

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA :
 : **CASE NO. 1:21-cr-00599-RBW**
 v. :
 :
 DONNIE WREN and THOMAS SMITH, :
 :
 Defendants. :

GOVERNMENT’S RESPONSE TO WREN’S MOTION FOR NEW TRIAL

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits that this Court should deny Wren’s Motion for New Trial, ECF No. 127, because the defendant fails to overcome the “strong presumption . . . in favor of upholding the jury verdict.” *United States v. Rogers*, 918 F.2d 207, 213 (D.C. Cir. 1990) (internal quotation marks and citation omitted).

I. Factual Background

The Government charged defendants Thomas Smith and Donnie Wren with fourteen counts concerning their conduct at the United States Capitol on January 6, 2021—eleven counts for Smith and seven for Wren. ECF No. 71. The defendants proceeded to jury trial on April 17, 2023.

Jury selection began on April 17 and concluded on April 19. During that time, the Court and parties interviewed all seventy-five potential jurors in the pool to qualify the requisite number. Among other topics, the Court inquired as to potential jurors’ comfort with COVID-19 protocols—which included mask wearing. The Court heard challenges for cause from both parties and struck many potential jurors. After this questioning, the jury pool included one unvaccinated potential juror and two potential jurors who would be uncomfortable serving with an unvaccinated person.

The Court dismissed the unvaccinated potential juror to protect the health of the jury and preserve the rights of the concerned jurors. Defense used preemptory strikes on these two concerned jurors.

During the exercise of preemptory challenges, the Government used three of its six strikes on African American jurors, and Wren—who appears to be White—raised a *Batson* challenge. The Court asked the Government to articulate race-neutral reasons. The Government responded that the first juror said she found the events of January 6, 2021, “confusing” because she saw videos on social media that made it seem like officers supported the rioters and let them into the Capitol building. The second had a son who she said was the victim of an illegal search by the Metropolitan Police Department. He was convicted. The third was impassionate about the events of January 6th, had a friend who attended the event, and did not consider that person to be a criminal. After careful consideration, the Court denied Wren’s *Batson* challenge.

At trial, the Government’s evidence proved that on January 6, 2021, a Joint Session of the United States House of Representatives and the United States Senate convened to certify the vote of the Electoral College of the 2020 U.S. Presidential Election. While the certification process was underway, a large crowd gathered outside the United States Capitol building, entered the restricted grounds, and forcibly breached the Capitol building. As a result, the Joint Session and the entire official proceeding of the Congress were halted until law enforcement was able to clear the Capitol of hundreds of unlawful occupants and ensure the safety of elected officials.

Defendants Thomas Smith and Donnie Wren, cousins, traveled together to Washington, D.C. to attend former President Trump’s rally on January 6, 2021. After the rally, Smith and Wren walked from the rally to the United States Capitol. They entered Capitol grounds and joined in the riot. As they approached the Lower West Terrace, they saw rioters climbing the scaffolding leading to the inauguration stage. Wren and Smith followed the rioters up this scaffolding onto the stage.

Wren and Smith approached the Lower West Terrace Tunnel at around 3:00 p.m. Wren remained at the mouth of the Tunnel while Smith, carrying a flag attached to a flagpole, entered the Tunnel. Moments later, Smith jammed the flagpole like a spear trying to stab at one of the glass windowpanes next to the doors of the Capitol. When reunited outside the Tunnel, Wren saw that Smith had been sprayed with pepper spray.

Smith and Wren then climbed up a railing to the Upper West Terrace, where they stood directly in front of the police line. When a police line advanced to clear the Terrace at approximately 4:20 p.m., Smith and Wren confronted the line and pushed back against the officers' riot shields for approximately 20 seconds. These shields said "POLICE" on them, and the officers wore riot armor and helmets and carried sticks. The evidence included several videos and photographs clearly depicting Wren's push against the police line. Government's Exhibits 329-332.

At trial, Special Agent Cindy Barrois testified about Wren's interview upon arrest, including his admission that when he was pushing the police line on the Upper West Terrace he knew he "shouldn't have been there." Wren cross-examined Agent Barrois on this statement and emphasized in argument that by "there" Wren only meant "on the Upper West Terrace." To further clarify this point for the jury, the parties provided a stipulation stating, "When Mr. Wren made the comment 'I shouldn't have been there' to Special Agent Cindy Barrois he was referring only to an image of him and police officers on the Upper West Terrace." Government's Exhibit 903.

When Wren attempted to admit another statement from around an hour later in the interview, the Court sustained the Government's hearsay objection and ruled that the statement was too far removed for the rule of completeness to apply.

The jury convicted Smith on all eleven of his counts but only convicted Wren on three of his seven counts.

II. Wren Failed to Demonstrate That the Interests of Justice Require a New Trial.

Wren argues that the interest of justice requires a new trial because the Court should have severed the defendants, should have allowed Wren to admit self-serving hearsay under Rule 106, should dismiss one of Wren felony convictions as multiplicitous, and prejudiced him throughout jury selection. These claims fail to overcome the “strong presumption . . . in favor of upholding the jury verdict.” *Rogers*, 918 F.2d at 213.

A. Legal Standards Under Federal Rule of Criminal Procedure 33

Pursuant to Rule 33, a court may “vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33. Motions for a new trial are “not favored and are viewed with great caution.” *United States v. Borda*, 786 F. Supp. 2d 25, 31 (D.D.C. 2011) (internal citations omitted). “Despite the court’s broad authority to order a new trial, it should be exercised sparingly and limited to situations presenting a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted.” *Id.* at 32 (internal quotations and citations omitted).

Ruling on a motion for a new trial is committed to the sound discretion of the trial court and is reviewed only for abuse of discretion, *United States v. Kelly*, 790 F.2d 130, 133 (D.C. Cir. 1986). The defendant bears the burden of proof to demonstrate that a new trial is warranted, and the burden is heavier when the motion is made beyond the first seven days—as it is here.¹ *United States v. Mangieri*, 694 F.2d 1270, 1285 (D.C. Cir. 1982). To prevail, he “must overcome a strong

¹ The jury convicted Wren on May 5, 2023, and he filed this motion on May 19, 2023. ECF No. 127.

presumption . . . in favor of upholding the jury verdict.” *Rogers*, 918 F.2d at 213 (internal quotation marks and citation omitted).

B. Rule of Completeness

Wren argues that the interest of justice requires new trial because by not applying Rule 106 to self-serving hearsay, the Court caused the jury to take “unfair and frankly untrue impressions” from Wren’s statement, “I shouldn’t have been there.” Fed. R. Evid. 106. But “exculpatory hearsay may not come in solely on the basis of completeness.” *United States v. Shaver*, 89 Fed. Appx. 529, 533 (6th Cir. 2004); *see United States v. Guevara*, 277 F.3d 111, 127 (2nd Cir.) *modified in non-relevant part*, 298 F.3d 124 (2002) (“Rule 106 does not render admissible evidence that is otherwise inadmissible”); *United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996).

Even if Rule 106 applied, the statement Wren sought to enter concerns whether the Capitol “grounds are free to walk on” (Attachment, p.45) and the statement in evidence shows that Wren knew he “shouldn’t have been” on the Upper West Terrace pushing officers (Attachment, p. 5). *See* Government’s Exhibit 903. The rule of completeness only applies when a statement is “*necessary* to clarify inculpatory statements already related by officers.” *Shaver*, 89 Fed. Appx. at 533 (emphasis added). Since these statements are separated by around one hour of interview and concern his knowledge at two different times and locations at the Capitol, the statement Wren hoped to elicit was not “*necessary to clarify*” the statement already in evidence.

If Wren believed Agent Barrois misstated or mischaracterized his statement, the proper remedy would have been to impeach her with the relevant portion of the transcript. He did not.

Thus, the Court’s ruling on this issue was correct.

C. Joint Trial

In arguing that his joint trial with Smith presented “a serious danger that a miscarriage of justice has occurred,” Wren first focuses on Agent Barrois’s testimony concerning his interview statements. *Borda*, 786 F. Supp. 2d at 31. Wren urges that his statement “I shouldn’t have been there” was misleading without further cross-examination and claims that the Court limited cross-examination to protect Smith’s rights.

But it is unclear what cross-examination was actually limited, and why. The Court did limit Wren’s cross when he attempted to illicit self-serving hearsay from around an hour later in the interview, but the hearsay rule would have applied even if the Court severed the trial. Since Wren provides no explanation as to how additional cross-examination—complying with the hearsay rule—would have aided his defense, he clearly fails to overcome his heavy burden under Rule 33. *Mangieri*, 694 F.2d at 1285.

Wren also briefly suggests that the inclusion of Smith’s Facebook messages and posts “clearly prejudiced” him because “the jury could then easily make assumptions about the intentions and/or propensities of Wren[.]” ECF No. 127 at 4. But the Court instructed the jury that “Each count of the indictment charges a separate offense. Moreover, each defendant is entitled to have the issue of his guilt as to each of the crimes for which he is on trial determined from his own conduct and from the evidence that applies to him as if he were being tried alone.” ECF No. 121 at 22. “A jury is presumed to follow its instructions,” *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and Wren has not provided any reason to overturn this presumption. In addition, the fact that the jury convicted Smith on all counts while it acquitted Wren of four undercuts Wren’s argument that it improperly used Smith’s statements against him.

D. Multiplicity

After making this argument several times before and during trial, Wren again asserts that the Government infringed upon his double jeopardy right by charging him under 18 U.S.C. §§ 111(a) and 231(a)(3).

A defendant may be convicted of and sentenced under different statutory provisions for multiple offenses arising out of the same single act or course of conduct so long as Congress authorized the imposition of such multiple punishments. *See United States v. McLaughlin*, 164 F.3d 1, 8 (D.C. Cir. 1998) (“If the legislature intends to impose multiple punishment, imposition of such sentences does not violate Double Jeopardy.”). “To determine multiplicity *vel non*, courts generally apply the *Blockburger* test: ‘[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,’ i.e., whether either is a lesser included offense of the other.” *United States v. Mahdi*, 598 F.3d 883, 888 (D.C. Cir. 2010) (quoting *United States v. Weathers*, 186 F.3d 948, 951 (D.C. Cir. 1999), and *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). If the two offenses each require proof of a fact the other does not, then the charges are not multiplicitous. *Id.* at 890. The *Blockburger* “test focuses on the statutory elements of the offense, not on the proof offered in a given case.” *McLaughlin*, 164 F.3d at 8. Thus, it is irrelevant whether there is significant overlap in the factual proof of each count at trial, or even whether two counts “are based upon the exact same set of facts and circumstances,” as long as each count’s elements require proof of a fact that the others do not.

United States v. Manafort, 313 F. Supp. 3d 311, 314 (D.D.C. 2018). The elements of felony 18 U.S.C. § 111(a) are:

First, that the defendants assaulted, resisted, opposed, impeded, intimidated, or interfered with an officer from the United States Capitol Police, Metropolitan Police Department, or other law enforcement agency;

Second, that the defendants did such acts forcibly;

Third, that the defendants did such acts voluntarily and intentionally;

Fourth, that the person assaulted, resisted, opposed, impeded, intimidated, or interfered with was assisting officers of the United States who were then engaged in the performance of their official duties; and

Fifth, that the defendants made physical contact with and assaulted a person who was assisting officers of the United States who were then engaged in the performance of their official duties, or acted with the intent to commit another felony. ECF No. 121 at 32.

The elements of 18 U.S.C. § 231(a)(3) are:

First, that the defendant knowingly committed an act or attempted to commit an act with the intended purpose of obstructing, impeding, or interfering with one or more law enforcement officers;

Second, at the time of the defendant's actual or attempted act, the law enforcement officer or officers were engaged in the lawful performance of their official duties incident to and during a civil disorder; and

Third, the civil disorder in any way or degree obstructed, delayed, or adversely affected either commerce or the movement of any article or commodity in commerce or the conduct or performance of any federally protected function. ECF No. 121 at 23.

