

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of September, two thousand nineteen.

PRESENT: RICHARD C. WESLEY,
DENNY CHIN,
JOSEPH F. BIANCO,
Circuit Judges.

----- X

UNITED STATES OF AMERICA
Appellee,

v.

17-2570-cr

REDINEL DERVISHAJ, AKA Redi, AKA Red,
*Defendant-Appellant.**

----- X

FOR APPELLEE:

Emily Berger, Nadia I. Shihata, Patrick
T. Hein, Assistant United States
Attorneys, for Richard P. Donoghue,

* The Clerk of Court is respectfully directed to amend the official caption to conform to the above.

United States Attorney for the Eastern
District of New York, Brooklyn, New
York.

FOR DEFENDANT-APPELLANT:

Redinel Dervishaj, *pro se*, Pine Knot,
Kentucky.

Appeal from the United States District Court for the Eastern District of
New York (Vitaliano, J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,
ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

Defendant-appellant Redinel Dervishaj appeals the judgment of the
district court entered August 16, 2017, convicting him of twelve counts: three counts of
Hobbs Act extortion conspiracy; three counts of attempted Hobbs Act extortion; three
counts of Hobbs Act violence-in-furtherance-of-extortion; and three counts of
possession or brandishing of a firearm in furtherance of a crime of violence. Dervishaj
was principally sentenced to a mandatory minimum term of 57 years' imprisonment.
Dervishaj, proceeding *pro se*,¹ raises a number of issues that he argues warrant a new
trial or vacatur of one of more of his counts of conviction. We assume the parties'
familiarity with the underlying facts, the procedural history of the case, and the issues
on appeal.

¹ Following the withdrawal of several appointed CJA attorneys, Dervishaj moved to
proceed *pro se* and we granted the motion.

First, Dervishaj argues that the government committed prosecutorial misconduct by suborning perjury. This argument is without merit. To the extent there were discrepancies between witnesses' pre-trial testimony and trial testimony, Dervishaj was entitled to draw out these discrepancies on cross-examination, and the jury was "entitled to weigh the evidence and decide the credibility issues for itself." *United States v. McCarthy*, 271 F.3d 387, 399 (2d Cir. 2001). Dervishaj has failed to show that "[s]imple inaccuracies or inconsistencies in testimony [rose] to the level of perjury," *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001), or that the government suborned such perjury.

Dervishaj next argues that the evidence resulting from the government's seizure of a vehicle at 5:47 a.m. on December 3, 2016 should have been suppressed. In evaluating a district court's ruling on a motion to suppress, "we review legal conclusions *de novo* and findings of fact for clear error." *United States v. Berschansky*, 788 F.3d 102, 108 (2d Cir. 2015). Although the warrant in question was to be executed between the hours of 6:00 a.m. and 10:00 p.m., the district court properly concluded that this technical violation of Federal Rule of Criminal Procedure 41 was neither intentional nor prejudicial. *See United States v. Lambus*, 897 F.3d 368, 391 (2d Cir. 2018). Dervishaj was already in custody when the vehicle was seized, it was seized from a public street in New York City, and there is no reason to believe that the seizure would have been less abrasive if conducted 15 minutes later.

Third, Dervishaj argues that the district court abused its discretion in admitting one photograph found on Dervishaj's co-conspirator's cellphone showing a single handgun resting on a target at a gun range. We review a district court's evidentiary rulings "under a deferential abuse of discretion standard" and will "disturb an evidentiary ruling only where the decision to admit or exclude evidence was manifestly erroneous." *United States v. Litvak*, 889 F.3d 56, 67 (2d Cir. 2018) (internal quotation marks omitted). The district court's finding that the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice was not an abuse of discretion. *See* Fed. R. Evid. 403. The photograph was probative of Dervishaj's co-conspirator's access to and comfort level with firearms, and it did not show anyone holding the gun or in any way suggest that the possession or use of the gun was illegal. *See United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1995).

Fourth, Dervishaj contends that the nine Hobbs Act charges are multiplicitous in violation of the Fifth Amendment's Double Jeopardy Clause. This argument is waived. Pursuant to Federal Rule of Criminal Procedure 12(b)(3), a defendant must raise arguments based on defects in the indictment, including "charging the same offense in more than one count (multiplicity)," by pretrial motion "if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Here, the basis for a motion challenging multiplicity was available when the Third Superseding Indictment was filed in February 2016, more than a month

before trial. No objection was then raised. *See United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999) ("[A] Double Jeopardy challenge can be waived . . . if not asserted at the district court level."). And in any event, the district court sentenced Dervishaj concurrently -- to one day's imprisonment -- on each of the nine extortion-related counts. Because erroneous multiplicity, if any, in the indictment did not affect Dervishaj's term of imprisonment, any error did not seriously affect the fairness of the proceedings below.

Fifth, Dervishaj argues that his convictions under 18 U.S.C. § 924(c) must be vacated because none of the predicate offenses are crimes of violence. We review *de novo* whether a crime is categorically a "crime of violence" under 18 U.S.C. § 924(c). *See United States v. Hill*, 890 F.3d 51, 54-55 (2d Cir. 2018). Under § 924(c), it is a federal crime to use or carry a firearm during and in relation to a crime of violence, or to possess a firearm in furtherance of a crime of violence. A crime of violence is a federal felony that:

- (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another [(the "Elements Clause")], or
- (B) by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense [(the "Residual Clause")].

18 U.S.C. § 924(c)(3). We need not consider whether Dervishaj's convictions are crimes of violence under the Residual Clause because his Hobbs Act violence-in-furtherance-

of-extortion convictions are plainly crimes of violence under the Elements Clause.

The Third Superseding Indictment charged Dervishaj with "knowingly and intentionally commit[ting and threatening] physical violence to [John Does #1, #2, and #3] in furtherance of a plan and purpose to obstruct, delay and affect commerce . . . , by extortion, to wit: a plan and purpose to obtain proceeds from [John Does #1, #2, and #3], with [their] consent, which consent was to be induced by wrongful use of actual and threatened force, violence and fear of physical injury."² Gov. App. at 153-54. The district court instructed the jury that to convict on Counts Three, Seven, and Eleven, the government had to prove that (1) "the defendant threatened (or, for count 11, committed) physical violence to any person or property," (2) "the physical violence threatened or committed furthered a plan or purpose to commit Hobbs Act extortion," and (3) "the plan or purpose to commit Hobbs Act extortion, if successful, would have in any way or degree obstructed, delayed, or affected commerce or the movement of any article or commodity in commerce." Trial Tr. at 1748. For the jury to convict Dervishaj on these counts, therefore, it had to find that Dervishaj threatened or committed physical violence to another's person or property. This element plainly meets § 924(c)(3)(A)'s definition of "use, attempted use, or threatened use of physical force against the person or property of another." Thus, Hobbs Act violence-in-

² This crime is distinct from the crimes of Hobbs Act extortion and Hobbs Act robbery. See *Scheidler v. Nat'l Org. for Women*, 547 U.S. 9, 22 (2006) (noting that the "Hobbs Act crime of using violence in furtherance of" robbery or extortion is a "separate" crime from Hobbs Act extortion and robbery).

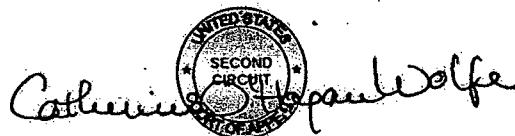
furtherance-of-extortion as charged here is categorically a crime of violence. In its verdict sheet, the jury specifically found that the government proved beyond a reasonable doubt that Dervishaj possessed and brandished a firearm with respect to each of Counts Three, Seven, and Eleven. Accordingly, Dervishaj's § 924(c) convictions stand.

Finally, Dervishaj argues that there is insufficient evidence to support his convictions on the § 924(c) counts. We are unpersuaded. The evidence amply supports Dervishaj's § 924(c) convictions because as to Count Four, the evidence demonstrates that Dervishaj actually possessed a firearm that was used to extort. And as to Counts Eight and Twelve, the evidence shows that Dervishaj aided and abetted the commission of extortionate acts furthered by the use or possession of a firearm. See *Rosemond v. United States*, 572 U.S. 65, 71-74 (2014); *United States v. Prado*, 815 F.3d 93, 105 (2d Cir. 2016).

