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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANCIS SCHAEFFER COX, Defendant-Appellant.	No. 13-30000 D.C. No. 3:11-cr-00022-RJB-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Robert J. Bryan, District Judge, Presiding

Argued and Submitted August 16, 2017
Anchorage, Alaska

Before: GRABER, CLIFTON, and M. SMITH, Circuit Judges.

Defendant Francis Schaeffer Cox appeals his convictions for conspiracy to murder a federal officer in violation of 18 U.S.C. §§ 1117 and 1114 and for solicitation to murder a federal officer in violation of 18 U.S.C. §§ 373 and 1114. We affirm Defendant's conspiracy conviction, vacate his solicitation conviction, vacate his sentences, and remand to the district court for resentencing.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. Defendant challenges several aspects of the jury instructions. First, he argues that the instructions failed to inform the jury that it had to find that he conspired with the mental state required for first-degree murder in order to convict him of conspiracy to commit first-degree murder. Reviewing for plain error, we conclude that any error in that instruction did not affect Defendant's substantial rights. United States v. Olano, 507 U.S. 725, 734–35 (1993). Second, Defendant argues that the instructions were deficient because they did not inform the jury that it had to find that the conspiracy was not one for self-defense. We conclude that, even assuming that Defendant has preserved the argument, the instructions adequately covered his theory of self-defense, United States v. Gomez-Osorio, 957 F.2d 636, 642–43 (9th Cir. 1992), they were not misleading, Stoker v. United States, 587 F.2d 438, 440 (9th Cir. 1978) (per curiam), and the district court did not abuse its discretion in formulating the instructions as it did, United States v. Knapp, 120 F.3d 928, 930 (9th Cir. 1997). Finally, Defendant argues that the lack of an instruction to the effect that the jury had to agree unanimously as to the target(s) of the conspiracy confused the jury. Reviewing for plain error, we conclude that it is not "obvious" or "clear" that the district court erred by not giving a specific unanimity instruction as to the intended target(s) of the conspiracy. See

Puckett v. United States, 556 U.S. 129, 135 (2009) (noting that, for an error to be "plain," it "must be clear or obvious, rather than subject to reasonable dispute").

2. Defendant next challenges the sufficiency of the evidence on the conspiracy charge. We assume, without deciding, that Defendant has properly preserved this challenge, so that our review is de novo. See United States v. Phillips, 704 F.3d 754, 762 (9th Cir. 2012). We conclude that, "consider[ing] the evidence presented at trial in the light most favorable to the prosecution[,] . . . [that] evidence, so viewed, is adequate to allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (internal quotation marks and alteration omitted). Defendant and his co-conspirators agreed to attack government officials—including federal officers—in the event of certain conditions that they subjectively thought were likely to occur. A rational trier of fact could find beyond a reasonable doubt that the agreement was not merely one for self-defense. A rational trier of fact could also conclude that "the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction." United States v. Feola, 420 U.S. 671, 695–96 (1975).

3. Defendant also challenges the sufficiency of the evidence on the solicitation charge. We review for plain error, but "plain-error review of a sufficiency-of-the-evidence claim is only theoretically more stringent than the standard for a preserved claim." United States v. Flyer, 633 F.3d 911, 917 (9th Cir. 2011) (internal quotation marks omitted). We conclude that it is clear that no rational trier of fact could find Defendant guilty of solicitation to murder a federal official, for two independent reasons. First, no rational trier of fact could conclude that the circumstances surrounding the formation of the security team for the television station event "strongly confirm[ed] that [D]efendant actually intended" for anyone to commit first-degree murder. United States v. Stewart, 420 F.3d 1007, 1020–21 (9th Cir. 2005). Second, because the federal "hit team" that the security team was supposed to guard against did not exist, the solicitation to murder a member of that hit team did not "constitute[] a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction." Feola, 420 U.S. at 695–96.[1] The error affected Defendant's substantial rights and seriously affected the fairness, integrity, or public reputation of a judicial proceeding, and we

[1] The Government's theory at trial was that Defendant's actions in connection with the formation of the security team for the television station event constituted solicitation to murder a federal official. No rational trier of fact could conclude that Defendant's other actions—those not related to the creation of the security team—amounted to solicitation within the meaning of 18 U.S.C. § 373.

will correct it. See Flyer, 633 F.3d at 917 ("When a conviction is predicated on insufficient evidence, the last two prongs of the plain-error test will necessarily be satisfied." (brackets omitted) (quoting United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009)); Cruz, 554 F.3d at 845 (holding that the last two prongs of the plain-error test are necessarily met "when [a] court, as a matter of law, ha[d] no jurisdiction to try [a defendent] for the alleged offense").

4. Defendant next argues that several of the district court's evidentiary rulings were erroneous. Reviewing for plain error, we conclude that the court's decision to admit evidence about Defendant's political speech and activities was not plainly erroneous. And assuming, without deciding, that Defendant has properly preserved his challenge to the district court's rulings on his requested limiting instruction, we conclude that neither the court's particular formulation of the limiting instruction nor the court's refusal to give an instruction at the time the evidence of political activity was presented to the jury constituted an abuse of its discretion. See United States v. Campanale, 518 F.2d 352, 362 (9th Cir. 1975) (per curiam) ("Appellants place special emphasis on the refusal of the judge to give cautionary instructions on the statements of co-conspirators at the time evidence was admitted. This subject was covered at the conclusion of the trial. There was

no prejudicial error in the judge's failure to give such an instruction also on other occasions during the trial." (citation omitted)).

5. We decline to reach Defendant's ineffective-assistance-of-counsel claim. See United States v. Jeronimo, 398 F.3d 1149, 1155 (9th Cir. 2005) ("[A]s a general rule, we do not review challenges to the effectiveness of defense counsel on direct appeal."), overruled on other grounds by United States v. Jacobo Castillo, 496 F.3d 947 (9th Cir. 2007) (en banc).

6. We vacate Defendant's sentences on all counts of conviction and remand with instructions to resentence Defendant in light of our reversal of his solicitation conviction. See United States v. Evans-Martinez, 611 F.3d 635, 645 (9th Cir. 2010) (holding that an appellate court has "the power to vacate all of the sentences imposed by a district court when the district court erred with respect to one of the sentences," and "remand of all sentences is often warranted").

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- The proceeding involves a question of exceptional importance; or
- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
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* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

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Signature _____

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Date _____

Name of Counsel: _____

Attorney for: _____

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Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk