

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 24-20034-CR-ALTONAGA/REID

UNITED STATES OF AMERICA,
Plaintiff,

v.

BILLY OLVERA,
Defendant.

_____ /

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

The Defendant, BILLY OLVERA, by and through undersigned counsel and pursuant to Local Rules 7.1 and 88.9, and Fed. R. Crim. P. 29(c), and moves this Court to set aside the guilty verdict and enter an acquittal. In support, the Defendant submits the following:

1. Defendant was charged with a single count of Intimidating a Flight Crew Member of an Aircraft in the United States, in violation of 49 U.S.C. § 46504. That statute provides, in pertinent part:

An individual on an aircraft in the special aircraft jurisdiction of the United States who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties, or attempts or conspires to do such an act, shall be fined under title 18, imprisoned for not more than 20 years, or both.

2. During jury trial, the Government presented evidence to establish that the Defendant was surreptitiously recording flight attendant A.G. with his cell phone as she passed up and down the aisle during flight.

3. Unbeknownst to the Defendant, the flight crew caught on to what he was doing and recorded him in the act.

4. The pilots were alerted and advised the crew against confronting the Defendant and asked that they stand down until the plane reaches its destination (MIA) where law enforcement will be waiting to take the Defendant into custody.

5. Flight attendant A. G. testified she could not perform any of her duties after she confirmed the Defendant had been recording her.

6. On May 22, 2024, the jury returned a verdict of guilty.

7. Sentencing is currently set for August 16, 2024.

STANDARD OF REVIEW

In considering a motion for the entry of judgment of acquittal under Federal Rule of Criminal Procedure 29(c), this Court should apply the same standard used in reviewing the sufficiency of the evidence to sustain a conviction. *See United States v. Sellers*, 871 F.2d 1019, 1020 (11th Cir.1989). The Court must view the evidence in the light most favorable to the government. *See id.* (citing *Glasser v. United States*, 315 U.S. 60, 80 (1942), *superceded by rule on other grounds*, *Bourjaily v. United States*, 483 U.S. 171 (1987)). The Court must resolve any

conflicts in the evidence in favor of the government, *see United States v. Taylor*, 972 F.2d 1247, 1250 (11th Cir.1992), and must accept all reasonable inferences that tend to support the government's case. *See United States v. Burns*, 597 F.2d 939, 941 (5th Cir.1979). The Court must ascertain whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *See Sellers*, 871 F.2d at 1021 (citing *United States v. O'Keefe*, 825 F.2d 314, 319 (11th Cir.1987)). "It is not necessary for the evidence to exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *Sellers*, 871 F.2d at 1021 (quoting *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (*en banc*), *aff'd on other grounds*, 462 U.S. 356 (1983)). A jury is free to choose among reasonable constructions of the evidence. *See Sellers*, 871 F.2d at 1021. The Court must accept all of the jury's "reasonable inferences and credibility determinations." *See id.* (citing *United States v. Sanchez*, 722 F.2d 1501, 1505 (11th Cir.1984)).

ARGUMENT

The quintessential question in this motion turns on the interpretation of the element "knowingly intimidate" as that term is set forth in the 11th Circuit Pattern Jury Instructions. The instructions read in relevant part:

O118
Assaulting or Intimidating a Flight Crew Member of an
Aircraft in United States
49 U.S.C. § 46504

It's a Federal crime to intimidate a flight-crew member or attendant on an aircraft in flight in the United States.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant was on an aircraft in flight in the United States;
- (2) the Defendant ***knowingly intimidated*** a flight-crew member or flight attendant of the aircraft; and
- (3) the intimidation interfered with or lessened the ability of the crew member or flight attendant to perform [his] [her] duties.

An aircraft is “in flight” from the moment all external doors are closed after the passengers have boarded through the moment when one external door is opened to allow passengers to leave the aircraft. For purposes of this crime, an aircraft does not have to be airborne to be in flight.

To “intimidate” someone is to intentionally say or do something that would cause a person of ordinary sensibilities to fear bodily harm. It's also to say or do something to make another person fearful or make that person refrain from doing something that the person would otherwise do – or do something that the person would otherwise not do.

The jury in this case was further instructed that:

The word “knowingly” means that an act was done voluntarily ***and intentionally*** and not because of a mistake or by accident.

A fair reading of these instructions and their key word definitions would require that, in order for the Defendant to “knowingly intimidate” someone, the Defendant would have to, at minimum, be ***aware*** of the act of intimidation. The word “knowingly” means that ***an act*** was done voluntarily and intentionally.... What “act”

is the definition referring to? Element (2) of the instruction provides the answer to that question: (2) the Defendant ***knowingly intimidated***....

Element (2) does not say “knowingly committed an act that intimidated...” Rather, it says intimidation ***is the act*** the Defendant must “knowingly” commit. Accordingly, a plain reading of these elements and definitions in context means the Defendant had to know that he was intimidating a flight crew member.

It is important to recognize that the Defendant is not here making an argument founded upon specific intent. Case law suggests that no specific intent is required to sustain a conviction under § 46504. *See United States v. Grossman*, 131 F.3d 1449 (11th Cir. 1997). Moreover, the United States Supreme Court has explained that the *mens rea* associated with “knowing” conduct, “[i]n a general sense . . . corresponds loosely with the concept of general intent.” *United States v. Bailey*, 444 U.S. 394, 405 (1980); H.R. Rep. 495, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1351-52 (“It is the Committee’s intent, that unless otherwise specified, the knowing state of mind shall apply to circumstances and results. This comports with the usual interpretations of the general intent requirements of current law.”).

More specifically, a “knowing” *mens rea* “merely requires proof of knowledge of the facts that constitute the offense.” *Bryan v. United States*, 524 U.S. 184, 193 (1998). To that end, “[A] defendant need not intend to violate the law to

commit a general intent crime, ***but he must actually intend to do the act that the law proscribes.***” *United States v. Phillips*, 19 F.3d 1565, 1576-77 (11th Cir. 1994), *amended*, 59 F.3d 1095 (11th Cir. 1995) (emphasis added).

In this case, the “act” that the law proscribes is intimidation.¹ Element (2) of the jury instruction requires the jury to find the Defendant “knowingly intimidated” a flight crew member. For Defendant to knowingly intimidate someone, he would at least need to be aware that the person was, in fact, being intimidated by him.

That did not happen in this case. At all times, the Defendant acted surreptitiously so as not to get caught. When flight attendant A.G. noticed that Defendant may have been doing something with his phone, he immediately covered the phone and slowly brought it up with the screen facing his body so that she couldn’t see. For all the Defendant knew, he had gotten away with his clandestine video voyeurism. It was not until the Defendant disembarked the plane and was apprehended by law enforcement that Defendant realized he had been caught and the gig was up. However, at no time during the flight did the Defendant know he was intimidating A.G.

¹ See *United States v. Hicks*, 980 F.2d 963, 974 n.16 (5th Cir. 1992) (“[T]he statute requires intent for the intimidation element of the statute; the statute merely requires no *mens rea* for the result of the intimidation, i.e., causing interference with crew members' duties. The gravamen of the offense -- for which intent is required -- is intimidation, not interference. Interference with the flight crew is merely an attendant circumstance.”).

WHEREFORE, because the Government failed to prove Element (2) –that Defendant “knowingly intimidated” A.G.– beyond a reasonable doubt, this Court should grant a judgment of acquittal and vacate the verdict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document was electronically filed via the CM/ECF filing system on June 5, 2024, and all parties were effectively served thereby.

By: /s/ Robert David Malove
Robert David Malove

CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that I conferred with opposing counsel, Audrey Pence Tomanelli, AUSA, who opposes the instant motion.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

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ORDER

THIS CAUSE having come before the Court on the Defendant's Motion for Judgment of Acquittal and the Court being duly advised in the premises, it is hereby:

ORDERED that the Defendant's Motion is **GRANTED**. The verdict of guilty entered on May 22, 2024, is hereby vacated.

DONE AND ORDERED in chambers at Miami, Florida, this ____ day of _____, 2024.

HONORABLE CHIEF JUDGE CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record