

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES M. KRUGER,

Defendant.

OPINION & ORDER

13-cr-113-wmc

Defendant James M. Kruger is charged with three counts of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g). (*See* Superseding Indictment (dkt. #24).) On November 14, 2014, Kruger notified the court that he intended to raise duress as an affirmative defense at trial. (Dkt. #51.) Both sides have since briefed the issue. For the reasons discussed below, the court will now deny Kruger's request to assert a duress defense.¹

OPINION

As noted above, Kruger is charged with three counts of unlawful possession of a firearm: (1) on or about June 7, 2013; (2) from on or about August 14 until August 28, 2013; and (3) on or about September 10, 2013. (Superseding Indictment (dkt. #24) 1-2.) As a defense, Kruger apparently seeks to testify at trial that a City of Madison Police Officer, Detective T.H., continually threatened him with harm unless he paid substantial sums of money. Kruger would further testify that these threats persisted during each of the

¹ This ruling is without prejudice, should Kruger wish to raise the issue again as a proposed jury instruction or motion before trial, in the unlikely event additional facts emerge providing the requisite evidentiary foundation for such a defense.

time frames alleged in the three counts of the indictment, compelling him to procure certain items, including firearms, to defend against an “imminent and impending attack on his life.”

A defendant is entitled to a defense instruction “only if: (1) the proposed instruction is a correct statement of the law; (2) the evidence lends some support to the defendant’s theory; (3) the theory of defense is not part of the charge; and (4) the failure to include the instruction would deny the defendant a fair trial.” *United States v. Jenkins*, 419 F.3d 614, 618 (7th Cir. 2005). As the foregoing suggests, the court would ordinarily take up this request nearer to trial, since the parties have not even proposed jury instructions, but the court is certainly willing to address it now as a pretrial motion for the benefit of the parties and as a matter of court efficiency, focusing on whether the current record provides a sufficient evidentiary basis to permit Kruger to raise a duress defense.

Under the law of the Seventh Circuit, “a defendant attempting to present a defense of duress or coercion must show: (1) [he] reasonably feared immediate death or serious bodily harm unless [he] committed the offense; *and* (2) there was no reasonable opportunity to refuse to commit the offense and avoid the threatened injury.” *United States v. Sawyer*, 558 F.3d 705, 711 (7th Cir. 2009) (emphasis added). Importantly, “[a] defense of duress or coercion requires evidence of ‘present, immediate, or impending’ violence.” *United States v. McDowell*, 687 F.3d 904, 911 (7th Cir. 2012) (quoting *Sawyer*, 558 F.3d at 711). In contrast, a claim of “potential future violence” is insufficient to support a duress defense. *Id.* at 911-12. Nor can a defendant maintain a duress defense where he had “a reasonable opportunity to refuse to commit the crimes.” *United States v. Robinson*, 663 F.3d 265, 269 (7th Cir. 2011).

Under these standards, Kruger has not established the required evidentiary foundation to assert an affirmative defense of duress. *First*, Kruger has pointed to no facts suggesting that the harm he feared was *imminent*. At most, he offers evidence that he feared Detective T.H. would harm him at some point in the *future*. As the Seventh Circuit has repeatedly held, “‘future’ or ‘later’ and ‘imminent’ are opposites.” *United States v. Tokash*, 282 F.3d 962, 970 (7th Cir. 2002).

Second, Kruger makes no effort to address the seemingly reasonable opportunity he had to refuse to commit the offense of felon in possession of a firearm. Indeed, Kruger has made no offer of proof *at all* with respect to any steps he may have taken to avoid committing the offenses at issue -- for example, showing that he could not go to the state or federal police for protection, or simply lie low, instead of carrying a gun as protection. This, too, is fatal to his attempt to assert duress as a defense -- particularly because the pattern of threats he alleges occurred over an extended period of time. *See, e.g., Sawyer*, 558 F.3d at 712 (“Sawyer did not present evidence that she never had the chance to contact the police in order to report Rodriguez’s threats. Since she is alleging ongoing threats over the course of a year, it would be virtually impossible for her to present such evidence.”).

In his reply, Kruger asserts that before the court makes a final ruling, he should be permitted to expound on his initial offer of proof. The court will allow Kruger to renew his request to introduce any additional evidence of duress at the final pretrial conference, if he is able to lay a proper evidentiary foundation for *both* elements of that defense.

ORDER

IT IS ORDERED that defendant James M. Kruger's motion to introduce an affirmative defense of duress (dkt. #51) is DENIED without prejudice.

Entered this 23rd day of December, 2014.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge