UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CASE NO. 21-cr-447 (CJN)**
	:	
JOSHUA CHRISTOPHER DOOLIN,	:	
MICHAEL STEVEN PERKINS	:	
	:	
Defendants.	:	

UNITED STATES' OPPOSITION TO DEFENDANTS' MOTIONS FOR ACQUITTAL

Defendants Joshua Christopher Doolin and Michael Steven Perkins have moved to dismiss their theft and civil disorder charges. ECF Nos. 219, 220, and 221. They argue that the government failed to show that Doolin intended to steal the riot shield and spray cannister (as charged in Counts Sixteen and Seventeen), failed to show that either defendant's civil disorder affected interstate commerce, and failed to defend the constitutionality of the civil disorder statute itself (as charged in Counts One and Eighteen). As the defendants themselves acknowledge, however, at this stage the court must "consider[] the evidence in the light most favorable to the government" ECF No. 219 at 3 (quoting *United States v. Kayode*, 254 F.3d 204, 212 (D.C.Cir.2001)) and accord the prosecution "the benefit of all legitimate inferences," ECF No 221 at 3 (quoting *United States v. Weisz,* 718 F.2d 413, 437 (D.C.Cir.1983)). Against this—or any—burden, the defendants' arguments fail.

I. Theft Charges

Defendant Doolin moves to dismiss Count Sixteen and Seventeen, the theft of the chemical spray cannister and riot shield, respectively. ECF No. 219. According to Doolin, the government failed to offer evidence that he intended to steal either item. *Id.* at 2 ("No witness offered evidence of Mr. Doolin's intent to steal or purloin, the personal property [i.e., the spray cannister] of another . . . . No witness offered evidence of Mr. Doolin's intent to embezzle, steal, purloin, steal,

knowingly convert to his use and the use of another, and without authority, sold, conveyed and disposed of the U.S. Capitol Police riot shield."). The gist of the Doolin's argument appears to be that, lacking direct evidence of an intent to steal, "a reasonable juror must necessarily have had a reasonable doubt as to the defendant['s] guilt." *Id.* at 5 (quoting *United States v. Weisz*, 718 F.2d at 437).

Doolin's argument misunderstands the law. Only rarely does a defendant directly communicate his intent to commit a crime. As such, a defendant's intent is typically inferred through circumstantial evidence. *See Parham v. United States*, 339 F.2d 741, 741 (D.C. Cir. 1964) ("[T]he judge correctly told the jurors they could deduce or infer intent from the facts and circumstances shown in the evidence."); *United States v. Schaffer*, 183 F.3d 833, 843 (D.C. Cir. 1999) ("In the absence of any specific statement or other contemporaneous documentation of the defendant's subjective motivation, the trier of fact can do no more than ascribe an intent on the basis of the circumstances surrounding the defendant's actions."); *United States v. Woodward*, 149 F.3d 46, 57 (1st Cir.1998) ("The jury was entitled to infer the defendant's intent from the circumstances surrounding his actions, from indirect, as opposed to direct, evidence."). The District of Columbia's pattern jury instructions on intent say as much, instructing in template language that:

> Someone's [intent] . . . ordinarily cannot be proved directly, because there is no way of knowing what a person is actually thinking, but you may infer someone's [intent] . . . from the surrounding circumstances. You may consider any statement made or acts [done] [omitted] by [name of the defendant], and all other facts and circumstances received in evidence which indicate his/her [intent].

D.C. Redbook 3.101 (brackets in original).

Moreover, at this stage, there is considerable evidence that the defendant intended to steal the riot shield and chemical spray cannister. Such evidence includes:

- Testimony that the chemical spray cannister belonged to the Metropolitan Police Department (Sergeant William Bogner);
- Video of Doolin with the spray cannister and the shield (Government Ex. 318, 419);
- Video of Doolin boasting about having the shield (Government Ex. 714.25);
- Doolin's recorded interview (Government Ex. 501); and
- Photographic evidence that the shield was autographed by Doolin (Government Ex. 713.24).

Such evidence is more than enough for a factfinder to conclude that Doolin intended to—and did—steal these law enforcement tools on January 6, 2021.

Doolin's reliance on *Morrissette v. U.S.* is misplaced. There, the district court concluded that the defendant intended to steal abandoned shell casings from an air force bombing range. 342 U.S. 246, 249 (1952). The court specifically excluded testimony that the defendant acted innocently and instructed the jury to find that he had criminal intent. On appeal, the Supreme Court concluded that such instruction was in error and held that where intent is an element of a crime, its existence is a factual—not legal—conclusion to be decided by a jury. *Id.* at 274. Here, the government agrees with Doolin that his intent is a question of fact. The source of disagreement is that the government believes—and Doolin apparently does not—that there is ample evidence that Doolin meant to steal the riot shield and spray cannister.

II. Civil Disorder

The defendants also move to dismiss Counts 1 and 18 against them, the civil disorder charges. Specifically, they argue that the government failed to introduce evidence that their actions affected interstate commerce which, they say, is required by the statute. ECF No. 220 at 13; ECF No. 221 at 11. As an initial matter, the defendants' argument misunderstands the statute. 18 U.S.C. § 231 prohibits obstruction of law enforcement officers "incident to or during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce or the conduct or

performance of any federally protected function[.]" The plain language of the statute thus indicates that it is the civil disorder that must have an adverse effect on commerce or the federal protective function of a government agency. It is not necessary, therefore, for there to be a direct causal link between defendants' obstructive conduct during the civil disorder and the civil disorder's adverse effects as the defendants contend.

A similar argument was raised in a Rule 29 motion *United States v. Mostofsky*, 579 F.Supp.3d 9, 18 (D.D.C. 2021), another case stemming from the events of January 6, 2021. The defendant in that case acknowledged that "§ 231 unambiguously modifies the term 'civil disorder,' not 'any act[,]" but argued that this represents a constitutional defect in the statute. In rejecting this claim, Judge James E. Boasberg relied on the analysis of *United States v. Howard*, No. 21-28, 2021 WL 3856290 (E.D. Wis. Aug. 30, 2021). As the court explained, "[w]hen a person deliberately commits some act to obstruct, impede or interfere with those officers [who are "attempting to quell an interference with interstate commerce"], that person is impacting interstate commerce." *Mostofsky*, 579 F.Supp. at 18 (*quoting Howard,* 2021 WL 3856290 at *10). The decision is attached for reference as Exhibit 1.

Several other judges of this court have addressed this section of the statute while ruling following bench trials. For example, in *United States v. Patrick Edward McCaughey, III et al.*, 21-cr-40-TNM, Judge Trevor N. McFadden recited the elements of a violation of 18 U.S.C. § 231 in announcing his verdict on Count 25. Exhibit 2 at 43–47. The court explained that "[t]he third element [of a § 231 violation] is that the civil disorder in any way or degree obstructed, delayed or adversely affected either interstate commerce or the movement of any article or commodity in interstate commerce or the conduct or performance of any federally protected function." *Id*. at 46. In assessing the evidence related to this element and addressing the defendants' claim that it was

the mayor's curfew that caused an adverse impact on commerce rather than the events at the Capitol, the court explained that "[t]he mayor's order was made necessary only by the civil disorder, so I cannot view it as some superseding event for the purposes of causation. Without the events at the Capitol, there would be no curfew and therefore no effect on interstate commerce." *Id*. at 46-47.

In this case, the government has admitted into evidence self-authenticating documents that show the effect that the civil disorder in which the defendants took part affected commerce. Government Ex. Nos. 801, 802, 802, 804, and 805. But even so, the government does not necessarily need to show such an effect. It can show that the civil disorder 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," (in this case, the election's certification, the Secret Service's duties to protect the Vice President and his family members, and the Capitol Police's function of protecting the Capitol building and grounds and those who inside the building.). Through testimony by Captain Sean Patton and Inspector Lanelle Hawa, the government has already proven the latter; the self-authenticating documents prove the former.

The defendants also claim that the underlying civil disorder statute—18 U.S.C. § 231(a)—is an unconstitutional exercise of the government's power under the Commerce Clause. ECF No. 220 at 2; ECF No. 221 at 4. Doolin already raised this argument in a motion to dismiss last summer, a motion that this court denied in its February 22 pretrial conference. Motion to Dismiss, ECF No. 129; Minute Order (Feb. 22, 2023).

Nevertheless, to address the arguments now raised by Perkins, the government briefly reviews their flaws. In brief, the defendants' line of attack is misplaced, as Congress's power under the Commerce Clause is not at issue in this case. In addition to its power to regulate foreign

and interstate commerce, Congress has broad authority to oversee the District of Columbia. U.S. Const. Article I, Section 8, Clause 17. The relevant constitutional clause states that:

> The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.

U.S. Const. Art. I, § 8, Cl. 17. Such power "is plenary." *Palmore v. United States*, 411 U.S. 397 (1973). "Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Id*. "Congress 'may exercise within the District all legislative powers that the legislature of a state might exercise within the State … so long as it does not contravene any provision of the constitution of the United States.'" *Id*. (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899)). "Congress may legislate within the District for every proper purpose of government," and "[w]ithin the District of Columbia, there is no division of legislative powers such as exists between the federal and state governments." *Neild v. D.C.*, 110 F.2d 246, 249 (D.C. Cir. 1940). "[W]hen it legislates for the District, Congress … exercise[es] complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other. *Id.* at 250-51. *See also Hyde v. S. Ry. Co*., 31 App. D.C. 466, 469 (D.C. Cir. 1908) ("The legislative power of Congress over the District of Columbia and the Territories [is] plenary, and [is] not depending upon the interstate-commerce clause").

By enacting § 231(a)(3), Congress relied on its plenary power over the District of Columbia. That statute prohibits "any act" that "obstruct[s], impede[s], or interfere[s] with any . . . law enforcement officer . . . engaged in [his] official duties incident to and during the

commission of a civil disorder which *in any way or degree* obstructs, delays, or adversely affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 231(a)(3) (emphasis added). "Commerce," as used in § 231(a)(3), "means commerce (A) between any State or the District of Columbia and any place outside thereof; (B) between points within any State or the District of Columbia, but through any place outside thereof; or (C) *wholly within the District of Columbia*." 18 U.S.C. 18 U.S.C.A. § 232(2) (emphasis added).

Here, the civil disorder offenses charge the defendants with "obstruct[ing] and attempt[ing] to obstruct a law enforcement officer . . . incident to a civil disorder" that "adversely affected" "in any way or degree" "commerce," meaning, among other possibilities, commerce "wholly within the District of Columbia." Regardless of whether Congress had authority under the Commerce Clause to regulate such conduct in jurisdictions other than the District of Columbia, it did not exceed its "plenary authority" to exercise "police power" within the District of Columbia unless that exercise violated some other provision of the Constitution. Defendants fail to identify any Constitutional provision that § 231(a)(3)'s enactment would or does violate. *See generally Darnell v. Markwood*, 220 F.2d 374, 375–77 (D.C. Cir. 1954) (reversing dismissal of complaint under the Sherman Act, 15 U.S.C. §§ 1, 2, and 3, alleging that defendants "restrain[ed] interstate trade and commerce, and trade and commerce in the District" of Columbia; although defendants' activities wholly within the District of Columbia do not come within the control of the Commerce Clause, or, therefore, within either Sections 1 or 2 of the Sherman Act, "Section 3 . . . is not dependent upon the Commerce Clause but rests upon the plenary legislative power of Congress within the District of Columbia").

In *Lopez* and *Morrison*, which the defendants cite, the Supreme Court stressed how Congress's Commerce Clause power was cabined by the retained authority of the states to regulate

commerce wholly within their borders. "The Constitution requires a distinction between what is truly national and what is truly local." *United States v. Morrison*, 529 U.S. 598, 617-28 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 568 (1995)); *Lopez*, 514 U.S. at U.S. at 559 ("the proper test [for the scope of Congress's power under the Commerce Clause] requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"); *id*. at 564 ("if we were to accept the Government's arguments [that the Gun Free Schools Zone Act did not exceed Congress's powers under the Commerce Clause], we are hard pressed to posit any activity by an individual that Congress is without power to regulate"). Although it is without power to regulate purely intrastate commercial matters, Congress has plenary authority to regulate wholly local matters within the District of Columbia.

Additionally, Congress may not "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Morrison*, 529 U.S. at 617. "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id*. at 616. By contrast "the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8." *Palmore*, 411 U.S. at 397-98.

Because the Constitution provided Congress with plenary authority to prohibit conduct that had any effect whatsoever on commerce within the District of Columbia, all of Defendants' challenges to the commerce element of § 213(a)(3) are beside the point. Indeed, even for criminal statues with national application that do not single out commerce within the District for special protection, as § 232(2)(C) does with respect to § 231(a)(3), Commerce Clause challenges to

prosecutions for crimes occurring wholly within the District must fail. *See United States v. Mahdi*, 598 F.3d 883, 896 (D.C. Cir. 2010) (rejecting claim that 18 U.S.C. § 1959, "is facially unconstitutional as it violates the Commerce Clause"; "[I]t is impossible to see how a statute regulating conduct within the District of Columbia could exceed congressional authority under the Commerce Clause"). *See id*. ("Even if there were some doubt about § 1959's constitutionality outside the District of Columbia, 'we need not find the language of [§ 1959] constitutional in all its possible applications in order to uphold its facial constitutionality.'") (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971)); *accord United States v. Carson*, 455 F.3d 336, 368 (D.C. Cir. 2006) ("Within the District, Congress did not need to rely on its Commerce Clause authority."). All the more reason why this Court should reject Defendants' challenge to the commerce predicate in the § 231(a)(3) count, where Congress expressly targeted domestic disorders that affected commerce within the District.

Although this Court need not reach the issue, the district courts that have addressed claims like Defendants', based on *Lopez* and *Morrison*, have held that § 231(a)(3) does *not* exceed Congress's Commerce Clause authority, even when applied to conduct outside the District of Columbia. *See United States v. Phomma*, 2021 WL 4199961, at *2-3 (D. Or. Sept. 15, 2021) (notwithstanding *Lopez* and *Morrison*, "§ 231(a)(3) is within Congress's Commerce Clause authority because the statute includes an express jurisdictional element, requiring that the defendant's obstruction or interference with a law enforcement officer or firefighter must occur 'during the commission of a civil disorder which in any way or degree obstructs, delays, or adversely affects commerce.'"); *accord, United States v. Howard*, 2021 WL 3856290, at *11 (E.D. Wis. Aug. 30, 2021); *United States v. Wood*, 2021 WL 3048448, at *4–6 (D. Del. July 20, 2021); *United States v. Pugh*, 1:20-cr-00073- TFM-B, ECF95 at 7-11 (S.D. Ala., May 13, 2021); *see*

generally United States v. Huff, 630 F. App'x 471, 484-85 (6th Cir. 2015) (unpublished) (rejecting Commerce Clause challenge to a charge of transporting a firearm in furtherance of a civil disorder, in violation of 18 U.S.C. § 231(a)(2)).

In both *Lopez* and *Morrison*, the challenged statutes contained no "jurisdictional element" that required the Government to prove that the offense conduct affected interstate commerce. *Lopez*, 514 U.S. at 561-62 (Gun Free Schools Zone Act "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."); *Morrison*, 529 U.S. at 613 (Violence Against Women Act, "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress'[s] power to regulate interstate commerce."). Unlike those statutes, § 231(a)(3) has an "explicit jurisdictional element" that requires the Government (when relying on the Commerce Clause alternative) to prove that the offense conduct interfered with interstate commerce. *Wood*, 2021 WL 3048448, at *4-6 (rejecting defense claim, based on *Morrison* and *Lopez*, that "§ 231(a)(3) unconstitutionally exceeds Congress's authority and intrudes into the States' primary role in general law enforcement because it broadly applies to purely local conduct and requires only an attenuated connection to interstate commerce"; "courts have held that 'despite *Lopez* and *Morrison*, the Government need only show a minimal effect on interstate commerce when the statute contains an explicit jurisdictional element'").

* * *

For the reasons discussed above, there is ample evidence that Doolin intended to steal the riot shield and chemical spray cannister. There is also ample evidence that the defendants' obstructive conduct was "incident to and during the commission of" a civil disorder that affected interstate commerce or a federally protected function. Finally, there is constitutional authority for

the civil disorder statute under which they have been charged. For all these reasons, the defendants' motions for acquittal should be denied.

Respectfully submitted,

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