day, poking holes in their condoms in order to try and get them pregnant and keep the white population alive. E.R. 494-495, 499. When Mott asked Beck what he would do if he found out that she were not full white, he replied, "I would never have fucked you." E.R. 500. At another time, Mott spoke to Beck over the phone as he sat in a bar. E.R. 500. After someone tried to buy him a drink, Beck laughed and replied, "Can you believe that these F'ing niggers want to buy me a drink?" E.R. 500. On another occasion, Mott saw a faded tattoo on Beck's back, related to Beck's supremacist views. E.R. 503-504. Beck explained that he was trying to have the tattoo removed so that it wouldn't give him away to law enforcement authorities, and so they would think he was changing his ways. E.R. 503-504.

3. The District Court's Opinion

On June 8, 2011, the district court issued its opinion finding Beck guilty on all counts. E.R. 15-29. First, the court found that, despite evidence of Beck's difficult childhood and history of mental illnesses, Beck had been able to function at a very high level in his adult life, and had not presented proof that he could not attain a culpable state of mind to commit the charged offenses. E.R. 19-20. The court also found that although Beck was contemplating providing assistance to the FBI, he was not entitled to a public authority defense, because he did not have a reasonable belief that he was authorized to assist law enforcement through his activities at Captain's Bar, and had not, in fact, been requested to participate in such events. E.R. 20-22.

Turning to the charged crimes, the court found that the best evidence of what happened was Currie's recollection of the events of that night. E.R. 22. The court found that Beck issued a warning to Currie and others that they should leave because there would be some sort of trouble; that Beck met with Silk and Boyd immediately before the fight started; that Beck, Boyd and Silk approached Currie together as a group; and that Beck said something to Currie to the effect that Currie should leave and something about "kissing our women." E.R. 23; see also E.R. 22-25. The court also found that Beck took a swing at Currie, that Boyd and Silk tried to attack Currie with "missiles or fists," and that there were many racial epithets

used during the attack. E.R. 23. The court held that, taken together, this constituted clear evidence that Beck knowingly and voluntarily agreed with Boyd and Silk to accomplish a plan of getting Currie to leave the bar, that the plan was based on race, that the specific intent of the plan was to interfere with Currie's right to enjoy a place of public accommodation, and that Beck was thus guilty of Count 1 of the indictment – conspiracy to violate civil rights. E.R. 24-26. The district court further noted that the evidence both showed that Beck himself committed the charged crime, and that he aided and abetted Silk and Boyd by intentionally counseling, inducing, or procuring them to commit the crime. E.R. 25-26.

Turning to Count 2 – interference with a federally-protected right – the court found that it was clear that Beck had used force or threat of force in an attempt to intimidate and interfere with Currie, and that it was clear that he had acted because of Currie's race and because Currie was enjoying a public accommodation. E.R. 26-27. The court noted that the analysis regarding Count 2 was essentially the same as that for Count 1. E.R. 27.

Finally, as to Count 3 – witness tampering – the court found that the evidence made it clear beyond a reasonable doubt that Beck requested that Von Marbod lie in order to prevent the communication of information about the crime

to a law enforcement officer regarding Beck's commission of the federal offenses charged in Counts 1 and 2. E.R. 27-28.

SUMMARY OF THE ARGUMENT

The defendant's waiver of his right to jury trial was voluntary, knowing, and intelligent. Although he alleges that the court failed to discuss with him his right to participate in jury selection, the court's comments to the defendant advising him that he would be able to exercise challenges for cause and peremptory strikes did just that. The district court also properly explained that a jury is made up of 12 people, that a jury's verdict must be unanimous, and that in the absence of a jury the court itself would decide the case.

The evidence was sufficient to support the defendant's conviction for conspiracy to violate civil rights. There was strong circumstantial evidence of his agreement with Boyd and Silk to assault Currie – most notably the fact that the defendant warned Currie's friend that there were other people on the way to the bar and if the group didn't leave "things would happen," and that, subsequently, other people did arrive at the bar and joined him in an assault upon Currie.

Beck's conviction should be affirmed.

ARGUMENT

I

THE DEFENDANT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS RIGHT TO A JURY TRIAL

A. Standard Of Review

The adequacy of a jury waiver is a mixed question of fact and law which this Court reviews de novo. *United States* v. *Christensen*, 18 F.3d 822, 824 (9th Cir. 1994).

