

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC EBERT,

Defendant.

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REPORT AND  
RECOMMENDATION

01-CR-80-S

REPORT

Before the court for report and recommendation is defendant Eric Ebert's motion to dismiss the charge against him on the ground that it is duplicitous in violation of the Fifth Amendment. As a corollary, Ebert has filed a motion for a bill of particulars. Ebert contends that the government has included a course of conduct within one charge that exposes him to the possibility of a non-unanimous jury verdict, prejudice in evidentiary rulings, prejudice in sentencing, and potential double jeopardy. For the reasons stated below, I am recommending that this court deny Ebert's motions.

The government charged Ebert in a one-count indictment as follows:

On or about March 20, 2001, at FCI Oxford, in the Western District of Wisconsin, the defendant, Eric Ebert, forcibly assaulted, resisted, opposed, impeded and interfered with an employee of the Bureau of Prisons while he was engaged in the performance of his official duties.

*See* Indictment, dkt. #2.

Ebert's attorney has submitted an affidavit in support of dismissal stating that the government's pretrial disclosures reveal nine different acts by Ebert on March 20, 2001 that could constitute the crime charged. *See* Affidavit of Attorney Briane Pagel, dkt. #10, at ¶¶ 3(a)-3(i). In his motion for a bill of particulars, Ebert has asked the government to specify which of these acts it intends to prove at trial, to name the employees he allegedly assaulted, and to commit to whether it is prosecuting him under the "course of conduct" theory.

The government responds in its brief that neither dismissal nor a bill of particulars is necessary because it *is* alleging a course of conduct in count one and the acts contained within this course of conduct are obvious to Ebert as demonstrated by Attorney Pagel's affidavit. Although the government could have drafted its charge better, it has not violated the rule against duplicity.

Duplicity is the joining of two or more offenses in a single count. *United States v. Buchmeier*, 255 F.3d 415, 421 (7<sup>th</sup> Cir. 2001). The prohibition against duplicitous counts is embodied in Rule 8(a) of the Federal Rules of Criminal Procedure, which provides for a separate count for each offense. *Id.* However, a single count that charges multiple criminal acts might not be duplicitous if those acts comprise a continuing course of conduct that constitutes a single offense. *Id.* Additionally, an indictment that arguably charges separate and distinct offenses in a single count is not fatally flawed if the court provides an adequate limiting instruction that requires the jury to agree unanimously on one act within the series before returning a guilty verdict. *Id.* at 425.

Here, the government has chosen to characterize Ebert's conduct at Oxford on March 20, 2001 as a continuous course of conduct that began when Ebert refused to comply with an order and escalated into a series of resistant and obstructive acts that all arose out of the initial confrontation. Perhaps the government could have charged each forcible act by Ebert as a separate count under 18 U.S.C. § 111(a)(1), but its decision to combine them into one count will not prejudice Ebert.

First, Ebert's forcible interactions with different Oxford employees on March 20 were closely related in time, place and circumstance. Therefore, it is logical and equitable for the government to deem Ebert's behavior as a single course of conduct.

Second, this decision actually ameliorates Ebert's double jeopardy concerns because jeopardy will attach to all of his acts on March 20, thus protecting him from a second set of charges. The jury's verdict on Count 1 will be the final word on what Ebert did that day.

Third, this court will instruct the jury as that it cannot return a guilty verdict unless it unanimously finds that at least one of Ebert's acts on March 20 violated the statute charged. This court has already drafted a jury instruction that reads:

In Count 1 the government has charged a series of events as one crime. It is not necessary for the government to prove each of these events beyond a reasonable doubt; it only needs to prove one of them. However, you must unanimously agree on at least one such event and unanimously agree that the government has proved all three elements as to that one event before you may find that the government has met its burden of proof. It is not sufficient for some of you to find that the government has proved one event in the charged series and the rest of you to find that the government has proved a different

event in the charged series. All twelve of you must agree on at least one charged event.

To the same effect, when proving the first element of Count 1 the government does not need to prove that the defendant forcibly assaulted, *and* resisted *and* opposed, *and* impeded *and* interfered with the person involved in the event that you are considering. It is sufficient if the government proves one of these acts beyond a reasonable doubt. However, before you may find that the government has met its burden of proof on this point, you must unanimously agree on at least one of these acts. For instance, it is not sufficient for some of you to find that a defendant forcibly assaulted someone and the rest of you to find that the defendant forcibly impeded that person. You must all agree on at least one of the acts specified in the count that you are considering.

Proposed Jury Instructions at 7 (attached to Preliminary Pretrial Conference Order, dkt. #15). At the final pretrial conference Ebert and the government may critique this draft and offer proposals of their own. This process ensures that Ebert will not face the prospect of being convicted by a non-unanimous jury verdict.

Fourth, Ebert's fear of prejudicial evidentiary rulings is unfounded. Ebert will have the opportunity, by means of motions in limine and objections at trial, to provide his views on whether the court should construe any of his various acts on March 20 as direct evidence of the charge, indirect evidence that is inextricably intertwined with the charged acts, or "other acts" evidence subject to analysis under Rule 404(b). The court's rulings will be based on a complete record. To the extent that Ebert fears the jury might misconstrue any

uncharged acts as a basis for a guilt verdict, the court's instructions on the elements of the charges and its related definitional instructions will prevent any potential jury confusion.

Finally, it is unclear what prejudice Ebert believes he might suffer at sentencing if he is convicted of the charge. Virtually any act he committed on March 20, 2001 is fair game for consideration at sentencing, either as charged conduct or as relevant conduct. If Ebert has a more specific concern, he should raise it to the sentencing court if he is convicted.

In sum, although Ebert raises some valid duplicity concerns, they are adequately addressed by the government's announcement of its charging theory and the court's jury instructions. Therefore, neither dismissal nor a bill of particulars is appropriate.

#### RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny defendant Eric Ebert's motion to dismiss the indictment and motion for a bill of particulars.

Entered this 18<sup>th</sup> day of October, 2001.

BY THE COURT:

STEPHEN L. CROCKER  
Magistrate Judge