

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

HECTOR VARGAS,

Defendant.

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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT’S RENEWED
MOTION FOR JUDGMENT OF ACQUITTAL

**I. The Evidence is Insufficient to Sustain Defendant’s Conviction on
Count 1.**

**A. There is No Evidence That Defendant Voluntarily Entered the
Capitol Building.**

The government fails utterly to address the fact that, as stated in the Memorandum of Points and Authorities in Support of Defendant’s Renewed Motion for Judgment of Acquittal (Dec. 23, 2022) [ECF NO. 66-1] (“Def. Mem. in Supp.”) at 2 and shown in the evidence (Gov. Exhibit 103 and Defense Exhibits 105 and 402), Defendant did not enter the Capitol Building voluntarily, but was pushed in, and resisted entry. The government claims Mr. Vargas “held open” a door as a crowd entered, Government Opposition to Defendant’s Renewed Motion for Judgment of Acquittal (Jan. 6, 2023) [ECF No. 68] (“Gov’t Opp.”) at 2, but in fact, the evidence is to the contrary. The doors were open before Defendant arrived at them. (Defense

Exhibit 103, Screenshots 2-7). And the evidence shows that Defendant was *behind* the open door, and not holding it open, before he was pushed in. (Defense Exhibits 104, 105, 402; Government Exhibit 103) The government is correct that “the defendant’s arm was extended and on the open door as he entered the building,” Gov’t Opp. at 3, but the evidence is clear that the Defendant was holding on to the door to *prevent* himself from being pushed inside. ((Defense Exhibit 105 Screenshots 5-11, Defense Exhibit 402, and Government Exhibit 103 from 3:21:03 p.m. through 3:21:07 p.m.)

The government asserts that “at approximately 3:15 p.m., [Defendant] tried to enter the building behind another group of rioters, but . . . was physically prevented from doing so by Capitol Police officers in the entryway.” Gov’t Opp. at 3 (citations omitted). But the evidence shows that when the Defendant reached the doors, he was not “physically prevented” from entering. Instead, seeing that law enforcement agents were attempting to prevent entry, he voluntarily stopped – before a police officer laid a hand on him – and moved out of the doorway. (Defense Exhibit 104, Screenshot 1). (Defense Exhibit 104, Screenshots 3 and 4 at 3:15:51 p.m. through 3:15:56 pm).

The government notes that, several minutes before he reached the door, Defendant sent a message saying “[w]e’re about to go in.” Gov’t Opp. at 4. But although that is true, it is irrelevant. The question whether Defendant acted voluntarily turns on his intent at the time of entry, and not on a prior statement of

future intent, and the evidence clearly shows that after sending that message, the Defendant voluntarily stopped at the building's threshold before being pushed in.

B. The Evidence is Insufficient to Sustain the Charge of Unlawfully Remaining in the Building.

The government is incorrect when it states that the government need only prove that the defendant entered or remained in a restricted building. See Gov't Opp. at 4. Instead, the government must show that he did so voluntarily – *i.e.*, that he knowingly did not avail himself of an opportunity to leave. Throughout the short span of time that he was in the building, Defendant was being pushed by the crowd and following the instructions of police officers and had no opportunity to leave until he followed officers' directions to leave.

The government correctly states that the Defendant recorded a video inside the building, Gov't. Opp. at 4, but while recording a video might be evidence of improperly "remaining" in the building if it was done while the Defendant was being ordered out, or while he had an opportunity to leave, the evidence is clear that he did so while he was following the orders of law enforcement agents to stand in a particular place. The statute punishes improperly "remaining" in the building; it does not punish conduct that occurs while an individual is in the building following the instructions of law enforcement officers.

II. The Evidence is Insufficient to Sustain Defendant's Conviction on Count 2.

As the government notes, conduct is disorderly “when a person is unreasonably loud and disruptive under the circumstances or interferes with another person by jostling against or unnecessarily crowding that person,” and disruptive when it “is a disturbance that interrupts an event, activity, or the normal course of a process.” Gov’t Opp. at 5. The government asserts that Defendant “disrupted police activities” outside the Capitol, but fails to explain how conduct such as opening a low gate (which was not marked with any signage prohibiting its opening, and observed by a police officer who took no action to prevent the opening) and waving a flag meets either definition. The government argues that Defendant’s climbing a wall was disruptive because it required a police response, but obeying the instruction of police officer is not disruptive conduct, and there is no basis on which to conclude that taking a few seconds to speak with the Defendant diverted the officer from other activity.¹

The Government has further failed to tie these specific actions of Mr. Vargas to any evidence of intent to disrupt a Congressional proceeding. The most the Government can say is that Inspector Hawa testified that “the Joint Session of Congress was suspended due to the security threat.” Gov’t Opp. at 5. In other

¹ Moreover, the evidence shows that Mr. Vargas was a calming influence by assisting an injured party who had a projectile pierce his cheek. (Defense Exhibits 201, 202, and 205). Mr. Vargas protects the space of the individual and communicates with two officers. Others clash with police during the incident but not Mr. Vargas.

words, there is no testimony other than the security threats of the day caused the suspension of the Congressional proceedings. That testimony is insufficient to establish that Mr. Vargas intended, by his actions outside the Capitol, to disrupt any ongoing proceeding.

There is no evidence that Mr. Vargas “crowded Officer Hallas and other Capitol police in the entryway of the East rotunda at 2:15 p.m.” Gov’t Opp. at 5-6 (citations omitted). The evidence is that Mr. Vargas stood in a crowd outside the door. The evidence is that policemen peacefully entered through the doors that Mr. Vargas stood outside. (Defense Exhibit 401). Mr. Vargas did not approach Officer Hallas, Officer Hallas approached Mr. Vargas and pushed Mr. Vargas back. The evidence shows Mr. Vargas then moved himself to get out the line of traffic by standing behind the edge of the door.

The government claims the conduct of Mr. Vargas inside the Capitol Building was disorderly because he unnecessarily crowded and jostled officers in the East Rotunda foyer. Gov’t Opp. at 6. But there is no evidence that Mr. Vargas touched any police officer inside the building, of that he used force of any kind. Mere presence does not meet the statutory standard of disorderly or disruptive conduct. It may be that every additional body in the Rotunda was an additional body that needed to be escorted out. However, 18 U.S.C. §1752(a)(2) does not make it a crime to require police attention. Nor is using police resources the same as disrupting a

proceeding. Nor has the Government shown any evidence that there was a process underway to disrupt.

III. The Evidence is Insufficient to Sustain Defendant's Conviction on Count 3.

The government response regarding Count 3 only refers the same evidence discussed above regarding conduct in the Capitol Building under Count 2. The Government has failed to show sufficient evidence to sustain conviction with respect to Count 3 for the same reasons discussed in section II above.

IV. The Evidence is Insufficient to Sustain Defendant's Conviction on Count 4

The Government has shown no evidence that the Defendant knowingly and willingly engaged in conduct to parade, demonstrate, or picket in the Capitol Building. Demonstrating requires expressive conduct, and there is no evidence that Mr. Vargas said anything, held a sign, or otherwise engaged in expressive conduct during the short time in the East Rotunda foyer. The government states “[m]any of the rioters chanted and carried flags,” Gov’t Opp. at 7, but the Defendant cannot be convicted for the actions of others. The government states that Mr. Vargas filmed a short video stating he “took over” the Capitol,” but recording a video, regardless of content, is not a demonstration, particularly when the video was not posted to Facebook while the Defendant was in the Capitol Building. (Government Exhibit 701 at 5). The government asserts that the Defendant “d[id] not submit to law enforcement’s commands to ‘get down,’” Gov’t Opp. at 7, but even if accurate, this is not expressive conduct, and therefore not “parading, picketing, or demonstrating.”

CONCLUSION

The government's evidence is insufficient to sustain Defendant Hector Vargas' convictions on Count 1, 2, 3, or 4. Therefore, pursuant to Federal Rule of Criminal Procedure 29(a), the Court should enter a judgment of acquittal.

Dated: January 12, 2023

Respectfully submitted,

/s/ Paul F. Enzinna

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