* * *

We have considered all of Dervishaj's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court


Catherine O'Hagan Wolfe

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of December, two thousand nineteen.

United States of America,

Appellee,

v.

Redinel Dervishaj, AKA Redi, AKA Red,

Defendant - Appellant.

ORDER

Docket No: 17-2570

Appellant, Redinel Dervishaj, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe



APPENDIX

EXHIBIT #1 - 1 pg. - Sentencing Transcript Cover Page

EXHIBIT #2 - 1 pg. - Sentencing Transcript pg. 14

EXHIBIT #3 - 4 pgs. - George Stoupas' Complaint Report Worksheet filed with the NYPD dated September 20, 2012

EXHIBIT #4 - 3 pgs. - George Stoupas' two DD5 Pink Narrative Search Worksheets and one NYPD Internal Affairs Bureau Worksheet

EXHIBIT #5 - 2 pgs. - George Stoupas' FBI 302 Report of his interview with FBI SA Sean Olsewski and AUSA Nadia Shihata and AUSA Kristin Mace dated January 14, 2014, detailing what happened during his encounter with Nikolla

EXHIBIT #6 - 1 pg. - George Stoupas' FBI 302 Report of his interview with FBI SA's Sean Olsewski and Violet Syku and AUSA Nadia Shihata dated January 23, 2014, the day of the convening of the Grand Jury

EXHIBIT #7 - 2 pgs. - First and Last page of Wire Tap Application dated August 6, 2013, filed by SA Sean Olsewski

EXHIBIT #8 - 2 pgs. - Pages 7 & 8 of Olsewski's wire tap application dated August 6, 2013

EXHIBIT #9 - 4 pgs. - Deni Nikolla's FBI 302 Report of his proffer interview with FBI SA's Syku and Olsewski, NYPD Detective Joseph Chiminetti and AUSA's Shihata and Mace dated April 30, 2014, detailing his actions at Jimbo's Bar

EXHIBIT #10 - 4 pgs. - George Stoupas' alleged perjured Grand Jury testimony elicited by prosecutors on January 23, 2014

EXHIBIT #11 - 1 pg. - George Stoupas' testimony on redirect regarding showing petitioner's picture to him on the day of Grand Jury presentment

EXHIBIT #12 - 1 pg. - George Stoupas' trial testimony during direct claiming he replaced his phone

EXHIBIT #13 - 1 pg. - George Stoupas' trial testimony during direct identifying the phone number related to "Denis Friend"

EXHIBIT #14 - 1 pg. - Picture of Stoupas' cell phone depicting contact info for "Denis Friend" with phone # 347-361-0854 appearing

EXHIBIT #15 - 1 pg. - Trial transcript qualifying Darryl Valinchus as a cell phone data analysis and location data expert

EXHIBIT #16 - 3 pgs. - Trial transcript during cross of Valinchus admitting the phone number is Stoupas' phone listed as "Denis Friend" did not belong to petitioner

EXHIBIT #17 - 1 pg. - Trial transcript of Tony during direct purporting petitioner told him his name was "Redi from Dorsi"

EXHIBIT #18 - 1 pg. - Trial transcript excerpt of Tony during direct describing Internet search for "Redi from Dorsi" but getting results for Redinel Dervishaj

EXHIBIT #19 - 3 pgs. - Sealed application falsely purporting petitioner gave Tony his real name to look up on the Internet

EXHIBIT #20 - 1 pg. - Warrant to seize petitioner's car

EXHIBIT #21 - 1 pg. - FBI 302 detailing the date and time of the seizure and search of petitioner's car

EXHIBIT #22 - 3 pgs. - FBI log detailing items seized from petitioner's car

EXHIBIT #23 - 2 pgs. - FBI addendum explaining why evidence appeared 5 months later

EXHIBIT #24 - 1 pg. - Hearing transcript excerpt of prosecutor during defense's Limine Motion admitting cell phone pictures were Nikolla's

EXHIBIT #25 - 1 pg. - Hearing transcript excerpt of prosecutor during defense's Limine Motion admitting they knew the guns in the pictures belonged to the firing range

EXHIBIT #26 - 1 pg. - Trial transcript excerpt of the district court's ruling on the Limine Motion

EXHIBIT #27 - 1 pg. - Picture of gun resting on target taken from Nikolla's cell phone

EXHIBIT #28 - 1 pg. - Counseled letter to prosecutors requesting 3rd Superseding Indictment Grand Jury minutes

EXHIBIT #29 - 1 pg. - Counseled letter to prosecutors requesting how the Government obtained phone records referenced in affidavit dated August 6, 2013

EXHIBIT #30 - 3 pgs. - Pages 6 - 8 of Government's Sealed Application dated July 16, 2013

EXHIBIT #31 - 1 pg. - Government's Appellate brief pg. 92

EXHIBIT #32 - 1 pg. - Paragraph #10 of Olsewski's affidavit

EXHIBIT #33 - 1 pg. - FBI 302 Report dated January 15, 2014, detailing Federal searching Nikolla's apartment and finding edged weapons and a BB gun

EXHIBIT #34 - 1 pg. - Picture of seized edged weapons from Nikolla's apartment

EXHIBIT #35 - 1 pg. - FBI 302 Report detailing seizing BB gun from Nikolla's apartment

EXHIBIT #36 - 1 pg. - Federal Agent's notes detailing Nikolla pulling a "real looking" BB gun on his girlfriend's cousin

EXHIBIT #37 - 2 pgs. - Search warrant issued for petitioner's apartment

EXHIBIT #38 - 1 pg. - Government letter to the district court acknowledging no firearms or ammunition was seized from any defendant

EXHIBIT #39 - 2 pgs. - FBI 302 report for Apostolos Felonis detailing his recounting of the narrative as told to him by Stoupas

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x -

UNITED STATES OF AMERICA, : 13-CR-00668(ENV)

13-CR-00668 (ENV)

-against-

United States Courthouse
Brooklyn, New York

Friday, March 24, 2017
11:00 a.m.

REDINEL DERVISHAJ, et al.

Defendant:

x

TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING
BEFORE THE HONORABLE ERIC N. VITALIANO.
UNITED STATES SENIOR DISTRICT COURT JUDGE

APPEARANCES:

For the Government: BRIDGET M. ROHDE, ESQ.
Acting United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
BY: NADIA SHIHATA, ESQ.
PATRICK HEIN, ESQ.
Assistant United States Attorney

For the Defendant: MERCHANT LAW GROUP, LLP
535 Fifth Avenue
New York, New York 10017
BY: DANIEL DeMARIA, ESO.

Court Reporter: Michele D. Lucchese, RPR
Official Court Reporter
E-mail: MLuccheseEDNY@gmail.com

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

1 inconsistent with their initial statements. All this while
2 time and time again I asked my lawyer to object and file
3 motions, only to find, for whatever reason, my very own lawyer
4 doing nothing to help me. I say again, there has been a gross
5 miscarriage of justice here.

6 Frankly, I don't even know where to begin, but I
7 suppose I should start with the Miranda Rights. I was never
8 given this, which is against the law. I was given an
9 overloaded indictment based on the actions of others and
10 discovery I couldn't even use as it was mostly having to
11 do, again, with the actions of others. These, of course,
12 should have been brought to the court and objected to
13 pretrial, but my lawyer did not see fit to raise these issues
14 for reasons unknown to me. It was the same with the other
15 issues, warrants for wiretaps were obtained based on
16 information already obtained without a warrant, raising a
17 fruit of the poison tree issue that once more went
18 unchallenged by my lawyer. My car was seized and not only did
19 they open the closed compartments, for which they had no
20 warrant and of which I have pictoral proof, but the team
21 assigned to the car failed to inventory phones they say were
22 taken from closed compartments of the car, only bringing them
23 to light five months and 13 days later.

24 They say they weren't inventoried due to the
25 priority of the case, but this makes no sense. The team

**Additional material
from this filing is
available in the
Clerk's Office.**