No. 00-1702

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

RICHARD VARTANIAN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIEF OF UNITED STATES AS APPELLEE

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BRIEF OF UNITED STATES AS APPELLEE

STATEMENT REGARDING ORAL ARGUMENT

While the United States does not oppose oral argument if this Court considers it beneficial, we believe that the Court could readily dispose of this appeal on the briefs submitted by the parties.

STATEMENT OF THE ISSUES

1. Whether the district court committed reversible error in admitting testimony from a deceased witness given in a prior civil trial against Defendant.

2. Whether a defendant may be charged with separate violations of 42 U.S.C. 3631(a) and 3631(b)(1) arising from a single incident.

3. Whether the United States adequately pled and sufficiently proved a violation of 42 U.S.C. 3631(a).

STATEMENT OF THE CASE

On August 28, 1997, a grand jury in the Eastern District of Michigan returned a two-count indictment charging Defendant with violating 42 U.S.C. 3631(b)(2) and 3631(a) by threatening and intimidating three real estate agents and an African-American couple during the sale of a house near Defendant's home (R. 1: Indictment). Defendant moved to dismiss this indictment on the grounds of failure to state a claim and multiplicity, but that motion was denied on December 16, 1997 (R. 9, 23: Motion and Order). However, on April 13, 1998, the court granted an unopposed motion to dismiss the indictment without prejudice based on flaws in the grand jury selection process (R. 27, 29: Motion and Order).

On August 12, 1999, the United States filed a superseding information containing the same charges as the dismissed indictment (R. 30: Superseding Information). On February 23, 2000, a jury found Defendant guilty on both counts (R. 44: Verdict). On June 12, 2000, the court sentenced Defendant to concurrent sentences of five months' imprisonment on each count, to be followed by 180 days of home confinement and one year of supervised release (R. 47: Judgment Order). The court declined to impose any fines or costs, but did order a $25 special assessment for each count (R. 47: Judgment Order). Defendant filed a timely notice of appeal on June 16, 2000 (R. 48: Notice of Appeal).

STATEMENT OF THE FACTS

Viewed in the light most favorable to the Government, the evidence at trial showed the following.

On August 16, 1994, real estate agents conducted an inspection of the home at 18980 Eastwood, Harper Woods, Michigan, with the prospective purchasers, the Stringers, an African-American couple (Tr. Vol. I at 83-85, 117-118; Weiss Transcript at 89-91[1]). Michael and Kathleen Martin, a married couple, represented the seller (Tr. Vol. I at 84, 117-118). Steven Weiss represented the buyers (Tr. Vol. I at 84, 117-118). After the inspection was completed, the Stringers left the property while the agents remained in the driveway discussing the sale (Tr. Vol. I at 86, 121, 199; Weiss Transcript at 90-91).

At this point, two neighbors approached the agents and complained that the house was being sold to an African-American family (Tr. Vol. I at 86-88, 121-122; Tr. Vol. II at 23-25; Weiss Transcript at 92-94). After a brief discussion with these neighbors, the agents decided to leave (Tr. Vol. I at 88-89, 122-123).

As the agents began to leave, Defendant rushed up to Ms. Martin, backing her against the car as he yelled at her (Tr. Vol.

[1] "Weiss Transcript" refers to the transcript of Steven Weiss's April 21-22, 1998 testimony in a civil action against Defendant. As discussed infra, pp. 6-7, portions of this testimony were read to the jury in this case (see Tr. Vol. I at 167-168) but were not recorded by the court reporter as part of the trial transcript. Defendant and the United States subsequently filed a Stipulation To Expand The Record and submitted the transcript of the Weiss civil trial testimony to be included in the record on appeal (R. 61: Order).

I at 89, 123; Weiss Transcript at 95-96). Defendant made clear that he was upset because the house was being sold to an African-American family (Tr. Vol. I at 127), stating among other things that he would not have invested $10,000 into his pool "if he knew that the blacks were going to be buying the house across the street" (Tr. Vol. II at 26). Defendant yelled that he was going to boycott the Martins' real estate company (Tr. Vol. I at 89). He was extremely upset and emotional, calling Mr. Martin a "mother fucker" and Ms. Martin a "mother fucking cock sucking bitch," and a "dumb fucking cunt," which caused Ms. Martin to burst into tears (Tr. Vol. I at 89; Tr. Vol. II at 56; Weiss Transcript at 97-98).

In the course of his tirade, Defendant threatened the agents' lives. Ms. Martin testified that Defendant stated that "I'm going to chop you up in little pieces and bury you in the backyard and nobody will ever find you" (Tr. Vol. I at 89). Mr. Martin testified that Defendant said "he'd kill us all and chop us up into little pieces, bury us in their backyard where no one would ever find us" (Tr. Vol. I at 124-125). Mr. Weiss testified that Defendant had said "I could make you disappear, I can chop you up and bury you in my back yard" (Weiss Transcript at 97). One of the neighbors also testified that Defendant had said "that he could cut these people in pieces or something" (Tr. Vol. II at 30).

During the confrontation Defendant also noted the licence number on the agents' car and told them he had a friend in the

police department from whom he could get the Martin's address (Tr. Vol. I at 124-125; Weiss Transcript at 97).