Applying the Blockburger test, each of these offenses include elements that the other does not. The second and fifth elements of Section 111(a) are totally distinct from any in Section 231(a)(3). Likewise, the elements requiring that the Government prove that a civil disorder was occurring and that it "obstructed, delayed, or adversely affected" commerce are unique to Section 231(a)(3). The alternative in the third element of Section 231(a)(3)—that the civil disorder "obstructed, delayed, or adversely affected . . . the conduct or performance of any federally protected

function”—is also not present in the elements of Section 111(a). Each of these elements “requires proof of additional fact” which the others do not. *Blockburger*, 284 U.S. at 304.

Since both offenses have unique elements, they are not lesser included offenses. The Court correctly denied Wren’s oral motions on this point during trial. Even if the Court agreed with Wren, this alone would not be grounds for a new trial. In that case, the Court would either dismiss one of the convictions or merge them at sentencing. *United States v. Clark*, 184 F.3d 858, 872 (D.C. Cir. 1999) (“the usual remedy is to hold that the convictions have merged and order that one be vacated”) (quoting *Ball v. United States*, 470 U.S. 856, 864 (1985)).

E. Jury Selection

First, Wren contends that the Court wrongly denied his *Batson* challenge, but Wren misapplies the law.

To establish a prima facie case of purposeful discrimination, “the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire *members of the defendant's race.*” *Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (emphasis added and internal citation removed). Since Wren did not show that he was a member of the same race as the contested jurors, he failed to establish a prima facie case of purposeful discrimination. Thus, the Court need not have inquired as to the Government’s reasoning. *See supra* p. 2.

Wren also argues that the Court’s dismissal of a juror because he was unvaccinated justifies a new trial. He complains that he was forced to use peremptory strikes on two jurors who were concerned about serving with an unvaccinated person. But it was well within the Court’s discretion to dismiss the unvaccinated juror to protect the health and mental well-being of the jury. *See United States v. Colon*, 64 F.4th 589, 594-96 (4th Cir. 2023) (holding that the Sixth Amendment “fair cross

section of the community” protection does not apply to a for-cause strike of an unvaccinated juror related to COVID-19 safety risks). The Fourth Circuit held that it was within the court’s discretion to dismiss an unvaccinated juror at the pre-trial conference. Here, by questioning every vaccinated juror and weighing the rights of those concerned by serving with an unvaccinated person, the Court was more protective of the rights of the unvaccinated juror and the defendants than the court in *Colon*.

Wren briefly argues that the interest of justice requires a new trial because the Court erroneously struck a juror who participated in the riot on January 6, 2021. While this argument is absurd on its face, the Court’s decision is further supported by its consistency throughout voir dire since the juror in question was not the only one dismissed for this reason. The Court struck another juror who did not support the riot and would likely have been favorable to the Government because he walked through the rioters on his way home and witnessed the event.

None of these arguments come close to meeting Wren’s heavy burden justifying a new trial. *See Mangieri*, 694 F.2d at 1285; *Rogers*, 918 F.2d at 213 (“strong presumption . . . in favor of upholding the jury verdict”).

III. Conclusion

For the foregoing reasons, the Court should deny Wren’s Motion for New Trial.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney
D.C. Bar No. 481052

By: /s/ Tighe R. Beach
TIGHE R. BEACH
Assistant United States Attorney
601 D Street NW

Washington, D.C. 20530
CO Bar No. 55328
(240) 278-4348
tighe.beach@usdoj.gov

VICTORIA A. SHEETS
Assistant United States Attorney
NY Bar No. 5548623
601 D Street NW
District of Columbia, DC 20530
(202) 252-7566
victoria.sheets@usdoj.gov

MELANIE L. ALSWORTH
Ark. Bar No. 2002095
Trial Attorney
On detail to the USAO-DC
601 D Street, N.W.
Washington, DC 20530
(202) 598-2285
melanie.alsworth2@usdoj.gov