United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-3040 **September Term, 2017**

FILED AUGUST 17, 2018

UNITED STATES OF AMERICA,
APPELLEE

v.

NOE MACHADO-ERAZO, ALSO KNOWN AS GALLO, ALSO KNOWN AS NOE MARCHADO-ERAZO,
APPELLANT

Consolidated with 15-3041, 15-3043

Appeals from the United States District Court
for the District of Columbia
(No. 1:10-cr-00256-8)
(No. 1:10-cr-00256-9)
(No. 1:10-cr-00256-20)

Before: ROGERS, WILKINS and KATSAS, *Circuit Judges*.

J U D G M E N T

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. Upon consideration of the foregoing, it is

ORDERED and ADJUDGED that the judgment of the District Court be affirmed in accordance with this unpublished judgment and the published opinion[*] issued herein this date.

Appellants Yester Ayala, Noe Machado-Erazo, and Jose Martinez-Amaya were charged with and convicted of conspiracy to participate in a Racketeer Influenced Corrupt Organization ("RICO"), in violation of 18 U.S.C. § 1962(d), and various other crimes. We resolved Appellants' claims that character evidence and cell-site data was improperly admitted in a published opinion issued simultaneously herewith. This judgment resolves the remaining issues, which do not

[*] Opinion for the court filed by Circuit Judge Wilkins.
Concurring opinion filed by Circuit Judge Rogers.

require a published opinion: Appellants' claims that (1) the District Court erred in instructing the jury on the RICO predicate offenses of obstruction of justice and extortion, and, in any event, the evidence does not support the jury's verdict on obstruction of justice or extortion; (2) the District Court abused its discretion in denying Appellants' motion for a mistrial; (3) their convictions for a RICO conspiracy and murder in aid of racketeering ("VICAR murder") violate the Double Jeopardy Clause; (4) Machado-Erazo and Martinez-Amaya's convictions for possession of a firearm during a crime of violence constitute legal error; (5) the District Court erred by precluding Ayala from presenting a duress defense and refusing to give a duress instruction; and (6) Machado-Erazo's and Martinez-Amaya's life sentences violate the Eighth Amendment's prohibition against cruel and unusual punishment. We address each issue in turn below and find none meritorious.

Obstruction of Justice and Extortion. Appellants contend that the District Court omitted material elements from its instructions to the jury on obstruction of justice and extortion, and that these offenses lacked sufficient evidence. Appellants' Br. 38-45. Reviewing these claims for plain error because they were not raised in the District Court, *United States v. Breedlove*, 204 F.3d 267, 270 (D.C. Cir. 2000), we find Appellants' claims unfounded.

Appellants argue that the obstruction of justice instruction was in error because it failed to instruct jurors that the effect of allegedly obstructed testimony on the proceeding must be material. Appellants' Br. 39; *see* J.A. 1880-81. Specifically, Appellants point to the definition of the "endeavor" at issue as "any effort or any act, however contrived, to obstruct, impede, or interfere with the grand jury or trial proceeding," so long as it was "reasonably foreseeable . . . [that] the actions were likely to affect [the] proceeding." J.A. 1880-81. We reject Appellants' contention. First, although the definition of endeavor, standing alone, might suggest a scope not intended by the statute, the remainder of the instruction remedies any potential concern: when considered as a whole, the instruction alerted the jury that mere effect on a proceeding would not necessarily constitute obstruction. In any event, the "likely to affect such a proceeding" language reasonably summarized the "natural and probable effect" requirement articulated by the Supreme Court in *United States v. Aguilar*, 515 U.S. 593, 599 (1995), the very requirement Appellants claim was missing from the instruction. Thus, to the extent that Appellants argue for a more expansive materiality standard, the District Court's failure to adopt it was not plain error as it was not obvious. *United States v. Olano*, 507 U.S. 725, 734 (1993).

Appellants' position regarding the sufficiency of the evidence supporting the obstruction-of-justice charge is equally unavailing. The evidence, taken in the light most favorable to the Government, *United States v. Booker*, 436 F.3d 238, 241 (D.C. Cir. 2006), shows that Ayala threatened to kill Hector Diaz-Flores, a Normandie clique member, co-defendant, and eyewitness to the Sanchez murder, if Diaz-Flores spoke to law enforcement, J.A. 1171, 1320-21; Ayala and Machado-Erazo attempted to dissuade Diaz-Flores from pleading guilty, J.A. 1170-71; Machado-Erazo and Ayala took photographs of incarcerated MS-13 members to intimidate them from cooperating with law enforcement, J.A. 1172-73; and the gang, more generally, took efforts to keep witnesses from testifying against other MS-13 members and to prevent gang members from cooperating with law enforcement, *see, e.g.*, J.A. 990, 1194, 1636, 1165-67, 1708, 1807-08. This evidence is more than sufficient to support the verdict.