Given the intensity of Defendant's reaction, Mr. Martin believed that Defendant was on verge of physically assaulting his wife; he looked to see if Defendant had a weapon and warned Defendant to back off (Tr. Vol. I at 89-90, 124; Weiss Transcript at 98). Ms. Martin, afraid that her husband and Defendant were about to get into a physical fight, convinced her husband to get into the car and leave (Tr. Vol. I at 89-90). As the agents were leaving, Defendant said, "Yeah, get out of here mother fuckers, you're dead" (Weiss Transcript at 98).

Later that evening, the agents reported the incident to the local police (Tr. Vol. I at 94-95, 128-129; Weiss Transcript at 100). Defendant subsequently told the police that he had an argument with the realtors and told them that "I'm going to buy a house near your house and rent it to blacks. See how your neighbors like it. They will probably cut you up into little pieces and bury you in the back yard" (Tr. Vol. I at 177; see also Tr. Vol. II at 55, 66). He also confirmed that he had taken down the Martin's license plate number with the intention of getting a friend of his on the Detroit police force to "run the licence tag" for him (Tr. Vol. I at 177).

Mr. Weiss, the home buyers' agents, subsequently asked the Stringers to meet him and suggested that they not bring their children (Tr. Vol. I at 200; Weiss Transcript at 102-103). He told the Stringers about Defendant's threats and behavior and

offered to allow them to back out of the deal without financial consequences (Tr. Vol. I at 204, 206; Weiss Transcript at 103-104). The Stringers, as result, became very concerned about the safety of themselves and their children (Tr. Vol. I at 205-208). Although the Stringers ultimately decided to go through with the purchase, they testified that Defendant's threats caused them to exercise special precautions regarding the safety of their children in the new neighborhood (Tr. Vol. I at 208-209; Tr. Vol. II at 3-4).

The Stringers and Mr. Weiss subsequently sued Defendant in state court under the Michigan Elliot-Larsons Civil Rights Act, Mich. Comp. Laws Ann. § 37.2501 et seq. (see R. 38: Motion in Limine). The initial trial began April 21, 1998, but ended in a mistrial. A subsequent retrial began on August 6, 1998, and resulted in a verdict for the plaintiffs. Mr. Weiss testified at both trials, but died before trial in this case (see R. 38: Motion in Limine).

In light of Mr. Weiss's unavailability to testify in the criminal trial, the United States filed a motion in limine to admit portions of the transcript of Mr. Weiss's testimony in the civil trial (R. 38: Motion in Limine). Over Defendant's objections, the court permitted the United States to read to the jury portions of Mr. Weiss's April 21-22, 1998 testimony (R. 39: Response to Motion in Limine; Tr. Vol. I at 161-165). The court also permitted Defendant's counsel to read whatever portions of the cross-examination he chose (Tr. Vol. I at 166, 168).

Defendant's counsel, in turn, read to the jury only a brief portion of the cross-examination during which Mr. Weiss agreed that Defendant had not directly threatened the Stringers because they had left before the confrontation began (Tr. Vol I at 168; Weiss Transcript at 21).

SUMMARY OF THE ARGUMENT

Defendant raises three objections to his trial and conviction, none of which merits reversal.

First, Defendant argues that the trial court's admission of the testimony given by Steven Weiss in the prior civil trial violated Fed. R. Evid. 804(b)(1) and his Sixth Amendment right to confront the witnesses against him. The trial court properly admitted the testimony because Mr. Weiss was unavailable and Defendant's civil attorney had had ample opportunity and a similar motive to cross-examine Mr. Weiss in the civil case. Because the testimony was properly admitted under an established exception to the hearsay rules, Defendant's rights under the Sixth Amendment were not violated.

Second, Defendant argues that the information violated the Double Jeopardy rule against "multiplicity" by charging him in two counts with a single offense. In particular, Defendant argues that he cannot be charged separately for violating two different subsections of 42 U.S.C. 3631 if both counts are based on a single incident. Because subsections (a) and (b)(1) of Section 3631 require proof of different elements, however, they

are properly considered separate offenses subject to separate charging and punishment.

Third, Defendant argues that the United States failed to plead or prove a violation of 42 U.S.C. 3631(a) with respect to Defendant's behavior toward the home buyers because Defendant never directly threatened the Stringers. However, the statute does not require that a threat be delivered directly to the victim and the United States adequately pled and proved that Defendant intentionally threatened and attempted to intimidate the Stringers through the real estate agents.

ARGUMENT

I. THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING THE PRIOR TESTIMONY OF A DECEASED WITNESS FROM A CIVIL ACTION ARISING FROM THE SAME INCIDENT

Defendant argues (Defendant's Br. 12-21) that the admission of Weiss's civil trial testimony violated Fed. R. Evid. 804(b)(1) and Defendant's constitutional rights under the Sixth Amendment. Neither is true.

A. The Testimony Of Steven Weiss Was Properly Admitted Under Rule 804(b)(1)

Under Rule 804(b)(1), "if the declarant is unavailable as a witness" a party may offer "[t]estimony given as a witness at another hearing of the same or a different proceeding * * * if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

1. Defendant Had A Sufficient Opportunity And Incentive To Cross-Examine Weiss In The Civil Case

In this case, Defendant does not dispute that the witness was unavailable — Mr. Weiss was dead. Nor does Defendant argue that he was not afforded an adequate opportunity to cross-examine the witness at the prior civil trial. Defendant was represented by counsel in the civil case, who cross-examined Mr. Weiss extensively (see Weiss Transcript at 7-43). Such an opportunity more than complies with the requirements of Rule 804(b)(1). See Taplin, 954 F.2d at 1258 ("It is well-settled that testimony presented at a trial provides a defendant with an adequate occasion to fully examine the witness."); Glenn v. Dallman, 635 F.2d 1183, 1187 (6th Cir. 1980) (Rule 804(b)(1) satisfied even when "counsel did not engage in a vigorous cross examination at the preliminary hearing, [so long as] there was the opportunity to do so.").

Nor does Defendant argue that he lacked sufficient incentive to vigorously exercise his right of cross-examination in the civil trial. The stakes in that case were high, as evidenced by the $400,000 judgment entered against him (see Sentencing Hearing Tr. at 24, 31, 35).

Defendant's objection on appeal, therefore, is limited to the narrow question of whether differences between the civil and criminal trials deprived him of a sufficiently "similar motive" to develop Mr. Weiss's testimony through cross-examination. This Court has held that "[t]he traditional formulation of the similar

motive requirement is that the two proceedings must reflect a 'substantial identity of issues.'" United States v. Taplin, 954 F.2d 1256, 1259 (6th Cir. 1992). In this case, there was a "substantial identity of issues," both legal and factual, in Defendant's civil and criminal trials. The causes of action in both cases were substantially identical: Michigan's Elliot-Larsons Civil Rights Act largely tracks the substantive standards of the federal Fair Housing Act, prohibiting, among other things, discrimination in the sale of real estate. Compare 42 U.S.C. 3631(a), (b)(1) with Mich. Comp. Laws Ann. § 37.2502. And the factual basis for the claims in both cases was also essentially the same: both cases arose from the same events, namely Defendant's confrontation with Mr. Weiss and the other real estate agents at 18980 Eastwood, Harper Woods, Michigan, on August 16, 1994.

2. That The Civil Case Did Not Require Proof Of A Threat Or Use Of Force Did Not Deprive Defendant Of Sufficient Motive To Cross-Examine Weiss

Defendant, however, disputes (Defendant's Br. 18) that the causes of action were "substantially identical," arguing that the federal statute requires proof of a use or threat force, but the Michigan statute does not. The district court properly determined, however, that this difference was not significant enough to deprive Defendant of an adequately similar motive to cross-examine Weiss in the civil case.

Defendant does not even attempt to explain how this difference in the statutes would have led to a different cross-

examination of Mr. Weiss in the criminal case or otherwise deprived his attorney of a "similar motive" to cross-examine Mr. Weiss during the civil trial. While proof of a threat of force may not be required in every case under the state statute, Defendant does not contest that his threats were a central issue in this particular Elliot-Larsons Act case. Perhaps for this reason, he does not offer a single example of a question he would have asked Mr. Weiss in the criminal case that he did not ask Mr. Weiss in the civil case. Nor does he point to any force-related questions his attorney asked the other realtors in the criminal case that his counsel failed to ask Mr. Weiss in the civil case.

It is not enough to simply point to a difference between the two cases and assume that this difference necessarily deprived prior counsel of an adequate motive to develop the testimony. Instead, this Court has made clear that:

> it is incumbent upon counsel for the defendant when objecting to the admissibility of such proof to explain as clearly as possible to the judge precisely why the motive and opportunity of the defendants in the first case was not adequate to develop the cross-examination which the instant defendant would have presented to the witness. Thus, we would have been much more impressed by the defense's objections had they articulated before the trial court in the first instance, and later before us, precisely what lines of questioning they would have pursued.

Dykes v. Raymark Indus., Inc., 801 F.2d 810, 817 (6th Cir. 1986). A theoretical possibility that differences between the two cases may have reduced his prior counsel's motive to cross-examine Mr. Weiss in the civil trial is not enough to bar admission under Rule 804(b)(1).

3. That The Martins Were Not Parties In The Civil Case Did Not Deprive Defendant Of Sufficient Motive To Cross-Examine Weiss

Although Defendant fails to identify any practical consequence of the differences between the civil and criminal statutes, he does argue that there were significant practical consequences to another difference between the two trials. He argues (Defendant's Br. 18) that the trial strategies in the two cases were significantly different because the Martins were not parties to the civil case. As a result, he says (Defendant's Br. 18), his lawyer in the civil trial attempted to show that while Defendant did engage in threats, the threats were directed solely at the Martins (who, after all, were not plaintiffs in that case). He asserts (Defendant's Br. 18), however, that his lawyer could not, and did not, pursue the same strategy in this case because Defendant was charged with criminally threatening the Martins as well as Mr. Weiss and the Stringers. As a result of this alleged difference in trial strategy, Defendant argues (Defendant's Br. 18-20), the "civil attorney elicited testimony from Steven Weiss that was incriminating as to Count I of the Information (which alleged threats to 'three real estate sales persons')." This argument does not withstand scrutiny.

First, although Defendant's brief seems to imply otherwise, the "incriminating" passages he quotes from Mr. Weiss's cross-examination in the civil case were not read to the jury in this

case.[2] Nor was any other incriminating cross-examination testimony read to the jury. The United States only read the direct examination into the record, leaving it to Defendant to decide which portions, if any, of the cross-examination to submit to the jury (see Tr. Vol. I. at 168). Morever, the district court specifically permitted Defendant to redact any portion of the cross-examination he believed harmful to his case (Tr. Vol. I at 7-8, 163-164, 166). And in the end, the only portion of the cross-examination Defendant's counsel chose to read to the jury in this case was a short passage in which Mr. Weiss agreed that the Stringers were not present during the altercation (Tr. Vol. I. at 168; Weiss Transcript at 21-22).

Second, there is no support in the record for Defendant's assertion that his attorneys in the civil and criminal cases pursued significantly different trial strategies. In the criminal case, Defendant again argued that the only threats he made were directed at Mr. and Ms. Martin, telling the jury during closing arguments that:

> Now, once this argument has heated up, yes, threats of death were being thrown back and forth, and my client does some ridiculous things. The evidence shows those threats were made to the Martins. There's no evidence that my client made any threats to Mr. Weiss who represented the Stringers. There's no evidence that my client made any threats to the Stringers, or to their children or to anybody else other than Mike Martin and his wife

[2] Defendant quotes (Defendant's Br. 19) passages from the August 6, 1998 transcript. However, as Defendant himself notes in his brief (Defendant's Br. 14 n.2), the only portions actually read to the jury were from Mr. Weiss's April 21-22, 1998 testimony (see also Tr. Vol. I. at 167; Weiss Transcript at 1).

(Tr. Vol. III at 50 (emphasis added)). Defendant's strategy in both the civil and criminal cases was to argue that the threats were directed only at the Martins, but not for any reason having to do with race. In both cases, Defendant's counsel took a calculated risk that Defendant could avoid liability by showing that although he did make threatening statements, they were not motivated by a racial animus, but instead by a personal, non-racial conflict with the Martins (see Tr. Vol. III at 45-47, 49-51, 54, 59-60 (Defendant's closing argument)). See also 42 U.S.C. 3631(b)(1) (requiring proof of racial animus); Mich. Comp. Laws Ann. § 37.2502 (same).

Finally, as discussed above, both in the district court and in his brief to this Court, Defendant has failed to identify any way in which the purported differences in trial strategies would have led to a materially different cross-examination of Weiss in this case. See Dykes, 801 F.2d at 817. Defendant does not identify any questions his attorney would have asked Weiss in this case that his lawyer did not ask in the first case because of the allegedly different trial strategy. Ibid. And while Defendant's counsel in this case might not have asked Weiss the incriminating questions posed in the civil case, that difference had no practical effect here because Defendant was allowed to redact that damaging testimony as if it had never been elicited in the first place.

B. Admission Of Weiss's Testimony Did Not Violate Defendant's Sixth Amendment Rights

Defendant argues (Defendant's Br. 14-16) that in addition to violating the Rules of Evidence, the admission of the Weiss transcript violated his rights under the Sixth Amendment.

The admission of hearsay evidence, such as a transcript of prior testimony, implicates the Sixth Amendment's Confrontation Clause because it deprives the defendant the opportunity to physically confront the witness whose testimony is presented against him. See Idaho v. Wright, 497 U.S. 805, 813-814 (1990). However, the Supreme Court has held that hearsay evidence does not violate the Confrontation Clause so long as it "bears adequate indicia of reliability." Id. at 815 (citation and internal quotation marks omitted). Moreover, the Court has held that this standard is necessarily met when the evidence is admitted pursuant to a traditional exception to the hearsay prohibition. See Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.") (emphasis added).

The admission under Fed. R. Evid. 804(b)(1) of a transcript of prior court testimony by a witness who is no longer available is one such well-established exception to the hearsay rule. See United States v. Licavoli, 725 F.2d 1040, 1049 (6th Cir. 1984) (testimony admitted under Rule 804(b)(1) bears "the indicia of reliability necessary to satisfy the confrontation clause"); United States v. Mann, 161 F.3d 840, 861 (5th Cir. 1998) ("As a

legal matter, we hold that Rule 804(b)(1) is a firmly rooted exception to the hearsay rule."), cert. denied, 526 U.S. 1117 (1999); United States v. McKeeve, 131 F.3d 1, 9 (1st Cir. 1997) (same); United States v. Koon, 34 F.3d 1416, 1426 (9th Cir. 1994) (same), aff'd in part and rev'd in part on other grounds, 518 U.S. 81 (1996); United States v. Kelly, 892 F.2d 255, 262 (3d Cir. 1989) (same); United States v. McClellan, 868 F.2d 210, 214 (7th Cir. 1989) (same); United States v. Salim, 855 F.2d 944, 954-955 (2d Cir. 1988) (same).[3]

C. Any Error In Admitting Weiss's Testimony Would Have Been Harmless Beyond A Reasonable Doubt

In determining whether a violation of the Confrontation Clause is harmless, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Deleware v. Van Arsdall, 475 U.S. 673, 684 (1986). In making that determination, courts must consider a variety of factors, including:

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted,

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[3] Thus, Defendant's citation (Defendants' Br. 15-16) to cases in which a party's attorney was completely absent from a trial or deposition are misplaced. Of course, these cases have no application here, where Defendant's attorney was not only present, but very active in cross-examining the witness in the prior proceeding. But more directly, Defendant's citation to these inapplicable cases ignores the proper test, described above, for determining whether the admission of prior testimony violates the Confrontation Clause.

> and, of course, the overall strength of the prosecution's case.

Ibid. These considerations support the conclusion that any error in admitting Mr. Weiss's testimony in this case was harmless.

First, the "importance of the witness' testimony" in this case was not critical. Defendant himself argued below that Mr. Weiss's testimony was cumulative and did not add anything to the testimony of the other real estate agents (Tr. Vol. I at 161-162). While Mr. Weiss's testimony was not so cumulative as to require exclusion, Defendant is correct that Mr. Weiss simply retold the events already described in the similar testimony of Mr. and Ms. Martin (see Tr. Vol. I at 89-90, 123-127), and corroborated in part by the testimony of one of the neighbors (see Tr. Vol. II at 30) and the statements of Defendant himself (see Tr. Vol. I at 177; Tr. Vol. II at 55-56, 66). In fact, Defendant has not identified any material testimony the jury heard from the Weiss transcript that was not also set forth in live testimony.

Second, there is no reason to believe that the "fully realized" "damaging potential of the cross-examination" Defendant alleges he was deprived of would have been particularly significant. As discussed above, Defendant has not even suggested how his criminal attorney would have conducted the cross-examination any differently than did his attorney in the civil case. In fact, in the criminal case, Defendant's attorney chose not to exploit the full "damaging potential" of the cross-

examination already available in the transcript of the civil trial — of the more than 30 pages of cross-examination in the civil transcript, Defendant's criminal attorney chose to read less than two pages to the jury (see Weiss Transcript at 21-22). Given that Defendant's counsel chose to ignore almost all of the cross-examination already available to him, there is no reason to believe that he would have included any more if the civil attorney had conducted a more exhaustive cross-examination in the first case.

Finally, the "overall strength of the prosecution's case" was overwhelming, even without Mr. Weiss's testimony. See supra, pp. 3-7 (Statement of Facts); infra, pp. 29-31 (sufficiency of the evidence for Count II).

II. THE INDICTMENT AND INFORMATION WERE NOT MULTIPLICITOUS

Defendant argues (Defendant's Br. 27-28) that the initial indictment charged a single offense in two separate counts, violating the prohibition against "multiplicity."[4]

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[4] The district court denied Defendant's motion to dismiss the original indictment on this ground without prejudice to renewal at the close of the government's case (R. 23: Order). However, the initial indictment was eventually dismissed by consent on other grounds (R. 29: Order). Defendant did not move to dismiss the superseding information although he did state, in his Rule 29 motion at the end of the United State's case-in-chief, that "[i]n a sense, Your Honor, I am renewing my motion to dismiss Count 2, which I filed, Your Honor, way back on October 01 of 1997" (Tr. Vol. II at 83). But by failing to move to dismiss the superseding information before trial, Defendant waived any multiplicity objection to the information itself. See Fed. R. Crim. P. 12(c), (f); United States v. Hart, 70 F.3d 854, 859-860 (6th Cir. 1995); United States v. Colbert, 977 F.2d 203, 208 (6th Cir. 1992); United States v. Woods, 544 F.2d 242, 250-251 (6th Cir. 1976). See also United States v. Oldfield, 859 F.2d 392,
(continued...)

"The principal danger raised by a multiplicitous indictment is the possibility that the defendant will receive more than one sentence for a single offense." United States v. Hearod, 499 F.2d 1003, 1005 (5th Cir. 1974); 1A Charles Alan Wright, Federal Practice and Procedure, Criminal § 145 (3d ed. 1999).[5] Such a result implicates the Double Jeopardy Clause, which "protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

This does not mean, however, that a legislature may not separately and cumulatively punish the same conduct under multiple statutory provisions (see Defendant's Br. 27). "[I]n

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[4](...continued)
396-397 (6th Cir. 1988) (failure to raise pretrial objection waives claims of deficiency in the indictment, even if the claim is later raised in a Rule 29 motion); Hart, 70 F.3d at 859-860 (same). However, because the Double Jeopardy Clause is also violated by multiple sentences for the same offense, a multiplicity objection will lie against a sentence even if an objection is not made to the indictment or information. See United States v. Rosenbarger, 536 F.2d 715, 722 (6th Cir. 1976). Although Defendant does not characterize his multiplicity objection as an attack on his sentence, the United States will treat it as such for the purposes of this brief.

[5] A multiplicitous information also "may falsely suggest to a jury that a defendant has committed not one but several crimes." United States v. Duncan, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988). However, it is within the discretion of the trial court to determine whether this risk is substantial enough to warrant requiring the Government to elect between the multiplicitous counts. United States v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990). Defendant does not argue that he was prejudiced in the eyes of the jury and never asked for a limiting instruction to mitigate that risk. Moreover, by failing to raise a multiplicity objection to the information on which he was tried before trial, Defendant has waived any argument regarding the risk of jury prejudice. See United States v. Morehead, 959 F.2d 1489, 1506 n.11 (10th Cir. 1992); United States v. Marroquin, 885 F.2d 1240, 1245 (5th Cir. 1989); United States v. Mastrangelo, 733 F.2d 793, 800 (11th Cir. 1984).

the multiple punishments context, [the Double Jeopardy Clause] is limited to ensuring that the total punishment did not exceed that authorized by the legislature." Jones v. Thomas, 491 U.S. 376, 381 (1989) (citation and quotation marks omitted). Thus, "analysis of prosecutions under multiple statutes under the Double Jeopardy Clause is limited to considering whether the legislature intended to allow simultaneous convictions." United States v. McLaughlin, 164 F.3d 1, 8 (D.C. Cir. 1998), cert. denied, 526 U.S. 1079 (1999).

To determine that intent, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). "If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." Ianelli v. United States, 420 U.S. 770, 785 n.17 (1975). And if the Blockburger test is satisfied, courts conclude that Congress intended to permit multiple punishments, absent some other clear indication that it did not. See Missouri v. Hunter, 459 U.S. 359, 365-368 (1983).

Defendant in this case was charged with violating two different provisions of the Fair Housing Act during the single confrontation. Those two Counts charged violations of different provisions that require proof of different victims singled out

for different reasons. Section 3631(a) requires, among other things, proof that the defendant was acting against the victim because of victim's race and because the victim has been selling, purchasing, leasing, etc. housing. Section 3631(b), on the other hand, does not require proof that the victim was threatened because of her race or because the victim was seeking to buy, sell, lease, etc. housing. Instead, Section 3631(b) requires proof that the defendant acted against the victim because the victim was offering nondiscriminatory housing services, facts that need not be proved under Section 3631(a). Thus, in this case, Defendant was charged in one Count of acting against the home buyers because they were African Americans looking to buy a house and, in the other Count, of acting against the real estate agents because they were offering nondiscriminatory realty services to an African-American couple. Thus, under Blockburger, Sections 3631(a) and (b) create separate offenses.

Nor is the information multiplicitous simply because the two subsections were violated, in this particular case, by the same threats. "The application of the test focuses on the statutory elements of the offense, not on the proof offered in a given case." McLaughlin, 164 F.3d at 8. As discussed above, the elements of the crimes created by subsections (a) and (b)(1) are distinct, even if the same threatening conduct in this case was sufficient to satisfy both.

Defendant nonetheless argues (Defendant's Br. 27-28) that "[r]ead as a whole" Section 3631 was intended to create a single

offense that could be violated in one of several ways. That the separate offenses are described in subsections of the same provision, rather than in completely separate provisions within the same statute (as was the case in Blockburger) is of no consequence. Courts have routinely concluded that "[t]he Blockburger test applies even if the offenses in question are subsections of the same statutory provision rather than two distinct provisions." Gray v. Lewis, 881 F.2d 821, 823 n.2 (9th Cir. 1989).[6] For example, in Brown v. Ohio, 432 U.S. 161, 162-163, 168 (1977), the Supreme Court applied the Blockburger test in case involving violation of two subsections of an Ohio criminal provision. And in United States v. Metzger, 778 F.2d 1195 (1985), this Court considered a multiplicity challenge to an indictment charging in separate counts violations of two subsections of 18 U.S.C. 844. This Court concluded that the separate subsections satisfied the Blockburger test and,

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[6] See also, e.g., United States v. McKittrick, 142 F.3d 1170, 1176 (9th Cir. 1998) (applying Blockburger to violations of different subsections of 50 C.F.R. 17.84(i)), cert. denied, 525 U.S. 1072 (1999); United States v. Morehead, 959 F.2d 1489, 1506-1508 (10th Cir. 1992) (multiple subsections of 21 U.S.C. 856(a)); United States v. Ouimette, 798 F.2d 47, 50 (2d Cir. 1986) (multiple subsections of 18 U.S.C. 922); United States v. Dennison, 730 F.2d 1086, 1088 (7th Cir. 1984) (multiple subsections of 15 U.S.C. 1644). See also Dennis v. Poppel, No. 99-6294, 2000 WL 1174723 (10th Cir. Aug. 18, 2000) (applying Blockburger to multiple counts based on different clauses of same statutory provision).

therefore, created separately punishable offenses. Id. at 1209-1210.[7]

Moreover, in this case, the separate subsections of Section 3631 clearly indicate a congressional intent to proscribe significantly different forms of discrimination, targeting different classes of victims. That the defendant in this case was, in a sense, efficient in his discrimination — violating two sections of the statute in the same transaction — is no reason to think that Congress would have considered his conduct less serious than if he had threatened the home buyers and realtors in separate incidents.

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[7] If, on the other hand, the United States had charged Defendant in a separate count under Section 3631(a) for each threatening statement he made, the question would be "what act the legislature intended as the 'unit of prosecution' under the statute." United States v. Weathers, 186 F.3d 948, 952 (D.C. Cir. 1999) (citing Sanabria v. United States, 437 U.S. 54, 69 (1978)), cert. denied, 120 S. Ct. 1272 (2000). This "unit of prosecution" analysis, however, is only applicable where the defendant is charged with violating the same statutory prohibition numerous times, as opposed to cases where one act is alleged to violate numerous statutory prohibitions. See Weathers, 186 F.3d at 952; United States v. Jones, 533 F.2d 1387, 1390-1392 (6th Cir. 1976). But even if the "unit of prosecution" test were applicable, it is clear that Congress intended to punish separately threats to separate victims. That is, there would be little question that Defendant would have committed three offenses if he had, for instance, physically assaulted each of the three realtors during the incident. See United States v. Street, 66 F.3d 969, 975 (8th Cir. 1995) (defendant committed two assaults against two forest rangers even though it was done during a single confrontation). In the same vein, Congress clearly intended to allow prosecution of threats against separate victims, particularly when the threats violate separate subsections of the statute.

III. THE UNITED STATES ADEQUATELY PLED AND PROVED A VIOLATION OF 18 U.S.C. 3631(a) IN COUNT II OF THE INFORMATION

Contrary to Defendant's contentions (Defendant's Br. 23-27, 28-30) the original indictment[8] and superseding information adequately pled, and the evidence sufficiently proved, a violation of 18 U.S.C. 3631(a) in Count II.

