

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America

v.

Docket No. 21-CR-178 (APM)

Markus Maly

Request for Unanimity Instruction as to Counts 2, 5, and 7

Mr. Maly is charged with two offenses that present potential unanimity issues: in count two, where Mr. Maly is charged with civil disorder; and in counts four and seven, where Mr. Maly is charged with assault. The government's closing argument, while not improper, increases the chances that a jury returns a non-unanimous verdict on these sets of charges.

With respect to count two, the government argued that the jury could find either that the defendants' actions affected interstate commerce or that the actions affected a federally protected function. Either of these provides the necessary jurisdictional requirement, but the jury ought to be unanimous on which it chooses. *See Richardson v. United States*, 526 U.S. 813, 817 (1999) (finding that a jury may disagree on the means to prove an element but must be unanimous on which elements it finds).

With respect to counts five and seven, the government has charged Mr. Maly with "forcibly assaulting[ing], resist[ing], oppos[ing], imped[ing], intimidate[ing] and interfere[ing] with an officer" *See* Second Superseding Indictment, ECF No. 63. Though the indictment uses the conjunctive *and*, rather than the disjunctive *or*, counsel assumes that was likely a typographical error. To the best of counsel's recollection, the government argued that count 3, which alleges the same charge against Mr. Schwartz, could be met by the jury finding any of these elements. Counsel does not recall if the government made a similar argument with respect to counts four and seven. However, given the uniformity of the charges and the evidence at issue for counts four and seven, Mr.

Maly is concerned that some jurors might find that his conduct intimidated an officer, but others might find that he interfered or assaulted. Given the dispute about whether Mr. Maly used pepper spray around 2:35, as alleged in count four, the court should provide an additional instruction on unanimity. Further, count seven alleges that Mr. Maly aided and abetted another's assault by handing off what might be a canister of pepper spray that might have been used by one of his co-defendants. Given the attenuated chain of events constituting the charge, the jury ought to be instructed specifically that it must find unanimously which variant he committed.

The D.C. Circuit addressed when the court must give a specific unanimity instruction in *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990) (*North 1*) and again in *North 2*, which modified the original version on a petition for rehearing. *See United States v. North*, 920 F.2d 940 (D.C. Cir. 1990). Although *North 2* amended *North 1*'s holding on unanimity, it did not strike any of the analysis promulgated on point. In *North 1*, the court held, “as a rule a general instruction on unanimity like the one given in the present case—advising the jury that its members must unanimously agree on any aspect of the case as to which it renders a verdict—protects the defendant’s right to a unanimous decision.” However, “in the face of ‘a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts’” . . . “a further safeguard in the form of a particularized instruction is required” *See id.* (citing *United States v. Duncan*, 850 F.2d 1104 (6th Cir. 1988) (*overruled on other grounds*)). Because the court is presented with a risk that the jury may not unanimously agree on the elements necessary for a conviction, the court should specifically instruct them on unanimity.

Mr. Maly defers to the court for the specific language. However, he proposes the language below, which was taken from Pattern Crim. Jury Inst. 5th Cir. 1.27 (2019):

As to count two:

You have been instructed that your verdict, whether guilty or not guilty, must be unanimous. Count two of the indictment charges Mr. Maly with committing the crime of committing and attempting to commit the crime of civil disorder in several ways.

First, the government alleges that Mr. Maly committed this crime by obstructing, impeding, or interfering with a law enforcement officer. The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt on one is enough. But in order for you to return a guilty verdict, all of you must agree that the same one has been proved.

Second, the government alleges that Mr. Maly committed this crime by obstructing, delaying, or adversely affecting commerce or by adversely affecting the performance of any federally protected function. The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt on one is enough. But in order for you to return a guilty verdict, all of you must agree that the same one has been proven.

As to counts four and seven:

Counts four and seven charge Mr. Maly with committing the crime of assault by forcibly assaulting, resisting, opposing, impeding, intimidating, or interfering with an officer and employee of the United States. The government does not have to prove all of these for you to return a guilty verdict on this charge. Proof beyond a reasonable doubt on one is enough. But in order to return a guilty verdict, all of you must agree that the same one has been proven.

Respectfully submitted,

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