B. Facts

On the first day of trial, Beck advised the court that he wished to waive his right to a jury trial, and instead be tried before the bench. E.R. 37-38. The court proceeded to conduct a colloquy with him regarding his rights, and to ensure that he had discussed those rights with his counsel:

> THE COURT: Well, Mr. Beck, let me walk you through this. First, you have an absolute right to a jury trial. That's a constitutional right.
>
> Do you understand that?
>
> MR. BECK: Yes, sir.
>
> THE COURT: In a jury trial, the judge conducts the trial, but the jury makes the final decision and you cannot be convicted of any count, of any charge, unless the jury found unanimously and beyond a reasonable doubt that you were guilty.
>
> Do you understand that?
>
> MR. BECK: Yes, Your Honor.

THE COURT: If there's one juror that would hold out and not agree to a conviction, you cannot be convicted of any count that was not unanimous.

Do you understand that?

MR. BECK: Yes, Your Honor.

THE COURT: In a jury trial, the evidence comes in and then I instruct the jury on the law, instruct them that they are to follow the law but they are to determine the facts from the evidence produced in court and that they are to apply the facts as they find them to the law as I give it to them and in that way decide the case.

Do you understand all that?

MR. BECK: Yes, Your Honor.

THE COURT: Now, in the event there's no jury, then I do the whole works myself. I hear the evidence and determine what the facts are. I determine what law applies to those facts. I apply the law to the facts and in that way decide the case myself. So you have one person doing all of that instead of 12 jurors and a judge participating in all those situations.

Do you understand all that?

MR. BECK: Yes, Your Honor.

THE COURT: Have you discussed the question of a waiver of a jury with Ms. Olson?

MR. BECK: Yes, Your Honor.

THE COURT: Are you satisfied with those discussions?

MR. BECK: Yes, Your Honor.

E.R. 38-39.

The district court also offered the defendant the opportunity to ask any other questions that he had about his right to a jury trial:

> THE COURT: Do you have any questions about your right to a jury trial that have not been answered?
>
> MR. BECK: I am just curious if the quote-unquote fact finder part of it, when it's reviewed on appeal, is it a different process than it would be for a jury than it would be for a judge?
>
> THE COURT: No. But at the end of the trial, if there's not a jury, then I have to make findings of fact and conclusions of law. In other words, I make findings of fact orally and on the record, and then I indicate what law applies to those facts and in that way decide the case.
>
> The burden remains on the government to prove each element of each charge against you beyond a reasonable doubt.
>
> Do you understand all that?
>
> MR. BECK: Yes, Your Honor.
>
> THE COURT: Any other questions about this?
>
> MR. BECK: With all due respect, I have a preconceived notion that – maybe not you – but maybe some judges are predisposed to find defendants guilty at a bench trial to compensate for the loss – or for the prosecution that the money that the government spent on prosecuting. Does that make any sense at all?
>
> THE COURT: No, not to me.
>
> MR. BECK: Okay. That's good. Thank you.

E.R. 39-40.

The district court then turned to defendant's trial counsel, Paula Olson, asking her whether she had discussed the defendant's rights with him, and whether she believed he understood those rights; she indicated that they had discussed the waiver issue, and that she believed Beck did understand his rights. E.R. 40-41. The court further inquired whether the government would object to the matter proceeding as a bench trial; the government indicated that it had no objection. E.R. 41. Finally, before accepting the waiver, the court gave the defendant an opportunity to change his mind, stating, "Once I excuse this jury, there's no going back on this, Mr. Beck; we are going to proceed. Do you understand that?" E.R. 41. Beck replied that he did. E.R. 41.

Shortly thereafter, at the government's prompting, the court recognized that it had neglected to discuss with Beck his rights regarding participation in jury selection:

> [Attorney for the United States] MR. CASPAR: Your Honor, may I raise one thing about the waiver, one last thing? I did some quick research, and the Ninth Circuit requires one more notice to the defendant that I don't believe was given before. It's just that the defendant needs to be on notice that he has the right to participate in jury selection. I don't think the previous –
>
> THE COURT: I am sorry.
>
> MR. CASPAR: The defendant has to be notified that he has the right to participate in jury selection and the previous colloquy didn't –
>
> THE COURT: I should cover that, too.

> You understand, Mr. Beck, that when we poll the jury, we advise them of what the case is about and then we ask them a bunch of questions and we have questionnaires from them that they have answered. All of this is done under oath. Then we excuse any jurors that appear to be in some way biassed [sic] or prejudiced and we seat a jury from the rest of those people, but you also have the right to challenge jurors for cause. If there's some reason we believe they shouldn't serve, you also have the right to excuse jurors by taking what we call peremptory challenges and excuse jurors without giving any reason to be sure that those jurors that remain will be fair and impartial.
>
> I believe in a criminal case you have – is it 14 peremptories? I am speaking from memory. So you have the opportunity to cut the jury down either because there's a particular reason or just because you choose other jurors; you choose not to have people on the panel.
>
> You understand all that?
>
> MR. BECK: Yes, Your Honor.

E.R. 45-46.

The court having accepted Beck's signed waiver (see E.R. 41-42), the case then proceeded to trial.

C. Beck Voluntarily, Knowingly, And Intelligently Waived His Right To A Jury Trial

A criminal defendant has a fundamental right to a jury trial, guaranteed by the Sixth Amendment. See U.S. Const. Amend. VI; *United States* v. *Duarte-Higareda*, 113 F.3d 1000, 1002 (9th Cir. 1997). This right, however, may be waived, if the following four conditions are met: "(1) the waiver is in writing; (2) the government consents; (3) the court accepts the waiver; and (4) the waiver is

made voluntarily, knowingly, and intelligently." *Ibid.* (citations omitted).

Regarding the fourth requirement, this Court has "set forth guidelines for a district court to follow in determining whether a defendant's jury waiver is voluntary, knowing, and intelligent. The district court should inform the defendant that (1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) a jury verdict must be unanimous, and (4) the court alone decides guilt or innocence if the defendant waives a jury trial." *Duarte-Higareda*, 113 F.3d at 1002 (citation omitted). This Court has also held that a district court "should question the defendant to ascertain whether the defendant understands the benefits and burdens of a jury trial and freely chooses to waive a jury," noting that "[s]uch a colloquy will ensure that the waiver is made voluntarily, knowingly, and intelligently." *Ibid.* (citations omitted).

The defendant's sole contention with regard to the waiver issue is that the district court's colloquy was insufficient because the court allegedly "did not advise Mr. Beck that he could take part in jury selection," or that "he had a right to be part of the process." Def. Br. 11-12. But that contention is squarely belied by the record in this case. That record shows that after the government observed that Beck "needs to be on notice that he has the right to participate in jury selection," the court responded by describing to Beck the jury selection process, telling Beck that he might have up to 14 peremptory challenges, and informing him that "*you*

* * * have the right to challenge jurors for cause," and "*you* have the opportunity to cut the jury down either because there's a particular reason or just because *you* choose other jurors; *you* choose not to have people on the panel." E.R. 45-46 (emphasis added). Given that the court was directly addressing the defendant during this portion of the colloquy – see E.R. 46 (Court: "You understand all that?"; Beck: "Yes, Your Honor.") – it is unclear to whom the "you" would have referred if not to Beck himself.

While Beck is correct that where a defendant's mental health is at issue a district court is obliged to conduct an "in-depth colloquy which reasonably assures the court that under the particular facts of the case, the signed waiver was voluntarily, knowingly, and intelligently made," *Christensen*, 18 F.3d at 826, the colloquy here is completely consistent with that command. This is not a case where the record is silent regarding the defendant's consideration of his right to jury trial. Cf. *United States* v. *Gonzalez-Flores*, 418 F.3d 1093, 1103 (9th Cir. 2005). Nor is the record absent of other indicia that Beck voluntarily, knowingly, and intelligently waived his right. See *ibid.* Rather, the record here shows that the district court described to the defendant that he had an absolute right to jury trial; that jury verdicts must be unanimous; that in a jury trial the jury would apply the law to the facts; that in the absence of a jury the court would decide the facts itself – that Beck would have one decision maker instead of 12; that the court asked both

the defendant and his appointed counsel whether they had discussed the issue; that the court described the jury selection process to Beck and informed him that he would be able to challenge jurors for cause and otherwise exercise peremptory strikes; and that the court extended the defendant the opportunity to ask other questions about the waiver of jury trial and the process of factfinding and appeal. See E.R. 38-41, 45-46. Indeed, there is no question that the district court's colloquy was far more extensive than that conducted in *Christensen*, where the court's only remarks were, (1) "You understand that you waive the right to trial by jury and a trial in which 12 jurors have to find you guilty. You also have the right to waive or give up that right," and (2) "And have you waived jury trial and agreed to trial just by the Court?" See *Christensen*, 18 F.3d at 823.

The record further reflects that the district court judge was both aware of and took account of the defendant's mental health status during the proceedings in this case. During a pretrial hearing regarding Beck's competency, the judge observed that he had "obviously at this point had a number of hearings with Mr. Beck in court. His approach, while not the usual, is certainly not very far outside of what we see in cases often[.] * * * He is articulate and seems to have some grasp, although not as thorough as one might like, but some reasonable grasp of the issues in the case, and he's able to write and express himself well." S.E.R. 2-3. While, as this court has held, the question of waiver of jury trial is clearly "more than a

competency determination," see *Christensen*, 18 F.3d at 826, the district court's approach to this case, including its evaluation of Beck's mental health status, further confirms that the colloquy here was sufficient to allow the court to "satisfy itself that [defendant's] waiver of his constitutional rights [was] knowing and voluntary." *Godinez* v. *Moran*, 509 U.S. 389, 400 (1993) (citations omitted). The defendant's conviction should be upheld.

II

THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE DEFENDANT'S CONVICTION FOR CONSPIRACY TO VIOLATE CIVIL RIGHTS

A. Standard Of Review

This court reviews de novo a district court's determination that sufficient evidence supports a conviction. *United States* v. *Tatoyan*, 474 F.3d 1174, 1177 (9th Cir. 2007). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); see also *United States* v. *Nevils*, 598 F.3d 1158, 1163-1164 (9th Cir. 2010) (en banc). The relevant inquiry is not "whether [the reviewing court] believes that the evidence at the trial established guilt beyond a reasonable doubt, only whether *any* rational trier of fact could have made that finding." *Nevils*, 598 F.3d at 1164 (internal quotation marks and citations omitted). Under the sufficiency of the evidence examination, "[c]ircumstantial

evidence and inferences drawn from it may be sufficient to sustain a conviction." *United States* v. *Jackson*, 72 F.3d 1370, 1381 (9th Cir. 1995), cert. denied, 517 U.S. 1157 (1996).

B. The Evidence Was Sufficient To Show That The Defendant Conspired With Boyd And Silk To Violate Currie's Civil Rights

To prove a conspiracy under 18 U.S.C. 241, the government needed to show that the defendants "(1) agreed to accomplish an illegal objective" – here, deprivation of civil rights because of race – "and (2) had the requisite intent necessary to commit the underlying offense." *United States* v. *Allen*, 341 F.3d 870, 890 (9th Cir. 2003), cert. denied, 541 U.S. 975 (2004). Beck argues that there was insufficient evidence that he conspired with Boyd and Silk to violate the victim's civil rights, and, further, that there was insufficient evidence that he intended to violate the victim's rights. See Def. Br. 17. Both of these arguments must fail. Notably, the defendant does not challenge the sufficiency of the evidence to prove a violation of 18 U.S.C. 245, which required proof that he interfered with the victim's right to enjoyment of a public accommodation because of race. The same evidence that supports his conviction on this charge, however, also proves that the defendant agreed with others to violate Currie's rights because he was enjoying a public accommodation, and because of his race.

1. The Evidence Showed That The Defendant Conspired To Violate The Victim's Civil Rights

Contrary to Beck's assertions, there was sufficient evidence at trial that Boyd and Silk were at the bar with him during the attack upon the victim, and that he conspired with these men to violate the victim's civil rights. First, as the district court held, there was clear evidence that the defendant threatened that other people would come to the bar if Currie and his other friends did not leave, and that other men, including Boyd and Silk, subsequently arrived and assaulted the victim. E.R. 22-25. Prior to the assault, Beck told the bartender at Captain's, Duby, to get his friends to leave the bar, and that "there *was a few other people on the way* and that if [Duby's] friends were still there, that things would happen." E.R. 154 (emphasis added); see also E.R. 22, 152-153. After Duby told Beck to leave, he stood up and left the bar, getting on his cell phone as he walked away. E.R. 90.

When the defendant returned to the bar, he walked up to the victim, physically placing his body against the victim's, and whispering, "I told you to leave otherwise there's going to be problems." E.R. 91. Shortly thereafter, three other white men, including Boyd and Silk, also walked into the bar, and stood in a semicircle around Currie and Beck. E.R. 24, 92, 94, 97, 100. As the district court found, Beck then told the victim that "*we* don't like you kissing our women"; this plainly demonstrates a group agreement on the matter, rather than an individual judgment. E.R. 93 (emphasis added); see also E.R. 24-25. Currie could see that all

the men were "gauged in on" Beck, waiting for something to happen. E.R. 94. One of the men then *nodded to Beck*, at which point Beck turned around and threw the punch at Currie. E.R. 94. The other men then joined in the assault upon the victim. See E.R. 97-101.

Evidence regarding occurrences following the assault also demonstrates the existence of the conspiracy. Currie, Duby and Stipe all testified that the defendant and the other men left the bar at the same time. E.R. 102-103, 163-164, 191. Silk was identified by Vancouver police officer Gerardo Gutierrez as the man arrested that night for assaulting the victim. E.R. 290-292. And the defendant's former girlfriend, Von Marbod, testified that she received a letter from Beck after he was arrested telling her to "[t]ell Silk * * * [t]hat he needs to tell the truth that I wasn't there and that we never met before and that I [sic] didn't have to do with the dude's race." E.R. 435.

This Court has held that "circumstantial evidence that the defendants acted with a common goal is sufficient * * * to prove agreement, and agreement may be inferred from conduct, express agreement is not necessary." *United States* v. *Corona-Verbera*, 509 F.3d 1105, 1117 (9th Cir. 2007), cert. denied, 555 U.S. 865 (2008); accord *United States* v. *Simon*, 380 F. App'x 629, 631 (9th Cir. 2010) (citing *Corona-Verbera*); *United States* v. *Hegwood*, 977 F.2d 492, 497 (9th Cir. 1992) ("Express agreement is not required [to support a conspiracy conviction];

rather, agreement may be inferred from conduct."), cert. denied, 508 U.S. 913 (1993). Taken together, the evidence in this case – that the defendant told Duby that there were other people on their way to the bar, and that if his friends didn't leave there would be problems; that a group of men, including Boyd and Silk, surrounded Currie and Beck; that one of the men nodded to Beck directly before the attack occurred; that all the men joined together in the attack upon Currie and then left the bar together; and that Beck later told Von Marbod to deliver a message to Silk telling him to say that Beck wasn't there during the attack – is more than sufficient to sustain the conviction.[2]

2. The Evidence Showed That The Defendant Intended Specifically To Violate Currie's Rights

The evidence was also more than sufficient to show that the defendant intended specifically to violate Currie's rights. As noted above, when Beck returned to the bar, he directly approached Currie, physically backing up against him, and telling him that "I told you to leave." E.R. 91; see also E.R. 91-92 (Currie testifying that Beck was "touching me with his back or his butt against like my right shoulder and right leg"). Currie testified that Beck was "giving me the impression that it was me that was the problem, and there was nobody else in the bar that was the issue. I was the problem." E.R. 92. After the other men arrived at

[2] As the district court held, the same evidence regarding the circumstances preceding and during the fight also shows that Beck aided and abetted Boyd and Silk during their commission of the charged crime. E.R. 25-26.

the bar and surrounded Currie, the defendant told the victim that "we don't like you kissing our women." E.R. 93; see also E.R. 92-93. As the district court found, Beck then took a swing specifically at Currie, and racial epithets were directed toward Currie during the subsequent attack. E.R. 23, 25-26; see also E.R. 100, 102 (slurs such as "coon," and "nigger" used during the attack).

The district court heard evidence that Boyd and Silk were members of the Oxnard Skinheads group (E.R. 524), and heard a number of witnesses testify to Beck's own affiliations with white supremacist groups (E.R. 323-324, 514-520, 497-504). Furthermore, the court had before it evidence that Beck told Von Marbod to tell Meade and Silk to say that the incident "had nothing to do with the [victim's] race." E.R. 435.

All of this constitutes powerful evidence that Beck specifically intended to target Currie, not that he had "a problem with the group of people one of whom was Mr. Currie," as he claims. Def. Br. 17. The district court's verdict should stand.

CONCLUSION

For the reasons stated above, the defendant's conviction should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is not aware of any related cases, as described in Local Rule 28-2.6, that are pending in this Court.

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CERTIFICATE OF COMPLIANCE

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

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6838 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/ Holly A. Thomas
HOLLY A. THOMAS
Attorney

Date: May 21, 2012

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that service will be accomplished via the appellate CM/ECF system for all participants in this case who are registered CM/ECF users.

I further certify that on May 21, 2012, an identical copy of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE was served on the following party via First Class Mail:

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