

NOT RECOMMENDED FOR PUBLICATION

No. 23-1914

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

May 16, 2025

KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	ON APPEAL FROM THE UNITED
v.)	STATES DISTRICT COURT FOR
)	THE WESTERN DISTRICT OF
KEVIN WILLIAM CASSADAY,)	MICHIGAN
)	
Defendant-Appellant.)	

ORDER

Before: NALBANDIAN, MURPHY, and RITZ, Circuit Judges.

Kevin William Cassaday, through counsel, appeals his conviction. The parties do not request oral argument and we unanimously agree that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons discussed below, we affirm.

A jury found Cassaday guilty of threatening to assault or murder a federal official, in violation of 18 U.S.C. § 115(a)(1)(B) (count one), and two counts of interstate communications with a threat to kidnap or injure, in violation of 18 U.S.C. § 875(c) (counts two and three). He was sentenced to serve concurrent terms of 37 months in prison for each conviction followed by two years of supervised release.

On appeal, Cassaday challenges only his conviction on count two, which was based on an email that he sent to a state court clerk's office, stating "I want the clerk dead!!" Cassaday argues that the jury instructions for count two were improper because they did not inform the jury that "the First Amendment protects mere advocacy of the use of force or violence." He argues that the omission was prejudicial because his theory of the case was that the email at issue advocated rather than threatened the use of force and was thus protected speech, but the jury instructions did not

No. 23-1914

- 2 -

support his defense. Cassaday also moves pro se to submit an “ex parte motion” raising allegations of prosecutorial misconduct and ineffective assistance of counsel.

“We review the district court’s choice of jury instructions for an abuse of discretion.” *United States v. Zheng*, 87 F.4th 336, 346 (6th Cir. 2023). The district court “does not abuse its discretion unless the jury charge ‘fails accurately to reflect the law.’” *Id.* (quoting *United States v. Ross*, 502 F.3d 521, 527 (6th Cir. 2007)). When a district court denies a requested jury instruction, we will reverse only if the requested instruction: “(1) [was] a correct statement of the law, (2) [was] not substantially covered by the charge actually delivered to the jury, and (3) concern[ed] a point so important in the trial that the failure to give it substantially impair[ed] the defendant’s defense.” *United States v. Anderson*, 67 F.4th 755, 764 (6th Cir. 2023) (per curiam) (quoting *United States v. Godofsky*, 943 F.3d 1011, 1019 (6th Cir. 2019)), *abrogated on other grounds by Ruan v. United States*, 597 U.S. 450 (2022).

Regarding count two, the jury instruction at issue concerned the type of speech protected under the First Amendment. Cassaday asked to instruct the jury that “true threats” are not protected by the First Amendment but “that the law cannot proscribe speech that merely advocates for the use of force or a violation of law—such advocacy can only be a crime if it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” The district court initially modified Cassaday’s proposed instruction to read that “the First Amendment protects mere advocacy of the use of force or violence.” The government objected to the modified instruction, arguing that the First Amendment reference in the instruction was not necessary and risked confusing the jury. Cassaday argued in favor of the First Amendment reference in the instruction because the First Amendment was part of the case. The district court decided “to keep a First Amendment instruction” with further modification eliminating the statement that “the First Amendment protects mere advocacy of the use of force or violence.” The jury was ultimately instructed:

Again, as this is a case involving speech, I advise you that the First Amendment protects vehement, scathing and offensive communications directed at public officials, including a member of the law enforcement or the state courts, but the

No. 23-1914

- 3 -

First Amendment does not protect the speech at issue here if you find that the government has proven each element beyond a reasonable doubt.

The district court did not abuse its discretion in declining to instruct the jury as Cassaday requested for count two. First, Cassaday's proposed jury instruction was not an entirely accurate statement of the law. *See Anderson*, 67 F.4th at 764. Cassaday's proposed instruction correctly stated that speech advocating force or violence is protected by the First Amendment. *See Counterman v. Colorado*, 600 U.S. 66, 76 (2023). But it failed to reflect that speech advocating force or violence could also comprise speech threatening violence such as the speech criminalized in § 875(c). "True threats of violence are outside the bounds of First Amendment protection and punishable as crimes." *Id.* at 69.

Second, Cassaday's proposed jury instruction was substantially covered by the instructions given to the jury for count two. *See Anderson*, 67 F.4th at 764. For count two, the jury was instructed that the government had the burden to prove that Cassaday knowingly sent a message in interstate commerce, that the message threatened injury to a person, and that he intended the message to be a threat or knew that it would be viewed as one. The jury was further instructed that "vehement, scathing, and offensive communications" are protected by the First Amendment but that if the jury found that the government proved all elements of the § 875(c) offense charged in count two, the speech at issue in the email to the court clerk was not entitled to First Amendment protection. Cassaday does not dispute that these jury instructions adequately conveyed the elements of the § 875(c) offense. And the instructions incorporated a modified version of Cassaday's proposed instruction that mere advocacy of force or violence is protected by the First Amendment.

Third, Cassaday has failed to show that his defense was substantially impaired by the district court's failure to give the jury his proposed instruction. *See Anderson*, 67 F.4th at 764. "[T]he court's refusal to give an instruction does not substantially impair the defense when the jury was already 'well aware' of that defense theory." *United States v. Henderson*, 2 F.4th 593, 597 (6th Cir. 2021) (quoting *Godofsky*, 943 F.3d at 1027). Cassaday's theory of the case was that his speech was not illegal, and he was given ample opportunity to argue that theory to the jury. To

No. 23-1914

- 4 -

illustrate, his opening statement asserted that the First Amendment protects some speech and that his speech was not a true threat. He repeated that theme in his closing argument. Specifically, as to count two, he argued that the email sent to the state court clerk was protected speech under the First Amendment because it merely advocated rather than threatened violence. In sum, we find no abuse of discretion in the district court's First Amendment-related jury instruction for count two.

Finally, because Cassaday is represented by counsel, we decline to address his pro se arguments. *See, e.g., United States v. Wilder*, 87 F.4th 816, 821 (6th Cir. 2023).

We **DENY** Cassaday's pro se motion and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

APPENDIX E

No. 23-1914

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 30, 2025
KELLY L. STEPHENS, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

KEVIN WILLIAM CASSADAY,

Defendant-Appellant.

O R D E R

Before: NALBANDIAN, MURPHY, and RITZ, Circuit Judges.

Kevin William Cassaday, proceeding pro se, has filed a petition for rehearing of this court's order of May 16, 2025, affirming his conviction.

Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(b)(1)(A).

We therefore **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens
Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 06/30/2025.

Case Name: USA v. Kevin Cassaday

Case Number: 23-1914

Docket Text:

ORDER filed: Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. See Fed. R. App. P. 40(b)(1)(A). We therefore DENY the petition for rehearing [7358957-2] John B. Nalbandian, Eric E. Murphy and Kevin G. Ritz, Circuit Judges.

The following documents(s) are associated with this transaction:

Document Description: Order

Notice will be sent to:

Mr. Kevin William Cassaday
4819 N. Stark Road
Hope, MI 48628

A copy of this notice will be issued to:

Ms. Laura E. Davis
Ms. Ann E. Filkins
Mr. Christopher Rawsthorne