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

UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

v.

15-cr-96-wmc

BRIAN DUTCHER,

Defendant.

Before the court is Defendant Brian Dutcher's Motion for Judgment of Acquittal under Fed. R. Crim. P. 29. (Dkt. #91.) For the following reasons, his motion will be denied.

BACKGROUND

On November 4, 2015, the grand jury returned a superseding indictment charging defendant Brian Dutcher with two counts of willfully threatening to injure and kill the President of the United States in violation of 18 U.S.C. § 871(a). Count one alleged that on July 1, 2015, Dutcher threatened to take the life or, or inflict bodily harm on, the President of the United States when he told a library security officer that he was in La Crosse to shoot the President. Count two alleged that on June 30, 2015, Dutcher threatened to take the life of, or inflict bodily harm on, the President of the United States when he posted the following on his Facebook page: "[T]hat's it! Thursday I will be in La Crosse. Hopefully I will get a clear shot at the pretend president. Killing him is our CONSTITUTIONAL DUTY!"

The case proceeded to trial on January 11, 2016. The government submitted evidence on both of the counts. Among other things, the evidence showed (1) Dutcher made the June 30, 2015, Facebook post from his account, and (2) he knew that the President of the United States would be appearing in La Crosse on July 2, 2015. Then, on July 1, 2015, it was undisputed Dutcher, who lived in the Tomah, Wisconsin area, which is approximately 45 miles from La Crosse, drove from Tomah to La Crosse.

After arriving, Dutcher went to a La Crosse library. The video at the entrance of the library shows him seeking out Travis Good, the library security guard. Dutcher and Good shook hands and spoke. At that time, Good testified that Dutcher said he had come to La Crosse to kill the President at his speech the next day. (Trial tr., dkt. #88, 1-P-16.) Good further testified that in response, he told Dutcher "it's against the law to say that," and that Dutcher responded "Watch me." (*Id.* at 1-P-17.) Good understood Dutcher to mean that he was going to do it. Their interaction took about 30 seconds, after which Good saw that Dutcher walked to the upstairs area of the library. (*Id.* at 1-P-20, 1-P-30.)

After Dutcher walked away, Good remained at his desk for approximately another 30 seconds, and then he told his supervisor about Dutcher's statements. (*Id.* at 1-P-21.) His supervisor called the police, and afterwards Good wrote up a report about the incident. (*Id.*)[1]

[1] Dutcher's trial counsel impeached Good with gaps and arguable inconsistencies between Good's trial testimony regarding his brief exchange with Dutcher and what is chronicled in his contemporaneous incident report and earlier statements relatively contemporaneously summarized by the police, but the gist of defendant's original threat has remained the same. Regardless, the jury was free to find Good's trial testimony credible.

When the La Crosse police arrived on the scene, they found Dutcher two blocks from the library and he voluntarily went with them to the police department so that the Secret Service in town due to the President's visit could question him. (*Id.* at 1-P-44, -45.) When interviewed by the Secret Service, Dutcher admitted that he made the statements. (*Id.* at 1-P-103 to -110). During the interview, an investigator with the La Crosse Police department also located Dutcher's Facebook posts related to a plan to kill the President. (*Id.* at 1-P-77.)

Following this interview, Dutcher was transported to the Gunderson Clinic for a medical evaluation. The officers who transported him also testified that during the car ride, Dutcher stated that he meant what he said and that he would not have said it if he did not mean it. (*Id.* at 1-P-50.) Later that day, Dutcher was examined by emergency room staff, who testified that Dutcher stated he traveled to La Crosse to kill the President and that the President should be assassinated. (*Id.* at 1-P-134, -141-42.) Once Dutcher was released from the clinic, the Secret Service interviewed him again. Those officers testified, too, that he again confirmed his statements. (*Id.* at 1-P-110.)

La Crosse police also executed a search warrant of Dutcher's vehicle, during which a slingshot, ball bearings, metal-tipped darts, a bullet and a saw were uncovered. (*Id.* at 1-P-112 to -116.) When asked about these items, Dutcher told officers that he was very good with a slingshot and that he could kill a human being with it. (*Id.* at 1-P-104.)