Appellants' claims with respect to extortion fare no better. The District Court provided the following instruction on extortion: "Extortion. Under Maryland and District of Columbia law, extortion occurs when a defendant or defendants obtain property from a complainant with the complainant's consent where that consent was obtained by use of actual or threatened force or violence or by threat of economic injury." J.A. 1878. Appellants claim that the District Court erred in instructing the jury on extortion for two reasons: (1) it omitted the element of wrongfulness and (2) it failed to define the term "property." Appellants' Br. 41-42.

At oral argument, the Government conceded that the omission of wrongfulness as an element in the instructions was in error. Oral Arg. 1:04:00-1:05:00. Despite this, Appellants' claim fails because they have failed to satisfy their burden to show sufficient prejudice to warrant reversal under plain-error review given the extensive evidence that MS-13's *modus operandi* was to extort through threats, *see* J.A. 1035-38, 1076-77, 1097-98, 1113-14, 1148, 1594-95, 1730-31, 1800-01, which are clearly wrongful. *See Olano*, 507 U.S. at 734 (to find plain error, the court of appeals must find that the error was prejudicial). And, even if it were error to omit an instruction on "property," the error was not prejudicial because the District Court defined property in the immediately preceding instruction, J.A. 1878, and the term, in this context, has a generally understood meaning. *United States v. Perkins*, 161 F.3d 66, 70 (D.C. Cir. 1998) (A trial court "is not required to define words which are in common use, and are such as are readily comprehended by persons of ordinary intelligence[.]"). Finally, given the bountiful evidence of threatening behavior to obtain "renta," Appellants' arguments fail regarding the sufficiency of the evidence to prove extortion.

Mistrial Motion. Appellants next claim that the District Court erred in denying their motion for a mistrial or refusing to give a further curative instruction in response to the Government's alteration of certain exhibit cover sheets. Appellants' Br. 66-70. We review the District Court's denial of a mistrial motion for abuse of discretion. *United States v. McLendon*, 378 F.3d 1109, 1112 (D.C. Cir. 2004). Although the Government's conduct here was improper, the alteration was undone, J.A. 1670-72; the jury was informed about the alteration and the Government's misconduct was disclosed and explained, J.A. 1682-84; the District Court required that any further changes were to be done through witness testimony; Defendants had the opportunity to cross examine the witnesses on the changes, J.A. 1688-91, 1694-96; and Defendants did not object to the admission of the corrected cover sheets, *see* J.A. 1763-85. These actions sufficed as an alternative to granting a mistrial, as they mitigated any prejudice that may have been caused by the Government's conduct. *McLendon*, 378 F.3d at 1112 ("A mistrial is a severe remedy – a step to be avoided whenever possible, and one to be taken only in circumstances manifesting a necessity therefor." (citation and quotation marks omitted)).

Double Jeopardy. Appellants argue that the general prohibition against multiple punishments for the same act bars the multiple punishments in this case. Specifically, they claim that they cannot be convicted and punished separately, as they were, for the RICO conspiracy and the VICAR violation because the VICAR violation was a predicate offense for the RICO conspiracy charge. Appellants' Br. 31, 45-46. To determine whether the Double Jeopardy Clause precludes the convictions and punishments here, we are guided by the Supreme Court's decision in *Blockburger v. United States*, 284 U.S. 299 (1932). *Id.* at 304 ("[W]here 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 a fact which the other does not."). As relevant here, none of the elements of VICAR murder under 18 U.S.C. § 1959(a) is required to prove a § 1962(d) racketeering conspiracy. *Compare United States v. Carson*, 455 F.3d 336, 369 (D.C. Cir. 2006) (per curiam) (VICAR), *with RSM Prods. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP*, 682 F.3d 1043, 1048 (D.C. Cir. 2012) (RICO conspiracy); *see also United States v. Basciano*, 599 F.3d 184, 199 (2d Cir. 2010) ("While the pattern element [of § 1962(d)] demands proof of an agreement to commit at least two crimes, neither crime need involve the violence specified in § 1959(a)(5)."). Thus, because distinct factual elements must be proved to establish a violation of § 1959(a) and a § 1962(d) conspiracy, Appellants' convictions under both RICO and VICAR do not violate the Double Jeopardy Clause.

Crime of Violence. Machado-Erazo and Martinez-Amaya challenge their convictions under 18 U.S.C. § 924(c)(1)(A), contending that murder under Section 2-201 of the Maryland criminal code is not a crime of violence under section 924(c)(3)'s force or residual clause. Appellants' Br. 46-54. In light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), we do not address whether murder under § 2-201 constitutes a crime of violence under the residual clause found in § 924(c)(3)(B). *See Dimaya*, 138 S. Ct. 1204 (holding unconstitutionally vague the definition of "crime of violence" in the residual clause of 18 U.S.C. § 16); *see also United States v. Salas*, 889 F.3d 681, 684-86 (10th Cir. 2018) (finding § 924(c)(3)(B) unconstitutionally vague after *Dimaya*). We therefore consider only whether murder under § 2-201 qualifies as a crime of violence under § 924(c)(3)(A), which covers any felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."

Under the reasoning of cases such as *In re Irby*, 858 F.3d 231 (4th Cir. 2017) (force clause of § 924(c) covers second-degree retaliatory murder), and *United States v. Redrick*, 841 F.3d 478 (D.C. Cir. 2016) (robbery with a deadly weapon is a "violent felony" under Armed Career Criminal Act), we hold that first-degree murder under § 2-201 is such a crime of violence. At bottom, the force necessary to kill another human being is by definition "*violent* force – that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010); *see also United States v. Castleman*, 134 S. Ct. 1405, 1414-15 (2014) (reasoning that poison and other "indirect" causes of physical harm require common-law "force"); *United States v. Moreno-Aguilar*, 198 F. Supp. 3d 548, 554 (D. Md. 2016) (rejecting the argument that first-degree murder under § 2-201 did not constitute a crime of violence). Moreover, hypothetical crimes involving first-degree murder through "intellectual force or emotional force," *Johnson*, 559 U.S. at 138, as opposed to "physical force," are "too farfetched to give us pause," as they involve what the Supreme Court and this Court have discounted as "excessive 'legal imagination.'" *Redrick*, 841 F.3d at 484 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Finally, at a minimum, the contrary conclusion does not rise to the level of plain error.

Duress. Ayala contends that the District Court erred in precluding him from introducing evidence of duress and refusing to provide a jury instruction regarding the legal significance of duress. Appellants' Br. 71. A defendant is entitled to an instruction on a theory of duress only if there is "sufficient evidence from which a reasonable jury could find" for the defendant on that theory. *United States v. Akhigbe*, 642 F.3d 1078, 1083 (D.C. Cir. 2011) (citation and quotation

marks omitted). We review the District Court's determination that the evidence was insufficient to support such an instruction *de novo*, *United States v. Nwoye*, 663 F.3d 460, 462 (D.C. Cir. 2001), and conclude that Ayala's claim does not hold water.

The affirmative defense of duress is available to a defendant only if she shows she acted "under an unlawful threat of imminent death or serious bodily injury." *United States v. Bailey*, 444 U.S. 394, 409 (1980). The threat must be both grave and so "immediate," *United States v. Gaviria*, 116 F.3d 1498, 1531 (D.C. Cir. 1997) (per curiam), as to preclude "any reasonable, legal alternative to committing the crime," *United States v. Jenrette*, 744 F.2d 817, 820-21 (D.C. Cir. 1984). That Ayala may have acted under an unlawful threat of death or serious bodily injury is not in dispute. We consider only whether Ayala satisfied his burden to show the imminence of the purported threats and conclude that he did not. Ayala characterizes the time at which the Court considers whether the defendant had a chance to remove himself from the situation as the minutes immediately before the alleged homicide occurred, that is, when he encountered the green-lighted individual. We reject that characterization. At a minimum, to succeed on his claim, Ayala would have to show duress not only from when he learned that one particular victim had been targeted for murder, but also from the much earlier time when he learned that MS-13 required its members to murder such targets. Having proffered no evidence showing that he could not contact law enforcement or otherwise make efforts to leave the conspiracy, Ayala failed to meet his burden.

Eighth Amendment Challenge. Appellants' final argument is that Machado-Erazo's and Martinez-Amaya's life sentences are grossly disproportionate to the sentences of other similarly situated defendants and violate the Eighth Amendment's prohibition against cruel and unusual punishment. Appellants' Br. 82-84. In their reply, Appellants concede that the case law does not support their position, but nonetheless raise a general challenge to the constitutionality of a sentence of life in prison without parole. Reply 47 ("We start by conceding . . . that certain Supreme Court precedents . . . are difficult to distinguish."), 48 ("[W]e submit, there is a good faith argument for a modification of existing law."). This Court, however, is bound by the Supreme Court precedent Appellants cite, and therefore we reject Appellants' Eight Amendment challenge. *See generally Harmelin v. Michigan*, 501 U.S. 957 (1991) (holding that imposition of mandatory sentence of life in prison without possibility of parole for possessing 650 grams of cocaine did not constitute cruel and unusual punishment in the constitutional sense).

Pursuant to D.C. Circ. Rule 36, the judgment will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven (7) days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 4.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk