

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America

v.

Case No. 21-CFR-178-APM-3

Markus Maly

Mr. Maly's position on his codefendants' motion in limine

Mr. Maly did not join in his co-defendants' motion in limine; depending on how testimony is offered at trial, he may raise an identical objection. He writes to inform the court of his position on the matter. Like with all evidentiary issues, much depends on the form of questions and the answers given. But he does not object to anticipated testimony that photographs appear to depict him in possession of something that looks like bear spray.

Mr. Maly is not alleged to have traveled to Washington on January 6th armed with pepper spray or any weapons. All evidence points to the contrary: that, armed with ham sandwiches (for eating, not for throwing), Mr. Maly traveled to Washington to see President Trump speak and then walked to the Capitol. Federal agents are expected to testify that he admitted to picking up a can of pepper spray (or some other type of aerosolized spray) while there, and evidence corroborates those assertions. And video evidence suggests that he was handed a cannister of something by one of his codefendants and passed it to the other.

If an officer recalls seeing a person armed with OC spray—like the kind issued by the Metropolitan Police Department—that person, with sufficient foundation, should be able to offer that testimony. Similarly, if an MPD officer looked at a photograph and states that an object looks like a can of OC spray similar to the kind issued to MPD, then, assuming a proper foundation has been laid, the testimony should be admitted. Answers like, “This looks like the kind of OC spray issued by MPD” seem perfectly fine. But whether a photograph shows that someone possessed MPD-issued pepper spray is a different kind of statement and one

that should be subject the requirements of 702. That testimony would require knowledge of aerosolized sprays generally, such as:

How common are certain sizes of aerosolized spray? What are the distinguishing features of differing types of sprays? What distinguishes a can of pepper spray from a can of spray paint or some other type of aerosolized spray? Is one differentiating between cans based on of the color of spray? The nozzle? The volume of the cannister? The carrying case? The relative commonality of a certain brand? How can one tell whether a given object is that type of spray v. a knockoff or inert training spray?

In other words, the jury would need to know how the officer reached that conclusion and what methods were used, whether the methods were reliable, and whether sufficient facts supported the conclusion—expert testimony.

Imagine, rather than OC spray, the case involved firearms. Could an officer testify that a given object looks like a firearm, that it looks like a pistol, and that it looks like the kind of pistol issued by MPD? Probably. Could that officer testify that an image shows that a given firearm is an MPD-issued Glock-9? Not as a lay witness. In that case, one would want to know the distinguishing features of MPD-issued firearms compared to firearms generally, which would help establish an error rate for a conclusion and would allow the jury to fairly evaluate the testimony. An officer could be intimately familiar with every aspect of MPD issued weapons and still not be able to opine that a given weapon is, in fact, an MPD-issued weapon. That opinion would require specialized knowledge about weapons generally, methods of identifying weapons, and other information within the realm of experts. And counsel expects such a determination could not be made merely by looking at an image.

Alternatively, if a determination is being made based on the depiction of an object in still image taken from a video file, then other information would be necessary: what is the origin of the video file? How was the still image extracted? What is the relative aspect ratio of the video? Approximately how many pixels are contained in the portion of the image

depicting the object—and what might an error rate be? Photogrammetry, in other words, is a science and ought to be left to the scientists.

Mr. Maly would object to the government offering Officer Bogner as an expert in the recognition of aerosolized weaponry, but it does not seem that the government is offering him as such. Provided his testimony is properly constrained by what he observed and other relevant observations, and not conclusions drawn from opinions about aerosolized weaponry generally, Mr. Maly has no objection.

Respectfully submitted,

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