At the close of the government's case, defendant moved for a judgment of acquittal, at which time the court advised:

> I'm not going to grant the motion. I would consider a brief after the case, although I will tell you that I think the government has made a substantial showing that [Dutcher] intended to do exactly what he did, which is to make repeated statements to -- of his intent. If nothing else, he seemed to have made a very studied effort to tell everyone exactly what he intended to do and he did that. And so I think it's up to the jury to decide what his intent was, whether it was to make a general statement, conditional statement, or to make an affirmative statement that would cause Secret Service and others to take the steps that they did, and that will be for the jury.

(Trial Tr., dkt. #99-3, at 3.) On January 12, 2016, a jury found the defendant guilty of both counts, and Dutcher renewed his Rule 29 motion in writing on February 19, 2016.

OPINION

I. STANDARD OF REVIEW

A defendant may move for a judgment of acquittal or "renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later."[2] Fed. R. Crim. P. 29(c)(1). The district court has the authority to set aside a jury's verdict and enter a judgment of acquittal. Fed. R. Crim. P. 29(c)(2). In reviewing such a motion, however, the court: (1) defers to the jury's credibility determinations in particular; and (2) applies a highly deferential standard of review generally. Indeed, the court's review is limited to "'whether, after viewing the evidence in the light most favorable to the government, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Torres-Chaves*, 744 F.3d 988, 993 (7th Cir. 2014) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

[2] Dutcher requested and received additional time to file his Rule 29 motion, so timeliness is not an issue.

The defendant thus faces "a nearly insurmountable hurdle" when seeking a judgment due to insufficient evidence. *Id*. (citing *Untied States v. Blassingame*, 197 F.3d 271, 283 (7th Cir. 1999). This is so because "the standard of review for such a challenge is highly deferential to the jury's verdict." *United States v. Garcia*, 754 F.3d 460, 470 (7th Cir. 2014) (citing *Cavazos v. Smith*, 132 S. Ct. 2, 3-4 (2011) (per curium); and *Jackson*, 443 U.S. at 319).

II. APPLICATION OF STANDARD

To sustain the conviction for violations of § 871(a), the "government must prove beyond a reasonable doubt that the threat was made knowing and willfully and that it was a 'true threat.'" *United States v. Fuller*, 387 F.3d 643, 646 (2004) (citing *United States v. Hoffman*, 806 F.2d 703, 706-07 (7th Cir. 1986)). Here, the government submitted sufficient evidence to sustain Dutcher's conviction on both counts.

In his Rule 29 motion, Dutcher essentially repeats the argument he made before trial -- that his statements were merely hyperbole, and the government could not (indeed, did not) prove that his statements were true threats. In support, Dutcher's counsel first argues that his *capability* to carry out his threats is relevant evidence in determining whether he made a true threat, stressing that the evidence at trial established he had no firearms, no ticket to the event where the President was appearing and no interest in obtaining such a ticket. In this way, counsel compares Dutcher to a hypothetical bedridden paraplegic who threatened to club someone to death, stating that in both Dutcher's and the hypothetical paraplegic's situation, their threats are hyperbole as a matter of law.

Counsel for Dutcher criticizes the government for relying on *Fuller* for the proposition that an objective standard determines the existence of a "true threat," which is now incorrect in light of the Supreme Court's holding in *Elonis v. United States*, 135 S. Ct. 2001 (2015). In that case, the Court stated that the "reasonable person standard" was inappropriate in evaluating whether a statement is a true threat. *Id*. at 2011. While the *Fuller* decision *did* apply the objective standard, 387 F.3d at 646, the government actually cited *Fuller* for the proposition that the lack of capacity is not dispositive in determining whether a statement constitutes a true threat, and Dutcher cites no authority to the contrary on this point. Indeed, as Dutcher concedes "it is well-established that the government is not required to prove that the defendant in a threat case intended or was able to *carry out* his threats." *United States v. Parr*, 545 F.3d 491, 498 (7th Cir. 2008) (emphasis in original). So even though Dutcher argues that his lack of capacity is *relevant* to whether his statements constitute a true threat, there is no dispute that lack of capacity to carry out the threat is not dispositive. *See Fuller*, 387 F.3d at 648 (finding that defendant's threats from prison were true threats despite the lack of capacity). Moreover, the jury was asked to apply a subjective standard, which required a finding that Dutcher *knew* he was making a threat.

Even if this were not so, the evidence Dutcher points to in support of his claim that he was incapable of carrying out the threat considers only a sliver of evidence presented at trial -- that Dutcher neither had a gun nor a ticket to see the President speak. When considering the government's actual evidence, there was sufficient evidence for a reasonable jury to conclude, not only that he made true threats, but that he was capable of

carrying them out. On June 30, for example, Dutcher made a statement on Facebook that it is "our CONSTITUTIONAL DUTY" to kill the President; he traveled to La Crosse, where he knew the President was making a public appearance the next day; he made additional statements affirming that he was there to kill the President; and he brought with him a slingshot and ball bearings that he claimed could kill a human being. This evidence of Dutcher's capabilities, at the very least, distinguish him from an individual in prison, much less a bedridden paraplegic. More importantly, the evidence likewise could persuade a reasonable juror that Dutcher was capable of carrying out the threat, at least as to an *attempt* to kill the President.

Dutcher also points out that the reaction of the listeners is relevant to the determination of whether a statement is a true threat or hyperbole. *Watts v. United States*, 394 U.S. 705, 708 (1969). Although listeners' reactions may be relevant to whether a statement is a true threat, Dutcher again ignores all of the other evidence available for the jury to consider on this point. For example, he asserts that the Facebook post readers did not consider the statements a true threat, but he provides no elaboration. Indeed, the evidence was that some readers tried to persuade him not to carry out his threat. Perhaps Dutcher intended to argue that because none of the Facebook readers *reported* the post to the police, they did not consider it a true threat, but that argument is purely speculative. Thus, the specific response (or lack thereof) from readers of Dutcher's Facebook post is not a persuasive piece of evidence that would establish that his post did not constitute a true threat.

The same is true of Dutcher's argument that Travis Good's reaction, as shown through the video footage, "was perfunctory," that he did not stop or follow Dutcher and that he "waited" to inform his supervisor of Dutcher's statements. Again, this argument ignores much of the evidence the government presented that would permit a reasonable juror to conclude Good did treat the statements seriously. In particular, Dutcher ignores Good's actual testimony that he believed that when Dutcher said "Watch me," he meant that he would attempt to kill the President. Additionally, Good watched Dutcher as he walked upstairs in the library, so he knew where he was, and then *less than a minute later* informed his supervisor about Dutcher's statements.

Furthermore, at that point, it is undisputed that his supervisor involved law enforcement, suggesting if nothing else that Good conveyed the threat as a serious one. Then, too, the police officers reached Dutcher when he was just two blocks away from the library, again suggesting a sense of urgency that would ultimately lead to Dutcher's multiple confessions and arrest. Although Good may not have immediately stopped Dutcher in his tracks when he made the statements, Good's reaction ultimately led to prompt intervention by law enforcement.

Finally, it is important to view Good's reactions in proper context. The President was not scheduled to arrive in La Crosse until the following day. As an urgent response to Dutcher's statements was not necessary to address the risk Dutcher presented, and Good's response was prompt enough to ensure Dutcher's quick detention, it would not be unreasonable for the jury to consider Good's reaction an appropriate response to a true threat.

Accordingly, Dutcher has failed to establish that the government did not submit sufficient evidence to support the jury's guilty verdicts.

ORDER

It is ORDERED that defendant Brian Dutcher's Motion for Judgment of Acquittal (dkt. #91) is DENIED.

Entered this 24th day of March, 2016.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge