

APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 12 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 22-30015

Plaintiff-Appellee,

D.C. No.
2:20-cr-00032-JCC-2

v.

KALEB J COLE,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, District Judge, Presiding

Argued and Submitted March 28, 2023
Seattle, Washington

Before: NGUYEN and HURWITZ, Circuit Judges, and GUTIERREZ, ** Chief District Judge.

Kaleb Cole was convicted on several counts of violating 18 U.S.C. §§ 245, 371, and 876(c) based on his participation in a campaign of mailing threatening posters. Cole raises several challenges to his convictions and sentence. We have

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

** The Honorable Philip S. Gutierrez, Chief United States District Judge for the Central District of California, sitting by designation.

jurisdiction under 28 U.S.C. § 1291 and affirm.

1. In reviewing a conviction based on a true threat, we “[d]efer[] to the jury’s findings on historical facts, credibility determinations, and elements of statutory liability” and “consider whether the verdict is supported by substantial evidence.” *United States v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002). If substantial evidence exists, “we then conduct an independent review of the record” and decide whether the facts establish a true threat. *Id.* A true threat is a “statement[] where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence.” *Thunder Studios, Inc. v. Kazal*, 13 F.4th 736, 746 (9th Cir. 2021) (quoting *Virginia v. Black*, 538 U.S. 343, 359 (2003)).

The record supports the jury’s finding that the three mailed posters were true threats under both an objective and subjective standard. *See United States v. Keyser*, 704 F.3d 631, 638 (9th Cir. 2012). The first poster depicts a man in a skull mask holding a Molotov cocktail in front of a burning house and states, “your actions have consequences our patience has its limits.” The second poster states, with the text broken up by swastikas, “we are watching we are noone [sic] we are everyone we know where you live do not fuck with us.” And the third poster, similarly broken up by swastikas, states, “two can play at this game these people have names and addresses,” and depicts armed individuals below the phrase “death

to pigs” standing behind another person. The victims who received the posters at their homes testified that they feared for their safety, and group chat messages and undercover recordings showed that Cole and his co-conspirators intended the posters to communicate threats of violence.

2. We review a district court’s denial of a motion to suppress *de novo*, *United States v. Crews*, 502 F.3d 1130, 1135 (9th Cir. 2007), and a magistrate judge’s finding of probable cause to issue a search warrant for clear error, giving “great deference” to that finding, *United States v. Krupa*, 658 F.3d 1174, 1177 (9th Cir. 2011) (citation omitted). Here, the magistrate judge could reasonably infer from the supporting affidavit that Cole discussed and coordinated the poster campaign; other information also indicated Cole’s leadership and involvement in Atomwaffen’s activities. The magistrate judge thus had a substantial basis to find probable cause to search Cole’s house. *See United States v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (en banc) (explaining that courts should not “flyspeck” an affidavit).

3. To receive a *Franks* hearing, a defendant must show that (1) the affidavit contained intentionally or recklessly false statements or misleading omissions and (2) the false statements or omissions were material to the finding of probable cause. *See United States v. Meek*, 366 F.3d 705, 716 (9th Cir. 2004). Here, the details about the FBI informant that were omitted from the affidavit were

immaterial to the finding of probable cause. Even if the magistrate judge had considered the informant's fifteen-year-old conviction and receipt of approximately \$140,000 from the FBI over sixteen years, the other information in the affidavit, such as screenshots of the group chat messages, nevertheless supports a finding of probable cause. *See United States v. Meling*, 47 F.3d 1546, 1553–55 (9th Cir. 1995) (holding that the omission of an informant's ten-year-old convictions and receipt of a \$100,000 reward was immaterial). The district court thus did not err in denying a *Franks* hearing.

4. We review a district court's denial of a motion to dismiss based on speedy trial grounds de novo and the court's factual findings for clear error. *United States v. Lam*, 251 F.3d 852, 855 (9th Cir. 2001). The district court here considered all applicable factors, including Cole's eighteen-month pretrial detention, issues stemming from the COVID-19 pandemic, the violent nature of his felony charges, and Cole's failure to consistently invoke his speedy trial right. The district court thus did not err in denying Cole's motion to dismiss. *See United States v. Olsen*, 21 F.4th 1036, 1040–49 (9th Cir. 2022); *United States v. King*, 483 F.3d 969, 975–77 (9th Cir. 2007).

5. We review statutory and constitutional challenges to the composition of a jury "independently and non-deferentially." *United States v. Sanchez-Lopez*, 879 F.2d 541, 546 (9th Cir. 1989). Because Cole has failed to establish that jurors

who are unvaccinated against COVID-19 constitute a distinctive group, his fair cross section challenge fails. *See Duren v. Missouri*, 439 U.S. 357, 363–64 (1979); *United States v. Kleifgen*, 557 F.2d 1293, 1296 (9th Cir. 1977).

6. We review factual findings made in conjunction with sentencing for clear error and the application of the Sentencing Guidelines for abuse of discretion. *United States v. Harris*, 999 F.3d 1233, 1235 (9th Cir. 2021). The district court did not err in applying sentencing enhancements under U.S.S.G. §§ 2A6.2(b)(1)(D), for Cole’s “threatened use[] of a dangerous weapon,” and 3B1.1(a), for Cole’s role as an “organizer” or “leader,” because the poster depicting an individual with a Molotov cocktail in front of a burning house is a true threat, and evidence, such as group chat messages, undercover recordings, and trial testimony, showed that Cole was an organizer and leader of the postering campaign.

AFFIRMED.

APPENDIX B

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MAY 22 2023

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UNITED STATES OF AMERICA,

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Plaintiff-Appellee,

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KALEB J COLE,

Western District of Washington,
Seattle

Defendant-Appellant.

ORDER

Before: NGUYEN and HURWITZ, Circuit Judges, and GUTIERREZ,* District Judge.

Judge Nguyen has voted to deny the petition for rehearing en banc, and Judges Hurwitz and Gutierrez have so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

* The Honorable Philip S. Gutierrez, Chief United States District Judge for the Central District of California, sitting by designation.

APPENDIX C

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 876. Mailing threatening communications

(a) Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered, as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than twenty years, or both.

(c) Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both. If such a communication is addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114 [18 USCS § 1114], the individual shall be fined under this title, imprisoned not more than 10 years, or both.

(d) Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a

crime, shall be fined under this title or imprisoned not more than two years, or both. If such a communication is addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114 [18 USCS § 1114], the individual shall be fined under this title, imprisoned not more than 10 years, or both.

§ 245. Federally protected activities

(a) (1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(1) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or in order to intimidate such person or any other person or any class of persons from—

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (1)(A) through (1)(E) or subparagraphs (2)(A) through (2)(F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined under this title, or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under this title, or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2)(F) or (4)(A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

(c) Nothing in this section shall be construed so as to deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term "law enforcement officer" means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or a political subdivision of a State.

(d) For purposes of this section, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.