A. The Information Adequately Pled A Violation Of 42 U.S.C 3631(a)

1. The Information Adequately Pled All The Elements Of The Offense

"The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Thus, "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." Hamling v. United States, 418 U.S. 87, 117-118 (1974). Moreover, "[a]n indictment tracking the language of the statute is sufficient as long as those words fully, directly, and expressly set forth all the elements necessary to constitute the offense intended to be punished." United States v. Caldwell, 176 F.3d 898, 901 (6th Cir.), cert. denied, 120 S. Ct. 275 (1999) (citation and internal punctuation omitted); see also Hamling, 418 U.S. at 117-118.

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[8] To the extent Defendant is challenging the district court's denial of his motion to dismiss the original indictment, that issue was mooted by the court's subsequent dismissal of that indictment on other grounds (see R. 29: Order).

Count II alleged a violation of 42 U.S.C. 3631(a), which provides that:

> Whoever * * * [1] by force or threat of force [2] willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with * * * [3] any person [4] because of his race * * * and [5] because he is or has been selling, purchasing, renting, financing, occupying, or contracting or negotiating for the sale, purchase, rental, financing or occupation of any dwelling.

The information, in turn, pled all the elements of the offense, closely tracking the language of the statute:

> That on or about August 16, 1994 * * * Richard Vartanian, defendant herein, did [1] by force and threat of force [2] willfully intimidate and interfere with and attempt to injure, intimidate, and interfere with [3] an African-American family * * * by accosting and threatening approximately three real estate sales persons with bodily injury * * * all [4] on account of the African-American family's race and [5] their attempts to negotiate for purchase, contract for purchase, purchase and occupy the dwelling.

(R. 30 at 2). The information also discusses, in some detail, the specific threats Defendant made (R. 30 at 2).

Thus, Defendant incorrectly states that the information "alleged no 'force or threat of force' against the purchasers of 18980 Eastwood" (Defendant's Br. 26). Nor is Defendant correct (Defendant's Br. 26) in asserting that "the Information alleges not a single contact or communication, direct or indirect, between Mr. Vartanian and the home purchasers." The information clearly alleges that Mr. Vartanian willfully communicated threats to the home purchasers indirectly through their agents: "Richard Vartanian * * * did by force and threat of force willfully intimidate * * * an African-American family * * * by accosting and threatening approximately three real estate sales persons."

Defendant does not claim that he did not understand that the United States intended to prove that he conveyed his threats to the Stringers through their agents or that the information otherwise failed to provide him with fair notice of the charges against him. See Caldwell, 176 F.3d at 901.

2. Section 3631(a) Does Not Require A "Direct" Threat

Instead, Defendant's real argument seems to be that Section 3631(a) only prohibits direct threats, not threats delivered through third parties. But nothing in the statutory language requires that the illegal threat be issued in person or "directly." The statute simply requires proof that the defendant "by force or threat of force willfully * * * intimidates * * * or attempts to injure, intimidate or interfere with" the victim. 42 U.S.C. 3631(a). The coverage is intentionally broad and general. See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209, 212 (1972) (the language of the Act is "broad and inclusive" and should be given a "generous construction"); United States v. Gilbert, 813 F.2d 1523, 1527 (9th Cir. 1987) ("[T]he language invites an expansive interpretation to the list of protected activities."). The breadth and generality of the language is dictated by the breadth and importance of the congressional purpose it enforces. See 42 U.S.C. 3601 (Congress intended the Act "to provide, within constitutional limitations, for fair housing throughout the United States").

Thus, in applying Section 3631, courts consider the alleged threats "in light of their entire factual context, including the

surrounding events and reactions of the listeners." United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990). "The fact that a threat is subtle does not make it less of a threat." United States v. Gilbert, 884 F.2d 454, 457 (9th Cir. 1989). Similarly, the fact that a threat is delivered through an intermediary does not make it any less of a threat against its intended recipient. See United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) ("When determining whether statements have constituted threats of force, we have considered a number of facts [including] * * * whether the threat was communicated directly to its victim."); People Helpers Found., Inc. v. City of Richmond, 781 F. Supp. 1132, 1135-1136 (E.D. Va. 1992) (complaint stated a claim under the civil intimidation provision of the Fair Housing Act, 42 U.S.C. 3617, by alleging, among other things, "indirect threats [that] were communicated to Plaintiffs through the Richmond Bureau of Police"). There is nothing in the statutory language, for instance, that would exclude a threat delivered through the mail even though the message was not conveyed in-person, but rather indirectly through the postal service. See Gilbert, 884 F.2d at 457 (affirming conviction under Section 3631 based on threatening letters).

Congress surely would not have intended to create a loophole by which defendants could threaten and intimidate those seeking fair housing by the simple expedient of delivering their threats indirectly. Instead, in enacting civil rights laws, Congress has long acknowledged that

> [e]xperience teaches that racial violence has a broadly inhibiting effect upon the exercise by members of the Negro community of their Federal rights to nondiscriminatory treatment. Such violence must, therefore, be broadly prohibited if the enjoyment of those rights is to be secured.

S. Rep. No. 721, 90th Cong., 2d Sess. (1967), reprinted in 1968 U.S.C.C.A.N. 1837, 1842 (legislative history to 18 U.S.C. 245).[9]

This does not mean that a defendant can be held criminally liable whenever a threatening statement is relayed to a home buyer by a third party. The Government must prove that the defendant willfully threatened the victim. See 42 U.S.C. 3631(a). That is, the Government must show that the defendant intended for the threat to be conveyed to the victim through that third party. If, for example, Defendant in this case had made threatening statements about the Stringers to his own wife, but did not believe that she would ever convey those threats to the Stringers, his statements would not have constituted a violation of Section 3631 even if the Stringers eventually became aware of his threats through some unforeseen circumstance. But so long as Defendant intended for a threat to be conveyed to the victim, the fact that the threat was delivered indirectly instead of in a face-to-face encounter does not render the indictment insufficient.

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[9] "Legislative history of section 3631 is sparse * * *. Civil rights legislation, now codified at 18 U.S.C. § 245 (1982), was the model for section 3631." Gilbert, 813 F.2d at 1527.

B. The Jury Had Sufficient Evidence To Conclude That Defendant Violated 18 U.S.C. 3631(a) By Threatening The Home Purchasers Through Their Real Estate Agents

Once the proper legal standard is understood, it is clear that the United States provided the jury sufficient evidence to support its verdict. "In examining defendant's claims that the evidence was insufficient to support his convictions, we view the evidence and all reasonable inferences therefrom in a light most favorable to the government." United States v. Tager, 788 F.2d 349, 354 (6th Cir. 1986).

Defendant's sufficiency-of-the-evidence argument simply restates his objection to the sufficiency of the indictment, arguing that "Count II must fail because there was no evidence of direct threats or intimidation to the Stringers" and because there was insufficient evidence that Defendant "was guilty of threatening or intimidating the Stringers directly, as alleged in Count II" (Defendant's Br. 29-30) (emphasis added). As argued above, however, the United States did not have to prove a direct threat; it needed to prove an intentional threat to the Stringers.

Defendant does not, therefore, appear to dispute that the evidence was sufficient to support the jury's conclusion that he intended for his behavior and threats toward the real estate agents to be conveyed to the Stringers. Nor does he appear to contest that the evidence was sufficient to demonstrate that he intended the Stringers, as well as the agents, to be intimidated. But even if Defendant did not concede these points, there was

more than sufficient evidence to prove both facts beyond a reasonable doubt.

The evidence showed that Defendant's threats were motivated by his anger over the prospect that the house at 18980 Eastwood was being sold to an African-American family (Tr. Vol. I at 127; Tr. Vol. II at 26).[10] That is, the ultimate objects of Defendant's anger were the Stringers and their choice to move into his neighborhood. In fact, Defendant made his animosity toward any African-American family wanting to move into his neighborhood so obvious that Mr. Weiss believed Defendant posed a serious threat to the safety of his clients (see Weiss Transcript at 103).

Defendant also knew that the Martins and Mr. Weiss were real estate agents working with the Stringers, (see, e.g., Tr. Vol. I at 89, 124) and, therefore, had every reason to believe that his threats would be conveyed to the Stringers by their agent. And, in fact, Mr. Weiss conveyed the threats to the Stringers, believing that he had a fiduciary responsibility to do so (Tr. Vol. I at 203-205; Weiss Transcript at 103).

Under a set of jury instructions agreed to by Defendant (Tr. Vol. III at 3), the court instructed the jury that it could infer that Defendant intended the natural and probable consequences of his knowing acts (Tr. Vol. III at 19). See also United States v. Thomas, 728 F.2d 313, 320-321 & n.3 (6th Cir. 1984) (approving

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[10] Defendant does not contest the sufficiency of the evidence to support his conviction under Count I, which required proof of this same animus.

similar instruction). The jury could reasonably conclude that Defendant intended his threats to the real estate agents to also convey a message to the Stringers, letting them know that their moving to the neighborhood would cause a violent reaction from their neighbor, a neighbor who was so upset about the prospect of their moving in that he was willing to threaten the life of even those who were only indirectly responsible for the further integration of the neighborhood.

CONCLUSION

For the above reasons, Defendant's conviction should be affirmed.[11]

Respectfully submitted,

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[11] If, however, this Court were to conclude that the information was multiplicitous, or that the United States failed to adequately plead or prove Count II of the information, the proper remedy would be to vacate the Count II conviction (which is being served concurrent with the sentence imposed under Count I) and the $25 special assessment for that count. See Jones v. Thomas, 491 U.S. 376, 381-382 (1989) (proper remedy for multiplicitous sentences is to vacate one of the sentences).

CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The attached brief contains 8,127 words and 876 lines of monospaced text.

____

Kevin Russell
Attorney

APPELLEE'S CROSS-DESIGNATION
OF APPENDIX CONTENTS

Pursuant to 6th Cir. R. 28(d), the United States hereby designates the following filings in the district court's record as items to be included in the joint appendix in addition to those identified in Appellant's Designation of Appendix Contents:

Transcript of Jury Trial, Volume I, pages 83, 94-95, 117-118, 123-127, 199-200, 209.

Transcript of Jury Trial, Volume I, pages 3-4, 23-26, 30, 55-56, 83.

Transcript of Jury Trial, Volume VI, page 4.

Transcript of Sentencing Hearing, pages 25, 31, 35.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief of the United States as Appellee were sent by first class mail postage prepaid this 11th day of September, 2000, to the following counsel of record:

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