SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division—Misdemeanor Branch

UNITED STATES OF AMERICA **v.** **EARL GLOSSER** **KRISTINA MALIMON,** **Defendants.**	**Case Nos.** **2021 CMD 000187** **2021 CMD 000195** **Hon. Neil Kravitz** **Trial: October 3, 2022**

GOVERNMENT'S RESPONSE TO THE COURT'S REQUEST FOR BRIEFING

On January 7, 2021, Ms. Malimon and Mr. Glosser were charged with Unlawful Entry (Public Property), in violation of 22 D.C. Code, Section 3302(b), and released on their own recognizance. Trial in this matter began on October 3, 2022. The Government presented testimony from ten witnesses. Defendant Malimon testified. On October 11, 2022, trial in this matter concluded. Following the submission of evidence and closing arguments, the Court requested additional briefing as to whether the second element of the offense, that the defendant "was directed to leave the property," requires that the direction to leave specifically identify the property at issue (i.e. the U.S. Capitol Grounds).

As an initial matter, the cases setting forth the elements of this offense do not appear to require that the Government prove beyond a reasonable doubt that a defendant was instructed to leave a specific property by name. *See O'Brien v. United States*, 444 A.2d 946, 948 (D.C. 1982) ("[A]s to public property, the statute requires: (1) that a person lawfully in charge of the premises expressly order the party to leave, and (2) that, in addition to and independent of the evictor's wishes, there exists some additional specific factor establishing the party's lack of a legal right to remain."); *Hemmati v. United States*, 564 A.2d 739, 741 (D.C. 1989) ("Under D.C.

Code § 22–3102 (1989), a person may be convicted of unlawful entry on public or private property if he or she remains on that property, without lawful authority, after having been told to leave by the person lawfully in charge. When public property is involved, this court has also required the government to prove an "additional specific factor establishing the [defendant's] lack of a legal right to remain."); *Byrne v. United States*, 578 A.2d 700, 701–02 (D.C. 1990) (same). Nor does the statute:

> Any person who, without lawful authority, shall enter, or attempt to enter, any public building, or other property, or part of such building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof or his or her agent, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof or his or her agent, shall be deemed guilty of a misdemeanor.

22 D.C. Code, Section 3302(b). And the jury instructions—which only reference "the property" and do not include a bracketed insert to include the specific name of the property—do not appear to require so either. *See* D.C. Jury Instruction 5.401. Instead, a person lawfully in charge need only direct an individual to leave without necessarily specifying the name, metes, or bounds of the precise property.

And the Government has not found a single case in which a conviction turned on the precise words used by the individual who ordered a defendant to leave a given property. Nor has the Government found any case that turns on whether such an order to leave identified the specific area at issue or means of leaving. Instead, general commands to leave regularly form the basis of Unlawful Entry convictions under 22 D.C. Code, Section 3302. *See, e.g.*, *Berg v. United States*, 631 A.2d 394, 399 (D.C. 1993) (affirming conviction where protestors were informed "[t]hat the Rotunda was now closed and that they were hereby ordered to [stand up and] leave at this time and if they failed to do so, they would be placed under arrest for unlawful entry");

Smith v. United States, 445 A.2d 961, 963 (D.C. 1982) (affirming conviction where "[t]he officer asked the demonstrators to leave, and informed them that their refusal would subject them to arrest under the unlawful entry statute."); *Woll v. United States*, 570 A.2d 819, 820 (D.C. 1990) (affirming conviction where "Sergeant Richard Getz informed appellants several times that they would have to leave, and when they refused to do so, they were arrested.")

Whittlesey v. United States is instructive. 221 A.2d 86, 88 (D.C. 1966). There, defendants entered the White House during regular visiting hours, but then seated themselves in front of a library. *Id.* "They were told that if they did not move they would be arrested for unlawful entry." There is no indication in the decision that they were told where to move or how to get there, whether they needed to entirely leave the White House complex or if moving to a different area of the White House would suffice. After several additional orders to the group to leave, they were arrested, charged with Unlawful Entry, and ultimately convicted at trial. *Id.* The Court of Appeals affirmed defendants' conviction after trial without drawing any attention to the specificity of the orders to leave. *Id.* at 92.

Chief Judge Howell addressed this issue, albeit in the context of a Section 1983 suit, in *McGovern v. George Washington Univ.*, 245 F. Supp. 3d 167 (D.D.C. 2017), *aff'd sub nom. McGovern v. Brown*, 891 F.3d 402 (D.C. Cir. 2018). There, a plaintiff sued officers who had arrested him while he was protesting a speech by former Secretary of State Clinton in an auditorium at GWU. *Id.* at 172-73. In response to the plaintiff turning his back while wearing a shirt with a political slogan, GWU security officers approached him, placed an arm on him, and said at least two times "Sir, can you please come with me." *Id.* After the plaintiff failed to respond, officers physically carried the plaintiff out of the auditorium as he shouted "So this is America. This is America!" *Id.* The plaintiff argued, among other things, that his arrest was

unlawful, because the command "Sir, can you please come with me," did not "constitute a directive to leave the premises." *Id.* at 186. The plaintiff claimed that "on their face those words do not reference leaving, do not reference the premises, do not reference the auditorium, and use language that literally constitute an inquiry as to capability and, if treated generously, constitute a mere request and not a directive or demand." *Id.* Chief Judge Howell rejected this argument: "Although the statute requires a 'demand' before a person may be held liable for refusing to quit another's premises, such demand need not take any particular form, as long as a reasonable person would understand that he was required to leave." *Id.*

For the Court to require the Government to prove not just that defendants were ordered to leave, but that the officers specifically told defendants to leave "U.S. Capitol Grounds" would be to impose an intent standard above and beyond that required by law. It creates a notice requirement whereby the Government must prove that a defendant has been alerted to the specific property upon which they were unlawfully remaining. But the Court of Appeals has made clear: "The only state of mind that the government must prove is appellant's general intent to be on the premises contrary to the will of the lawful owner." *Artisst v. United States*, 554 A.2d 327, 330 (D.C. 1989). As the Court of Appeals held in *Ortberg*:

> [O]ur cases make clear that the mental state with respect to acting against the will of the owner or lawful occupant is not one of purpose or actual knowledge. Rather, it is sufficient for the government to establish that the defendant knew or should have known that his entry was unwanted. Thus, we have held that the government need only prove that the 'will' of a lawful occupant was objectively manifest through either express or implied means, not that the will was subjectively understood by the defendant.

81 A.3d 303, 308 (D.C. 2013). To require the Government to prove that Ms. Malimon and Mr. Glosser were specifically informed that they were on U.S. Capitol Grounds would be to require the Government to prove that Ms. Malimon and Mr. Glosser subjectively understood that they

were on U.S. Capitol Grounds against the will of the person lawfully in charge. That is, the Court would be requiring the Government to prove that Ms. Malimon and Ms. Glosser had actual knowledge that they were on U.S. Capitol Grounds. In doing so it would hold the Government to a standard rejected by the D.C. Court of Appeals.

Moreover, requiring the Government to prove that the defendants were specifically ordered to leave U.S. Capitol Grounds would also undermine the Court of Appeals' guidance with respect to how the Government may meet the intent requirement. The Court of Appeals has made clear that this element can be met "through either express or implied means." *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013). By requiring the Government to prove that the officers directing Ms. Malimon and Mr. Glosser to leave Capitol Grounds did so with the specific words "leave U.S. Capitol Grounds" or similar variations, it would necessarily need to find that the Government could not prove this element using implied means. But the Court of Appeals has recognized on multiple occasions that implicit directives are sufficient to sustain a conviction. *See, e.g.*, *Artisst v. United States*, 554 A.2d 327, 329 (D.C. 1989) (finding that Georgetown University "expressed its will by prominently posting a sign directing persons seeking entry to Loyola Hall to present Georgetown identification cards to the security guard posted at the entrance."); *Culp v. United States*, 486 A.2d 1174, 1177 (D.C. 1985) (affirming unlawful entry conviction for a home where "at least some of the windows were boarded over" but there was no sign forbidding entry); *Bond v. United States*, 233 A.2d 506, 514 (D.C. 1967) (affirming unlawful entry conviction even in the absence of signs or warnings forbidding entry where an individual was found in areas not open to the public). The Court has also recognized the validity of implicit directives in remaining without authority cases like this one. *See e.g.*, *McGovern*, 245 F.Supp.3d at 186 ("[U]nder District of Columbia law, the will of the lawful

occupant need only be 'objectively manifest' through 'express or implied means.'") (quoting *Ortberg*, 81 A.3d at 308). Imagine for example, if the area on which Mr. Glosser and Ms. Malimon were standing had a posted sign that stated: "This area is closed to the public." It cannot be that the Court would deem such a sign insufficient because it failed to state: "This portion of U.S. Capitol Grounds is closed to the public."

Here, there can be no question that the multiple orders to Defendants—all of which were far more explicit than the language in *McGovern*—would put a reasonable person on notice that they were required to leave. The Government presented evidence that MPD made three warnings through an amplification system attached to an MPD vehicle. The first warning sounded at 7:17 PM and stated: "You're in violation of a curfew of the United States Capitol and the District of Columbia . . . You're in violation of a curfew. If you do not leave the area you will be arrested. This is your first warning." The second warning sounded at 7:18 PM and stated: "Attention, attention . . . it is 19:18 hours, 7:18 PM. You're in violation of both the United States Capitol curfew and the city curfew effective at 1800 hours or 6:00 PM. If you do not leave you are subject to immediate arrest." The final warning sounded at 7:19 PM and stated: "This is your last and final warning. You're in violation of a curfew in the 100 Block of Pennsylvania Avenue NW. You are subject to immediate arrest if you do not disperse." Following these warnings, Ms. Malimon and Mr. Glosser were ordered to leave multiple times by individual MPD officers. Mr. Glosser was physically pulled off of a line of National Guard troops bearing riot shields and pushed by an officer to an area from which he could have exited. *See* Gov. Ex. 301 at 19:20:16-19:22:00, Gov. Ex. 308 at 19:22:15-19:22:45. Mr. Glosser stated to the officer: "You're pushing me out of where I have a legal right to stand." The officer responded, "No, you're in violation of curfew." Gov. Ex. 308 at 19:22:28-19:22:45. Mr. Glosser responds: "I'M

NOT IN VIOLATION OF A CURFEW. THAT'S ARBITRARY. THAT'S AN ARBITRARY MADE-UP FUCKING BULLSHIT-ASS LAW." *Id.* Ms. Malimon was directed to leave by a few different officers, both verbally and by using hand gestures. Gov. Ex. 306 at 19:22:04-19:22:17. One officer approached her and bellowed directly at her from a distance of perhaps a foot: "YOU'RE IN VIOLATION OF THE MAYOR'S CURFEW! CLEAR OUT!" Gov. Ex. 306 at 19:23:27-19:23:58. Officers even directed or attempted to direct Defendants as to how the exit the area. For example, Officer Quiles and other officers can be seen waving protestors and shouting the following instructions at them: "Out, out, out," "Let's go, this way," "Come this way," "Please come this way," "Let's go, let's go, please," "Let's go home," "Please through here," "Keep walking, keep walking," "Exit, come on, exit," and "This is the exit." Gov. Ex. 302 at 19:24:00-19:25:50. The Government proved beyond a reasonable doubt that Ms. Malimon and Mr. Glosser knew or should have known that they were remaining on property against the will of the person lawfully in charge. That is all that the Government was required to prove with respect to these Defendants' intent, knowledge, or understanding.

To the extent the Court is concerned that Ms. Malimon and Mr. Glosser were not given sufficient direction for how to leave the area, that issue is academic. The evidence offered at trial demonstrated beyond a reasonable doubt that Ms. Malimon and Mr. Glosser made no effort to leave after being instructed to do so. Any claim that Ms. Malimon and Mr. Glosser were confused as to how or where to exit because they were not specifically instructed "leave U.S. Capitol Grounds," is baseless. Video after video offered into evidence by the Government demonstrated that neither ever made any real effort to leave the area. Prior to the closing of the area, neither ever asked officers how to leave, and neither appear to ever even look for an exit. Minutes after expressly being told he was remaining in violation of a curfew, Mr. Glosser made

his intent to remain explicit when he declared: "I'm good right now, I'll wait for the shields to push me out I guess." Gov. Ex. 316 at 19:25:25-19:25:37. After Officer Creech shouted unmistakably to leave at Ms. Malimon she did not respond at all. She just continued to stand in the area filming. And the Government's evidence made clear that if Ms. Malimon or Mr. Glosser had actually wanted to leave the area they could have left through one of the many exits through which their fellow protestors left. Ms. Malimon conceded this during cross-examination.

Moreover, it is unclear how the direction "leave U.S. Capitol Grounds" compared to more general instructions to leave would have assisted Ms. Malimon or Mr. Glosser in leaving U.S. Capitol Grounds. As an initial matter, there is no evidence that either defendant was aware of the specific bounds of U.S. Capitol Grounds. Therefore, telling them to "leave U.S. Capitol Grounds" would be unlikely to have armed them with any additional information to aid in their exit. And there is no reason to believe that the direction to "leave U.S. Capitol Grounds" would have motivated either Ms. Malimon or Mr. Glosser to seek an exit when they were given far more consequential orders to leave such as "if you want to be arrested stay here, if not, leave." Gov. Ex. 312 at 19:25:20-19:25:25. Perhaps this issue could be determinative in a different case. It is of no moment here.[1]

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[1] The Court also noted during argument that the Superseding Information in this case states that the Defendants "did remain on, attempt to enter and enter certain public property, that is, the United States Capitol Grounds." This tracks the language of the Unlawful Entry statute (22 D.C. Code, Section 3302(b)), which, as noted above, does not require proof that Defendants were specifically ordered to leave U.S. Capitol Grounds. "The information has two primary functions: to apprise a defendant of the charge against him so he may properly prepare a defense, and to 'spell out the offense clearly enough to enable the accused to plead the judgment as a bar to a subsequent prosecution for the same crime.'" *Dyson v. United States*, 485 A.2d 194, 196 (D.C. 1984) (*quoting Horowitz v. District of Columbia,* 291 A.2d 202, 203 (D.C. 1972). Neither defendant has challenged the Superseding Information in this case or claimed that they were not provided sufficient information to prepare a defense.

CONCLUSION

For the foregoing reasons, the Government has proven that Ms. Malimon and Mr. Glosser committed the offense of Unlawful Entry (Public Property) beyond a reasonable doubt.

Respectfully submitted,

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