

APPENDIX

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FILED

AUG 18 2017

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD DOUGLAS LATKA,

Defendant-Appellant.

No. 16-50044

D.C. No.
2:15-cr-00095-DSF-1

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted August 7, 2017
Pasadena, California

Before: **REINHARDT, KOZINSKI** and **CHRISTEN**, Circuit Judges.

1. Latka’s indictment was sufficient because “it contain[ed] the elements of the charged crime in adequate detail to inform [him] of the charge, and . . . enable[d] him to plead double jeopardy.” See United States v. Morlan, 756 F.2d 1442, 1444 (9th Cir. 1985) (citation omitted).

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

Further, the indictment wasn't "constructive[ly amended, which] occurs when the defendant is charged with one crime but, in effect, is tried for another crime." United States v. Mancuso, 718 F.3d 780, 792 (9th Cir. 2013) (citations omitted); see also Stirone v. United States, 361 U.S. 212, 214–15 (1960) (holding that an indictment for moving sand was impermissibly amended when the conviction was for moving steel); United States v. Choy, 309 F.3d 602, 607–08 (9th Cir. 2002) (holding that an indictment for bribing a public official was impermissibly amended when the conviction was for giving money to a private individual).

"The continuous nature of [Latka's offense] prevents the indictment from being duplicitous." Mancuso, 718 F.3d at 792 (citation omitted). The trial court's unanimity instruction also remedied any possible duplicity. See United States v. Ramirez-Martinez, 273 F.3d 903, 915 (9th Cir. 2001), overruled on other grounds by United States v. Lopez, 484 F.3d 1186 (9th Cir. 2007).

2. The district court didn't violate Latka's right to confront Ellsworth because the excluded evidence wasn't relevant and the jury had "sufficient information to assess [Ellsworth's] . . . credibility[.]" United States v. Cazares, 788 F.3d 956, 983–84 (9th Cir. 2015).

3. A district court may, for good cause, remove “any jurors who are unable to perform or who are disqualified from performing their duties.” Fed. R. Crim. P. 24(c)(1); see Williams v. Cavazos, 646 F.3d 626, 652 (9th Cir. 2011), rev’d on other grounds sub nom. Johnson v. Williams, 568 U.S. 289 (2013). The district court didn’t abuse its discretion because it had good cause to remove Juror 9.

4. There being no individual errors, Latka’s cumulative error claim fails.

AFFIRMED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	CR 15-95 DSF	Date	10/20/15
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Present: The Honorable DALE S. FISCHER, UNITED STATES DISTRICT JUDGE

Interpreter Not Applicable

Debra Plato <i>Deputy Clerk</i>	Not Present <i>Court Reporter/Recorder</i>	Cassie Palmer Christopher Kendall (Not Present) <i>Assistant U.S. Attorney</i>
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<u>U.S.A. v. Defendant(s):</u>	<u>Present</u>	<u>Cust.</u>	<u>Bond</u>	<u>Attorneys for Defendants:</u>	<u>Present</u>	<u>App.</u>	<u>Ret.</u>
1) Richard Douglas Latka	Not	X		1) Marilyn Bednarski	Not	X	

Proceedings: (In Chambers) Order DENYING Defendant's Motion to Dismiss Indictment for Duplicitous (Dkt. No. 138)

Defendant Richard Latka moves to dismiss the indictment for duplicity. He argues that the government should be forced to choose the single act that is the threat charged for the single count of violation of 18 U.S.C. § 115(a)(1)(B). The government counters that threatening a federal officer can be viewed as a continuing offense and therefore the jury need not unanimously agree on any particular threat that violates the statute. While the government's argument has some surface appeal, the Court generally agrees with Defendant that threatening a federal officer is more akin to a discrete offense like making a false statement than a continuing offense like possession of a firearm or a controlled substance. A "threat" has been defined as "an expression of an intention to inflict evil, injury, or damage on another." United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990). This definition suggests that the charge is for a discrete "expression," not the kind of amorphous or continuing course of action that the government puts forth. Nor is this a case involving an alleged "scheme" wherein the defendant planned and took actions in accordance with that plan over an extended time. Cf. United States v. Klat, 156 F.3d 1258, 1266 (D.C. Cir. 1998) (single charge related to six-month "scheme" to threaten Chief Justice and Clerk of United States Supreme Court not duplicitous).

That said, dismissal of the indictment is not the appropriate remedy for this problem. "[A] defendant indicted pursuant to a duplicitous indictment may be properly prosecuted and convicted if either (1) the government elects between the charges in the offending count, or (2)

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the court provides an instruction requiring all members of the jury to agree as to which of the distinct charges the defendant actually committed.” United States v. Ramirez–Martinez, 273 F.3d 903, 915 (9th Cir.2001) overruled on other grounds by United States v. Lopez, 484 F.3d 1186, 1188 & n. 2 (9th Cir.2007) (en banc). The government may choose to elect one act/statement as the operative threat or an appropriate verdict form can be developed to ensure that the jurors are unanimous as to the operative threat in any guilty verdict that they might reach.

The motion is DENIED.