UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:06-CR-261-1F2

UNITED STATES OF AMERICA)
)
v.) ORDER
)
CARL WARREN PERSING,)
Defendant.)
)

This matter is before the court upon Defendant Carl Warren Persing's motion [DE-135] for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 or in the alternative, for a new trial pursuant to Rule 33 and motion [DE-144] to strike a response filed by the Government. These matters are now ripe for disposition.

I. BACKGROUND

On May 3, 2007, Defendant was convicted by unanimous jury verdict of violation of 49 U.S.C. § 46504, which prohibits interference with the duties of a flight crew member or flight attendant by assault or intimidation. On May 10, 2007, Defendant filed a motion [DE-135] for judgment of acquittal or in the alternative, for a new trial. The Government responded [DE-136] on May 17, 2007 and Defendant replied [DE-138] on May 22, 2007. The Government filed a second response [DE- 143] on June 13, 2007. Thereafter, on June 18, 2007, Defendant filed a motion [DE-144] to strike the Government's second response. These matters are now ripe for disposition.

II. MOTION FOR JUDGMENT OF ACQUITTAL

A. Standard

Under Rule 29, the district court is required to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." FED. R. CRIM. P. 29(a). A court may uphold the jury's verdict "if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Substantial evidence is that which "a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Newsome*, 322 F.3d 328, 333-34 (4th Cir. 2003) (quoting *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996)). In determining whether there is substantial evidence to support a verdict, the court is not to "weigh the evidence or assess the credibility of witnesses." *Burks v. United States*, 437 U.S. 1, 16 (1978). Rather, "[t]he relevant question is . . . whether, viewing the evidence in the light most favorable to the government, any rational trier of facts could have found the defendant guilty beyond a reasonable doubt." *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982).

B. Facts Adduced at Trial

Viewed in the light most favorable to the Government, the evidence presented at trial showed the following:

On September 15, 2006, Defendant took a Southwest Airlines Flight that originated in Los Angeles, California, stopped in Phoenix, Arizona, and terminated in Raleigh, North Carolina. During the second leg of the flight, flight attendant Frank McCabe observed Defendant and another passenger, Dawn Sewell, kissing heavily and asked them to stop. Later, McCabe again noticed the actions of Defendant and Sewell, when Defendant had his face in Sewell's crotch. When McCabe asked Defendant to stop, Defendant sat up, pointed a finger at McCabe's face and said, "I'll give you one chance to get out of my face."

Defendant repeatedly requested alcohol during the flight, but McCabe refused to serve him. In response, Defendant asked McCabe, "Why can't you talk to me like a man?" and called McCabe derogatory names. Throughout the flight, Defendant made obscene gestures toward McCabe and called him names. McCabe testified that Defendant appeared intoxicated, as he was glassy eyed, slouched, and his speech was slurred.

McCabe called Captain James Kniese, who was located in the cockpit, several times

during the flight to report Defendant's behavior. In response to McCabe's initial phone calls, Captain Kniese discussed the possibility of diverting the plane with his co-pilot.

When the plane was roughly one hour outside of Raleigh, McCabe told Defendant that he had contacted the plane's pilot to report Defendant's behavior. In response, Defendant told McCabe that he should not have gotten any one involved and that Defendant and McCabe would "have it out" when the plane landed in Raleigh. McCabe then called Captain Kniese to explain that Defendant had threatened to assault him upon arrival in Raleigh. Captain Kniese called Southwest Airline officials in Raleigh to arrange for law enforcement officers to meet the plane when it landed in Raleigh.

Defendant fell asleep for the last forty-five minutes of the flight.

Throughout the flight, due to Defendant's actions, McCabe was distracted and was slowed in performing his duties. Additionally, McCabe kept looking over his shoulder by glancing in a mirror located in the aisle, because he was concerned that Defendant would come up to the cockpit. Both McCabe and Kniese thought there would be a physical altercation when the plane landed in Raleigh.

When the plane landed and Defendant exited the plane, he was met by Southwest Airlines personnel and law enforcement officers. No physical altercation occurred.

C. Analysis

Defendant moves for judgment of acquittal on the following five grounds:

> (1) the Government . . . failed to establish venue in the Eastern District of North Carolina; (2) insufficient facts support the verdict as a matter of law; (3) conviction on a statement, without more, violates the First Amendment; (4) the Indictment is vague, overbroad and prohibits potentially protected conduct; and (5) the . . . jury instruction on the third element of the offense constructively amended the indictment on an essential element of the offense impermissibly, rising to the level of more than mere modification, which is as a matter of law per se error.

Mot. for Acquittal [DE-135] at p. 1. The court will examine each of Defendant's contentions

in turn.

1. Venue

Article III, Section 2 of the United States Constitution provides that trials "shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may be Law have directed." Offenses that are "committed in more than one district . . . may be inquired of and prosecuted in any district in which such offense was begun, continued or completed." 18 U.S.C. § 3237(a). "Venue is not an element of the offense, and so it need be proved only by a preponderance of the evidence." *United States v. Hall*, 691 F.2d 48, 50 (1st Cir. 1982).

When considering a challenge to venue in a similar action, *United States v. Hall*, the First Circuit interpreted the predecessor to 49 U.S.C. § 46504 as providing "that the offense continues for at least as long as the crew are responding directly, and in derogation of their ordinary duties, to the defendant's behavior." *Id.* In *Hall*, the defendant had engaged in unpredictable assaultive and threatening behavior, but sat quietly while the plane flew over Illinois. The First Circuit found that venue was proper in Illinois because the offense continued even while the defendant sat quietly. The defendant "continued to intimidate the crew until the plane landed," as even though he was quiet, passengers and members of the crew continued to watch him. *Id.* Moreover, the *Hall* court reasoned that "[e]ven if [the defendant's] behavior did not directly 'intimidate' the crew until the flight reached Chicago . . . the offense lasted until he was removed from the plane." *Id.*

Here, the court concludes that there was ample evidence for a rational trier of fact to conclude that the offense was committed in part over the Eastern District of North Carolina. First, a reasonable fact finder could conclude that McCabe was intimidated until the plane landed in Raleigh, as he testified that he was distracted, kept looking over his shoulder, and perceived that a physical altercation would occur upon arrival. Second, similar to *Hall*, a

reasonable trier of fact could conclude that the offense continued until airline authorities met Defendant when the plane landed in Raleigh. Consequently, the court concludes that venue was appropriate in the Eastern District of North Carolina.

2. Sufficiency of facts to support the verdict

Defendant next contends that there were insufficient facts to support the verdict. At the conclusion of the trial, the court instructed the jury on the elements of the offense of violation of 49 U.S.C. § 46504. Specifically, the court explained that the elements of the offense are: (1) Defendant was on an aircraft in flight in the United States; (2) Defendant knowingly intimidated a flight attendant; and (3) such intimidation interfered with the performance of the flight attendant's duties or lessened the flight attendant's ability to perform those duties.

Defendant argues that there is not sufficient evidence to support the verdict on the second and third elements of the offense. The court disagrees. The second element of the offense requires that the Government establish that Defendant knowingly intimidated a flight attendant. "In order to prove intimidation within the meaning of § 46504, 'it is sufficient that the conduct and words of the accused would place an ordinary, reasonable person in fear.'" *United States v. Gilady*, 62 Fed.Appx. 481, 484 (4th Cir. Jan. 22, 2003)(quoting *United States v. Meeker*, 527 F.2d 12, 15 (9th Cir. 1974)). In this case, McCabe testified that Defendant called him derogatory names and threatened him on two occasions. Specifically, McCabe testified that Defendant told McCabe to get out of his face and also told McCabe they would "have it out" when the plane landed in Raleigh. The court concludes that, based on this testimony, there is sufficient evidence in the record to support a finding that Defendant intimidated McCabe, as a reasonable person would have been placed in fear by Defendant's conduct during the flight.

As to the third element, the Government must establish that Defendant's conduct

interfered with the performance of a flight attendant's duties. McCabe testified that he was distracted, slowed in performing his duties and kept looking over his shoulder. Additionally, McCabe had to call Captain Kniese several times to report Defendant's conduct. Based upon this evidence, the court concludes that a rational trier of fact could find that Defendant's intimidation interfered with the performance of McCabe's duties. Accordingly, the court finds that there was sufficient evidence to support the verdict in this case.

3. First Amendment

Defendant next contends that judgment of acquittal is appropriate because "conviction on a statement, without more, violates the First Amendment." Mot. for Acquittal [DE-135] at p. 1. "True threats," however, are not constitutionally protected speech. *Watts v. United States*, 394 U.S. 705, 707-08 (1969); *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992)("threats of violence are outside of the First Amendment"). "True threats" are statements "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

As described above, the testimony at trial established that Defendant pointed a finger at McCabe's face and said, "I'll give you one chance to get out of my face." Additionally, Defendant told McCabe that he and McCabe would "have it out" when the plane landed in Raleigh. In light of this evidence and the context of the statements, the court concludes that a reasonable jury could interpret Defendant's statements as a threat of injury and find that Defendant engaged in unprotected, threatening speech. Because the First Amendment affords no protection to those who utter direct threats of force and violence toward other persons, Defendant's conviction must stand.

4. Indictment

Defendant next renews his argument that the Indictment is vague, overbroad and

prohibits potentially protected conduct. The court already has ruled on this issue and found Defendant's arguments to be without merit. *See* Order [DE-81]. Consequently, Defendant's motion for acquittal on this basis is denied.

5. Constructive amendment of Indictment

Finally, Defendant contends that the court constructively amended the Indictment in instructing the jury on the elements of the offense. Specifically, the Indictment charged:

> On or about September 15, 2006, in the special aircraft jurisdiction of the United States . . . Carl Warren Persing . . . did by intimidation, knowingly interfere with the performance of the duties of an aircraft flight attendant and lessen the ability of the attendant to perform his duties, that is, aboard a Southwest Airlines Flight . . . the defendant[ ] repeatedly engaged in overt sexual activity in the cabin of the plane to such an extent that the flight attendant had to direct them to stop, and did threaten to initiate a violent confrontation with the flight attendant, and did otherwise interfere with the flight attendant . . . in violation of Title 49, United States Code, Section 46504. . . .

Indictment [DE-17]. The Indictment essentially tracks the language of 49 U.S.C. § 46504, which provides:

> An individual on an aircraft in the special aircraft jurisdiction of the United States who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties, or attempts or conspires to do such an act [shall be guilty of an offense against the United States].

The Indictment does add the term "knowingly," that is not found in 49 U.S.C. § 46504 and requires the jury to find that Defendant knowingly interfered with the performance of the duties of an aircraft flight attendant. Although § 46504 contains no explicit mens rea element, it has been interpreted as a general intent crime. *See United States v. Grossman*, 131 F.3d 1449, 1452 (11th Cir. 1997); *United States v. Meeker*, 527 F.2d 12, 14 (9th Cir. 1975) (construing the predecessor § 46504 "as a general intent crime, in harmony with the statutory purpose of safeguarding flight personnel from any statutorily described acts which would

interfere with their efficient functioning"). The use of the term, "knowingly," in the Indictment, however, is consistent with general intent. *See United States v. Lamson*, No. 92-5777, 1993 WL 168934 (4th Cir. May 20, 1993)("[A] general intent crime . . . require[s] proof that the acts were done knowingly and willfully.").

At the conclusion of the trial, the court instructed the jury that in order to satisfy its burden of proof for the crime of interference with the duties of a flight attendant, the government must establish three essential elements beyond a reasonable doubt. Specifically, the court described the elements of the offense as: (1) Defendant was on an aircraft in flight in the United States; (2) Defendant knowingly intimidated a flight attendant; and (3) that such intimidation interfered with the performance of the flight attendant's duties or lessened the flight attendant's ability to perform those duties.

In his motion for acquittal, Defendant contends that "[t]he Court constructively amended the indictment by failing to require the jury to find as a fact that Defendant knowingly interfered with the flight." Mot. for Acquittal [DE-135] at p. 19. Defendant argues that "[s]uch amendment was error per se because it removed an essential element of proof of the government, surprising defendant at trial and hindering his defense." *Id.*

"When the government, through its presentation of evidence and/or its argument, or the district court, through its instructions to the jury, or both, broadens the bases for conviction beyond those charged in the indictment, a constructive amendment - sometimes referred to as a fatal variance - occurs." *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999). "A constructive amendment is a fatal variance because the indictment is altered 'to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment.'" *Id.* (citing *United States v. Schnabel*, 939 F.2d 197, 203 (4th Cir. 1991)).

Here, Defendant argues that the court constructively amended the Indictment by its

placement of the term, "knowingly," in the jury instructions. As described above, the Indictment alleged that Defendant "knowingly interfere[d]" with the performance of a flight attendant's duties, while the court instructed the jury to determine whether the Defendant knowingly intimidated a flight attendant and whether such intimidation interfered with the flight attendant's duties. Defendant argues that the court should have instructed the jury to determine whether he knowingly interfered with the performance of the flight attendant's duties.

Having carefully considered Defendant's motion, the court concludes that the jury instructions did not constructively amend the Indictment. The court acknowledges that the jury instructions were not identical to the Indictment, but the court's use of the term "knowingly" in the jury instructions did not broaden the possible basis for conviction beyond that charged in the Indictment. As described above, interference with a flight attendant's duties is a general intent crime and the use of the term "knowingly" in the jury instructions and Indictment was consistent with the requisite mens rae. Moreover, any difference in the wording may have favored Defendant, as the jury instructions required a finding of both knowing intimidation and resulting interference.

Even if the jury instructions can be viewed as erroneous, taken as a whole, the instructions fairly stated the controlling law and the Indictment. Accordingly, Defendant's motion for acquittal on this basis is denied.

III. MOTION FOR NEW TRIAL

In the alternative, Defendant moves for a new trial pursuant to Federal Rule of Criminal Procedure 33, which provides that "a court may vacate any judgment and grant a new trial if the interest of justice so requires."

Defendant moves for a new trial on the same grounds that he seeks acquittal. As described above, the court has found each of these grounds to be without merit.

Consequently, Defendant's motion for a new trial is DENIED.

IV. MOTION TO STRIKE

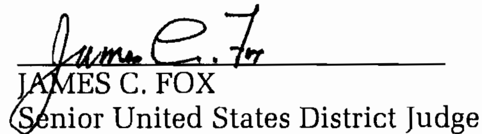
The court has not relied upon the Government's second response to Defendant's motion for judgment of acquittal. Consequently, Defendant's motion to strike [DE-144] the response is DENIED as moot.

V. CONCLUSION

Based on the foregoing, Defendant's motion for judgment of acquittal or in the alternative for a new trial [DE-135] is DENIED. Defendant's motion to strike [DE-144] is DENIED as moot.

SO ORDERED.

This the 24d day of July, 2007.



JAMES C. FOX
Senior United States District Judge