

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 1:21-cr-00047-RDM

HECTOR VARGAS,

Defendant.

DEFENDANT'S RESPONSE TO GOVERNMENT'S TRIAL BRIEF

Defendant Hector Vargas, through counsel, respectfully submits this Response to the Government's Trial Brief (Nov. 28, 2022) [ECF No. 44] ("Gov't Trial Br.").

I. The Charges Against the Defendant

Hector Vargas is charged with four misdemeanors: knowingly entering or remaining in a restricted building , 18 USC §1752(a)(1) (Count 1); knowingly engag[ing] in disorderly or disruptive conduct in a restricted building for the purpose of disrupting the orderly conduct of Government business or official functions and which in fact disrupts such government business or function; 18 USC §1752(a)(2) (Count 2); knowingly and willfully engaging in disorderly or disruptive conduct in the Capitol Building with the intent to disrupt government business, 40 U.S.C. § 5104(e)(2)(D) (Count 3); and knowingly and willfully parading, demonstrating, or picketing in the Capitol Building. 40 U.S.C. § 5104(e)(2)(G) (Count 4).

Count 1: To prove a violation of 18 U.S.C. §1752(a)(1), the government must show that the Defendant knowingly entered a restricted building without legal authority. The Defendant did not voluntarily enter the building, but was pushed in by the crowd, and he remained inside

only long enough to follow the instructions of law enforcement agents with regard to leaving the building. Moreover, at the time the Defendant was present, the Capitol Building was not posted, cordoned off, or otherwise restricted, and the Defendant did not have knowledge of a restricted building.

Count 2: to prove a violation of 18 U.S.C. §1752(a)(2), the government must show:

- That the Defendant engaged in engaged in “disorderly conduct” (*i.e.*, that he was unreasonably loud and disruptive under the circumstances, or interfered with another person by jostling against or unnecessarily crowding that person) or “disruptive conduct” (*i.e.*, a disturbance that interrupts an event, activity or the normal course of a process), in or in proximity to a restricted building;
- That he did so knowingly and with intent to impede or disrupt the orderly conduct of Government business or official functions; and
- That his conduct in fact impeded or disrupted that government business or official function.

The Defendant did not engage in any “disorderly” or “disruptive” conduct in or in proximity to a restricted building, and his conduct did not in fact impede or disrupt any government business.

Count 3: to prove a violation of 40 U.S.C. §5104(e)(2)(D), the government must show that the Defendant willfully and knowingly engaged in disorderly or disruptive conduct in the Capitol Building, with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress.

The Defendant did not engage in any “disorderly or disruptive” conduct in the Capitol Building. Nor was his entrance into the Capitol voluntary and no conduct inside was knowingly and with intent to impede, disrupt, or disturb the orderly conduct of a session of Congress.

Count 4: to prove a violation of 40 U.S.C. §5104(e)(2)(D), the government must show that the Defendant paraded, demonstrated, or picketed in the United States Capitol. He did not.

II. The Government's Proof

The Defendant objects to several items that the government has identified as potential evidence. These objections are addressed in Defendant's Motion *in Limine* [ECF No. 46].

III. Legal Issues

The government identifies two legal issues raised by what it anticipates may be the Defendant's arguments.

A. Knowledge of the Vice President's Presence.

The Defendant does not contend that the "knowing" requirement of 18 U.S.C. §1752(a) requires that he have knowledge of the Vice President's presence in the building.

B. Nature of Defendant's Conduct

The Government's Trial Brief makes clear its intent to argue that the Defendant's mere presence at the Capitol on January 6, 2021, constitutes "disorderly" or "disruptive" conduct, because he "joined the mob," some members of which were engaging in such conduct. Gov't Trial Br. at 1. Purporting to describe its case against Mr. Vargas, the government refers repeatedly to the actions of the "crowd" and the "mob," and even refers to Mr. Vargas' supposed "fellow rioters." *Id.* at 1, 2, 7, 14, 15, 18, 19.

However, Mr. Vargas is not charged with conspiracy, aiding and abetting, or any other form of criminal liability by which he might be found liable for the actions of another. The presence of others, and their actions, has no bearing on the question whether Mr. Vargas illegally entered a restricted building, and the government does not claim that it does. However, the government asserts that evidence of actions taken by others is relevant to show that Mr. Vargas engaged in

disorderly or disruptive conduct, because the “disruption” at issue comprises the actions of everyone involved in the events of that day. Gov’t Trial Br. at 8. But the government must prove more than that Mr. Vargas was present – determining whether Mr. Vargas engaged in such conduct requires the jury to pass judgment on his acts, not the acts of others. In other words, if an individual illegally enters a restricted area, he is guilty of that crime. If, once inside, he engages in disorderly conduct, or “parades,” he is guilty of those crimes. However, if, after entering the area, that individual himself engages in no improper conduct (for example, if he stands silently), he is *not* guilty of the separate crime of disorderly conduct or “parading,” no matter what anyone else in the vicinity does.¹ In short, an individual’s mere presence in the Capitol while others engaged in improper conduct does not make that individual guilty, by osmosis, of such conduct.

With respect to the Defendant’s own conduct, the government is incorrect in asserting that he “unreasonably jostled and crowded officers” inside the Capitol. As noted above, the Defendant was involuntarily pushed into the Capitol Building and, once inside, followed the instructions of law enforcement agents regarding exit from the building. Defendant also disputes that any of his conduct “in proximity” to the Capitol Building was disorderly or disruptive, or that it impeded or disrupted any ongoing government business.

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Respectfully submitted,

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¹ As an example, the government claims that Mr. Vargas moved a bike rack, through which other persons entered, and that those other persons then “engaged in hand-to-hand fighting” with law enforcement officers. Gov’t Trial Br. at 19. Whether or not an individual commits disorderly conduct by creating an opening through which others enter a space, conduct by those others after passing through the opening is not conduct by the individual who created the opening.

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