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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMMON BUNDY, *et al,*

Defendants.

Case No. 3:16-cr-00051-BR

MOTION FOR A MISTRIAL OR, IN THE
ALTERNATIVE, OTHER RELIEF

The Honorable Anna J. Brown

On cross-examination, the government's first witness, Harney County Sheriff David Ward, gave unresponsive and prejudicial testimony, attempting to link the actions of Defendant Ammon Bundy, at Bunkerville, Nevada, to the murder of two Las Vegas police officers in 2014. The rough transcript of the exchange shows how brazenly unresponsive Sheriff Ward's testimony was:

Q. And you had conducted some investigation, into Bunkerville?

A. I had.

Q. And did that investigation come – that was in the process of those meetings that you had with the U.S. attorney, and the FBI?

A. I had – I had gone on to the Internet and googled it, it's amazing what you can find on there.

I found videos from the things that happened at Bunkerville. I – I looked at a lot of different – lot of different things that happened, throughout that incident. And the thought that have happening in my community scared the hell out of me, where I saw armed people lined up on both sides, advancing, you know, with – with one side advancing against another.

I had learned some of unstable people who had left that situation, and killed two police officers, while they were eating lunch in a restaurant.

I think that there are – there are a lot of circumstances I was attempting to avoid in my community, sir.

[CITE]

And yet the Court denied Mr. Bundy's motion to strike the testimony, and even defended the substance of Sheriff Ward's testimony in front of the jury.

MR. MUMFORD: Your Honor, I would move to strike that.

THE COURT: Move to strike what, sir?

MR. MUMFORD: The nonresponsive part of the –

THE COURT: I don't know what you identify as nonresponsive.

The answer seemed responsive to your question, so be specific.

MR. MUMFORD: Okay. Well – I think it was a yes-or-no question, your Honor.

THE COURT: Is there another objection?

[CITE]

It was only when Defendant Ryan Bundy raised a hearsay objection that the Court gave a limited curative instruction. But the Court nevertheless continued to defend, in front of the jury, the purported responsiveness of Sheriff Ward's testimony.

DEFENDANT RYAN BUNDY: Yes, my objection, your Honor, hearsay, there. It's allude events that were not necessarily.

Related to. To the situation.

THE COURT: The court reporter is not hearing you, Mr. Bundy, because of your microphone not being on.

Would you –

DEFENDANT RYAN BUNDY: The mic is on.

THE COURT: Let's try again. The court reporter wasn't hearing, would you please restate your objection?

DEFENDANT RYAN BUNDY: Yes, hearsay.

He's tying in persons that were not involved it (pause, conferring.)

Prejudicial, I change that to prejudicial.

About the folks supposedly killing people that were not associated with us.

THE COURT: Jurors, I'm going to ask you to disregard the witness's references to events that occurred in Nevada that had to do with the police officers being killed, and whether they were or weren't associated with Bunkerville.

The answer generally was responsive, in that it reflected the witness's state of mind, but you're not to consider that particular part of his answer in any part of your consideration of this evidence.

MR. MUMFORD: In –

THE COURT: Continue, please.

MR. MUMFORD: Thank you.

[CITE]

The Court's errors in its consideration of this issue were compounded by the fact that it had earlier refused counsel's efforts to constrain Sheriff Ward's answers to yes or no questions.

Q. You mentioned you – you acknowledged that Mr. Bundy never – never physically threatened you. Are you aware of anyone that Mr. Bundy physically threatened?

A. I'm not aware of anyone that Mr. Bundy physically threatened.

Q. Okay. Thank you.

A. But I did have reasons for concerns.

THE COURT: The witness needs to finish his answer, Mr. Mumford.

MR. MUMFORD: Well, it's a yes or no, your Honor.

THE COURT: No. Then object during the course of the answer, but don't interrupt the witness, and talk over him. The answer stands to your next question.

MR. MUMFORD: Thank you. And if I can just – if the witness – can I just have the witness admonished –

THE COURT: I'm not admonishing the witness, I'm directing you not to interrupt the witness. Neither of you should be speaking at the same time. If you're concerned the witness is going beyond the scope of the question, please ask for my assistance if you can't redirect it.

[CITE]

ANALYSIS

Rule 103(d) of the Federal Rules of Evidence provides that, “[t]o the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.” As a general principle, “when evidence is heard by the jury that is subsequently

ruled inadmissible, or is applicable only to limited defendants or in a limited manner, a cautionary instruction from the judge is sufficient to cure any prejudice to the defendant.” *United States v. Escalante*, 637 F.2d 1197, 1202-03 (9th Cir. 1980). But courts apply a different rule where there is a “significant possibility” that the unresponsive, inaccurate statement of a government agent may have had a substantial impact upon the jury. *United States v. Escamilla*, 666 F.2d 126, 128 (5th Cir. 1982). When the evidence “heard by the jury” is from a government witness, who gives inflammatory or prejudicial information in an unresponsive answer to defense counsel during cross-examination, mistrial is the appropriate remedy. *See, e.g., Nalls v. United States*, 240 F.2d 707, 710 (5th Cir. 1957) (reversing district court for denying mistrial where “[a]n unresponsive statement was volunteered by City Policeman Scott” even though the “[g]overnment was not responsible” but the “statement was calculated to influence the thinking of the jury and was likely to induce prejudice”); *Brown v. United States*, 202 F.2d 474, 476 (5th Cir. 1953) (reversing district court that refused mistrial for “unresponsive” answer that was “highly prejudicial and immediately objected to by appellant’s attorney”).

Courts generally recognize that “[a] governmental officer’s accusation that a defendant has committed other crimes presents an inherent risk of prejudice because it ‘might lead a jury to convict a defendant not of the offense charged, but instead of an extrinsic offense.’” *United States v. Sumlin*, 489 F.3d 683, 689 (5th Cir. 2007) (citing *United States v. Ridlehuber*, 11 F.3d 516, 521 (5th Cir. 1993)). “‘This danger is particularly great where ... the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged.’” *Ridlehuber*, 11 F.3d at 521 (quoting *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir. 1978)).

In the present circumstance, the prejudice Mr. Bundy faces is significantly heightened as a result of several factors. First, Mr. Bundy is already facing the potential prejudice of significant adverse pretrial publicity. Second, the fact that the case involves activity protected by the First and Second Amendments, and the need to discern that activity from actions underlying the alleged criminal conspiracy, thus triggering the doctrine of *strictissimi juris*. [See #1124] Third, the fact that the underlying conspiracy charge in this case is an inchoate offense means that the jury deliberations will be more susceptible to allusions or speculation regarding the affects of Mr. Bundy's alleged wrongdoing. Fourth, the fact that a significant portion of Sheriff Ward's testimony was only allowed, in the first instance, pursuant to the rule governing the admissibility of coconspirator statements, Federal Rule of Evidence 801(d)(2)(E), and its accompanying limiting instruction. Finally, as indicated above, Sheriff Ward is a governmental agent and a central governmental witness who was clearly aware of the prejudice he was unfairly creating with his testimony, which he intentionally directed at Mr. Bundy and his counsel, as indicated by his indignant use of the word "sir," in the answer at issue. *Sumlin*, 489 F.3d at 689; *Ridlehuber*, 11 F.3d at 521.

While the Court offered a curative explanation to the jury, that instruction was inadequate in light of the highly inflammatory and prejudicial insinuations that Mr. Bundy's actions are somehow related to a high-profile, double-murder of police officers. *See Escamilla*, 666 F.2d at 128. Once such statements are made, the damage is hard to undo: "one cannot unring a bell"; "after the thrust of the saber it is difficult to say forget the wound"; and finally, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." *Unites States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979) (holding that any further attempt to cure the "objection to these extremely prejudicial comments would serve only to focus the jury's attention on them."); *Dunn*

v. United States, 307 F.2d 883, 886 (5th Cir. 1962) (“The fact that the Court told the jury to ‘disabuse your minds of that statement’ cannot remove the prejudice.”); *see also Taliaferro v. United States*, 47 F.2d 699 (9th Cir. 1931) (acknowledging “reversible error” for prejudice caused by “evidence that the defendant had previously committed other crimes or consorted with lawless persons”). Accordingly, Mr. Bundy moves for a mistrial and dismissal with prejudice.

If the Court does not grant mistrial, Mr. Bundy moves for an alternative remedy that will more appropriately address this matter. This may include one or more of the following:

- (1) Striking the entirety of Sheriff Ward’s testimony;
- (2) Holding an evidentiary hearing regarding any and all communications between the government and Sheriff Ward related to Bunkerville and his trial testimony;¹ and/or
- (3) Defendant requests a curative jury instruction that would go further than the present record, to (i) explain the training and standards for law enforcement officers in giving court testimony and how Sheriff Ward’s unresponsive testimony is contrary to those training and standards, (ii) confirm for the jury that there is no evidence in the record that would support Sheriff Ward’s unfounded speculation, and (iii) instruct the jury that it should consider Sheriff Ward’s willingness to engage in unfounded speculation which was intended to prejudice Mr. Bundy improperly in deciding what weight to give the rest of his testimony.

Respectfully submitted this 13th day of September, 2016.

/s/ Marcus R. Mumford
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Attorneys for Ammon Bundy

¹ Defendant’s Exhibit 1000 (November 19, 2015 Mtg.), at approx. 7:40 to 8:00, reveals Sheriff Ward’s familiarity and past frustrations with the testimonial oath in giving testimony in court.