No. 99-10514

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH RUSSELL DOWNEN,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

_____

BRIEF FOR THE UNITED STATES

_____

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The defendant, Joseph Russell Downen, was convicted of violating 18 U.S.C. 241 (conspiracy against rights), 18 U.S.C. 371 (conspiracy), and 18 U.S.C. 1001 (false statements). This is an appeal from a judgment of conviction and sentence. The district court entered a final judgment and commitment order on September 21, 1999 (R. 182).[1/] A timely notice of appeal was filed by defendant on September 28, 1999 (R. 187). The district court had jurisdiction pursuant to 18 U.S.C. 3231. This Court has jurisdiction of this appeal pursuant to 28 U.S.C. 1291.

[1/] "R. ___" refers to the docket entries on the district court's docket sheet at item 25 of the Excerpts of Record filed with Defendant's brief. "Br. __" refers to pages in defendant's brief. "Motions Tr. ___" refers to pages in the transcribed Motions hearing conducted by the district court on March 16, 1999. "Tr. ____" refers to pages in the transcript of the trial held June 10-11 and 15-16, 1999. "U.S. Exh. ___" refers to the United States' trial exhibits.

STATEMENT OF THE ISSUES

1. Whether the evidence is sufficient to sustain defendant's convictions.

2. Whether the district court abused its discretion in denying defendant's motion to sever counts I and III from counts IV and V.

3. Whether the district court abused its discretion in denying defendant's motion for mistrial.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

Defendant was indicted by a federal grand jury on June 25, 1998, on four counts of a five-count indictment (R. 1). Count I of the indictment charged defendant with conspiring to violate the housing rights of Carlos Durand, Sr., a Mexican American and legal permanent resident of the United States, and his children who are Mexican-American citizens of the United States, in violation of 18 U.S.C. 241. Count III charged defendant with intimidating and inflicting bodily injury on victim Durand and his children because of their race, and because they were occupying a dwelling in violation of 42 U.S.C. 3631(a). Count IV charged defendant with conspiring to make false statements regarding his participation in the beating of victim Durand in violation of 18 U.S.C. 371. Count V charged defendant with making false statements to federal officials investigating the beating of Durand in violation of 18 U.S.C. 1001. Co-defendants Raymond Parisi and Jason Alvord were also charged and pled guilty

to civil rights conspiracy in violation of 18 U.S.C. 241. Co-defendant Gary Wilkins pled guilty to interfering with housing rights in violation of 42 U.S.C. 3631.

On December 17, 1998, prior to trial, defendant moved, inter alia, to sever counts I and III from counts IV and V (R. 73). Defendant supplemented that motion on January 29, 1999 (R. 89). The United States opposed the motion (R. 74). The district court denied the motion at a hearing on March 16, 1999 (Motions Tr. at 99-100).

A jury trial was held June 10-11, and 15-16, 1999. Co-defendants Parisi and Wilkins testified on behalf of the government pursuant to a plea agreement. At the conclusion of trial, but prior to the verdict, defendant again moved to sever the counts (Tr. 446). The district court denied the motion (Tr. 449). Defendant also moved for a mistrial on the basis of a statement made by a government witness regarding a polygraph test (Tr. 441). The district court denied the motion for mistrial (Tr. 446).

The jury found defendant guilty of counts I, IV and V (Tr. 574-575). A mistrial was declared on count III (Tr. 577). Defendant was sentenced to 15 months imprisonment on September 16, 1999, and ordered to pay restitution in the amount of $550, and a special assessment of $300. Defendant is not in custody pending appeal of his conviction (Def. Br. 8).

B. Defendant's Motion For Mistrial Based On A Government Witness's Remarks About A Polygraph Test

At trial, FBI Agent Timothy Kirkham testified for the government. Agent Kirkham investigated the circumstances surrounding the assault on Carlos Durand (Tr. 414). He testified that he interviewed Downen as part of that investigation, and described that interview at trial (Tr. 415-418). Agent Kirkham testified that the information that he received from defendant with respect to identifying who inflicted bodily injury on Carlos Durand directly contradicted the information that he received from Durand himself (Tr. 418-419). He stated that in view of the contradictory information, he "had to attempt to ascertain who was really telling the truth" (Tr. 419). He stated that to do that he wanted to "bring a polygraph examiner or lie detector test person in" (Tr. 419). Defendant objected to the witness's reference to a polygraph examination, and asked that it be stricken (Tr. 419-420). The district court sustained the objection and struck the testimony (Tr. 420).

At the conclusion of trial, defendant moved for a mistrial based on the Agent Kirkham's reference to the polygraph test during his testimony (Tr. 441). The district court denied the motion (Tr. 446).

STATEMENT OF THE FACTS

A. The Assault On Carlos Durand

During the fall of 1997, Carlos Durand and his three children moved into 2880 Palisades Drive, Apartment 2, Lake Havasu City, Arizona (Tr. 264, 369-372, 375; U.S. Exhs. 1 and 2).

At the time of trial, Durand's children were ages 4, 5 and 23 (Tr. 369-370). The Durands are Mexican-American (Tr. 145, 374). They moved next door to a white couple, Gary and Melissa Wilkins, who lived in Apartment 3 (Tr. 142, 145, 263, 375). Just prior to the Durands moving into their Palisades Drive home, Gary and Melissa Wilkins invited Raymond and Daniel Parisi, who are brothers, to move in with them until they could afford their own apartment (Tr. 140-141, 190-192, 194, 263-264, 337-338). The Parisi brothers are white (Tr. 145). They had wanted to move into Apartment 2, the unit that the Durand family moved into, but could not afford the apartment (Tr. 144-145, 338).

There were no problems between the neighbors, except for a few requests by Gary Wilkins that Durand turn down his music and otherwise reduce the level of noise in Durand's apartment (Tr. 146, 167, 265, 339, 375-377). Later, however, in the fall of 1997, Ray Parisi's friend, Jason Alvord, began to spend a significant amount of time at the Wilkins' apartment (Tr. 147, 266). Alvord's nickname was “Hammer” (Tr. 147, 197). He had a shaved head, tattoos of swastikas on his arms, and wore tank tops, long baggy pants, red suspenders, and black boots with white laces (Tr. 147-148, 170-171, 197-198). Alvord was an avowed white supremacist who espoused beliefs that white people were superior to Hispanics, African-Americans and Asians (Tr. 148-149, 198, 267, 340). He referred to Hispanic people as “wetbacks” and “beaners,” African-Americans as “niggers,” and Asians as “chinks” (Tr. 149). As Ray Parisi began “hanging out”

more frequently with Alvord, he shaved his head, dressed like Alvord, and had tattoos of a swastika, a skull with a swastika in the forehead, a skull with a dagger, and an eagle tattooed on his body (Tr. 199). Ray Parisi's behavior began to change, and he began using racially derogatory terms when speaking about minority persons (Tr. 150, 169, 171-172, 200-201). Defendant Downen met with Ray Parisi and Alvord at Alvord's apartment almost every day, participated in conversations that Parisi and Alvord had about white supremacy, and listened to "hate rock music" (Tr. 202-203). Defendant Downen did not dress like Alvord or have any tattoos on his body (Tr. 201-202). Gary Wilkins' behavior also began to change (Tr. 267). He shaved his head, had a tattoo placed on his body, and started referring to the Durands as "wetbacks" (Tr. 150, 267-268, 377-378).

Ray Parisi, Wilkins, and Alvord had conversations about the Durand family and talked about wanting the Durands out of the apartment complex because they were Hispanic (Tr. 152-153, 172-173, 269, 340). The men referred to the Durands as the "beaner" family and said that they needed to get the family out of Apartment 2 (Tr. 152-154, 203). Downen, who was at the apartment during some of these conversations, agreed with the racial slurs made by Parisi, Wilkins and Alvord, and also talked about "wetback[s]" (Tr. 201-203).

The evening of December 31, 1997, Carlos Durand was walking up to the door of his apartment when he saw Ray Parisi, Gary and Melissa Wilkins, and Alvord standing outside (Tr. 205-206, 379).

Durand said "Happy New Year" to them, and Gary Wilkins responded, "Fuck you, wetback" (Tr. 206, 379). Durand went into his apartment, then returned back outside of his front door to smoke a cigarette (Tr. 380). Gary Wilkins and Parisi returned to the Wilkins' apartment (Tr. 206, 271). Alvord approached Durand, pointed a pellet gun to Durand's head, and threatened to shoot him (Tr. 206, 380-382). After the incident, Durand returned to his apartment (Tr. 382). He did not call the police because he was afraid that Parisi, Wilkins and Alvord would "do[] something else to [him] or [his] kids" (Tr. 383).

About two weeks later, the evening of January 14, 1998, Gary Wilkins and Dan Parisi were at the Wilkins' apartment playing a video game while Melissa Wilkins did laundry (Tr. 273, 341). They heard Carlos Durand banging on the front door of the Durand's apartment (Tr. 272-273, 341). Durand thought that his son was in the apartment, and he was trying to get his attention (Tr. 273, 384). Gary Wilkins yelled profane language at Durand, and called him a "wetback" (Tr. 273-274, 384). Wilkins got a crowbar, and he and Dan Parisi went to the Durand apartment and confronted Carlos Durand, who was still pounding on his front door (Tr. 274, 385). Wilkins and Parisi yelled at Durand, and Durand explained that he was trying to get his son's attention (Tr. 275). Durand's son then arrived, and they went into the Durand's apartment (Tr. 276). Wilkins and Parisi returned to Wilkins' apartment (Tr. 276).

Ray Parisi, Alvord, and Downen were drinking at Downen's

apartment when they received a phone call from Gary Wilkins (Tr. 208-209, 240-241). Alvord took the phone from Ray Parisi, and talked to Wilkins (Tr. 209, 242, 277). After Alvord got off the phone, he told defendant Downen and Parisi that there was a "problem with the wetback next door" (Tr. 209, 243). Defendant Downen went into his room and grabbed a baseball bat (Tr. 209). The three men got into a car and drove to the Wilkins' apartment (Tr. 210-211). During the drive, the men got "pumped up" and talked about "getting the beaner" (Tr. 211).

They drove to the Wilkins' apartment where they met Gary, his wife Melissa, Dan Parisi, and Dan's girlfriend Megan Bronzell (Tr. 154, 278). Defendant Downen entered the apartment carrying a baseball bat and pounding it on his hand (Tr. 155). Downen appeared to be intoxicated because his eyes were bloodshot (Tr. 155-156, 175-176). Alvord came into the apartment and left his dog there (Tr. 345). After arriving at the Wilkins' apartment, defendant Downen, Alvord, Ray Parisi, and Gary Wilkins went to Durand's apartment (Tr. 156, 212, 280).

As they approached Durand's apartment, Carlos Durand was standing at his front door (Tr. 213, 281). The group surrounded Durand, called him a "wetback," and Downen yelled that Durand was "going to get [his] ass kicked" (Tr. 282-283, 388-392). Alvord then hit Carlos Durand on the head and knee with the baseball bat (Tr. 215, 284, 393-394). Durand's oldest son grabbed his father, pulled him into the house, and shut the door (Tr. 216, 285, 394). Alvord broke the windows with the baseball

bat while defendant Downen and Ray Parisi kicked on the front door (Tr. 157, 216). Defendant Downen yelled, "Come out wetback" as he continued kicking on the Durand's front door (Tr. 216-217, 259-260, 395). Then they left (Tr. 218, 286). Alvord returned to the Wilkins' apartment for his dog, while Downen, Ray Parisi and Gary Wilkins ran to a car (Tr. 157, 286, 346). Alvord was carrying the baseball bat that Downen had been carrying earlier in the evening (Tr. 157-158).

Defendant Downen rode with Alvord and Ray Parisi to Alvord's house (Tr. 158, 218). They were met there by Gary and Melissa Wilkins, Dan Parisi, and Bronzell (Tr. 158, 346-347). Alvord had the cars parked in the back of his house so that if the police came to the house they would not see the vehicles parked in the front (Tr. 158-159). Alvord kept the lights to the house off (Tr. 159, 347). They were scared that the police would show up, so they left and went to defendant Downen's house where they drank and stayed for three or four hours (Tr. 160, 218, 287, 289, 347).

At some point in the evening Downen, Alvord and Ray Parisi went alone into Downen's backyard (Tr. 219-220). They talked about the incident and about "covering up what happened" (Tr. 220). Alvord asked defendant Downen to "take the rap for him because Jason [Alvord] had been in a whole bunch of trouble before * * * [a]nd Joe [Downen] has not, so he would have probably not been as — as much trouble as Jason [Alvord] would have been" (Tr. 220, 248). Defendant Downen agreed (Tr. 220).

Back inside Downen's house, Downen, Alvord and Ray Parisi laughed and joked about the incident, and Downen laughed as he described himself hitting Carlos Durand over the head with the baseball bat (Tr. 160, 162, 350). Downen told everybody in the house that he had hit the "wetback" over the head and then "smacked him in the knee after that" (Tr. 162, 348). The three men also joked about Durand, calling him a "wetback," and Downen, along with Ray Parisi and Alvord, gave the "white power salute" as they talked about the incident (Tr. 161-162, 349).

When police arrived at Durand's apartment they found blood in front of Durand's door, a broken front window, blood along the doorframe and along the carpet inside the apartment, and shattered glass (Tr. 132). Mr. Durand was in his apartment with his children, and was holding a bloodied towel or t-shirt to the left side of his head (Tr. 133). Durand suffered injuries that required five staples to his head (Tr. 398). Soon following the incident the Durand family moved out of their Palisades Drive apartment because they were afraid to continue living there (Tr. 398-401).

B. The Investigation Of The Assault

On January 23, 1998, Ray Parisi was arrested by the Lake Havasu Police Department in connection with a different assault than that committed on Carlos Durand (Tr. 221). While under arrest for that matter, Parisi was questioned about the assault on Durand (Tr. 222). Parisi initially told police that an unidentified person assaulted Durand (Tr. 222). Later, when

Parisi was interviewed by the FBI about the Durand assault, he lied to investigators telling them that defendant Downen had hit Durand with the bat (Tr. 222-223). He told investigators that Downen was the assailant because he wanted to protect Alvord pursuant to the agreement that he had entered into with Alvord and Downen the evening of the Durand assault (Tr. 223; see also Tr. 352). After telling the FBI the truth about Downen's involvement, Parisi entered a plea agreement with federal prosecutors (Tr. 354).

City police Detective Robert Spoerry investigated the circumstances surrounding Durand's assault, and on January 29, 1998, he stopped Gary Wilkins, Alvord and Downen (Tr. 464-465). After stopping the men, Detective Spoerry arrested Wilkins and Alvord for assaulting Durand (Tr. 291, 317, 464-465). Although Downen was not arrested with Alvord and Wilkins, Detective Spoerry interviewed Downen, and Downen told him that he had assaulted Durand (Tr. 465). Wilkins told city police that he was not home the evening of Carlos Durand's assault (Tr. 293). He later told the FBI that defendant Downen had assaulted Durand (Tr. 293). He told this story to the FBI because it was something that he had agreed with Alvord to do (Tr. 293). After entering into a plea of guilty on reduced charges, Wilkins told the United States Attorneys Office the truth about Alvord's involvement in the assault (Tr. 294-295).

Detective Spoerry contacted the FBI, and in February, 1998, the FBI picked up the investigation (Tr. 474). Detective Spoerry

met with FBI Agent Timothy Kirkham at least once a week over a period of two months to discuss the case and the conflicting reports about who struck Durand with the baseball bat (Tr. 470, 475-476).

Defendant Downen was interviewed by the FBI in March, 1998 (Tr. 416). Downen told FBI Agent Timothy Kirkham that on the evening of January 14, 1998, he went to Durand's apartment, struck Carlos Durand with a baseball bat, and broke the front windows of Durand's apartment (Tr. 417). Downen told Agent Kirkham that Alvord did nothing during the assault, although he was present (Tr. 418). During the discussion with Agent Kirkham, Downen insisted that he was telling the truth (Tr. 418). Agent Kirkham testified at trial that the information that Downen provided to him with respect to his role in the assault contradicted the statement provided by Durand, who said that Alvord had struck him with the baseball bat (Tr. 418-419). FBI Agent Kirkham and City Detective Spoerry both testified that because of this contradiction, the investigation was extended and further witness interviews were conducted (Tr. 419-420, 476-478).

STANDARDS OF REVIEW

Claims challenging sufficiency of evidence to support a conviction are reviewed de novo. United States v. Duran, 189 F.3d 1071, 1078 (9th Cir. 1999). The district court's denial of defendant's motion to sever counts pursuant to Fed. R. Crim. P. 14, should be reviewed for abuse of discretion. United States v. Cuozzo, 962 F.2d 945, 949 (9th Cir.), cert. denied, 506 U.S. 978

(1992). The district court's denial of defendant's motion for mistrial because of remarks by a government witness regarding a polygraph test should be reviewed for abuse of discretion. United States v. Wills, 88 F.3d 704, 712 (9th Cir. 1996), cert. denied, 519 U.S. 1000 (1996).

SUMMARY OF ARGUMENT

The issues raised by defendant in this appeal lack merit and do not warrant reversal of the convictions. After a jury trial, defendant was found guilty of conspiring to violate the civil rights of an individual in violation of 18 U.S.C. 241, and making, and conspiring to make, false statements in violation of 18 U.S.C. 371 and 1001.

Defendant challenges the sufficiency of the evidence to support his convictions. He challenges his conviction under 18 U.S.C. 241, arguing that there is no evidence to show that he was involved in the conspiracy. This claim is without merit in view of the ample evidence demonstrating that defendant had a relationship with the co-conspirators, that he was present during the assault, and that he then intentionally lied to an FBI agent about the circumstances surrounding the assault.

Defendant's sufficiency of evidence argument regarding the materiality of his false statements is equally without merit. The government need not show that the agent believed the false statements. Rather, statements are material if they have the "intrinsic capability" of misleading a government official. In this case, defendant's false statements not only had the

intrinsic capability of misleading FBI Agent Kirkham, they actually did mislead the agent who extended his investigation and interviewed additional witnesses because defendant's identification of the assailant who inflicted bodily injury on Carlos Durand conflicted with the testimony of other witnesses.

Contrary to defendant's argument, the district court did not abuse its discretion by refusing to sever counts I and III from counts IV and V. The government's decision to charge defendant with related offenses in a single indictment was clearly proper. Similarly, the district court's refusal to sever the counts was not an abuse of discretion. Trying defendant on these counts jointly did not prejudice the defendant because the counts are not inconsistent. As the jury found, it was possible to find defendant guilty of conspiring with Alvord and others to assault Durand, and of falsely stating that he, not Alvord, had beaten the victim. The district court properly instructed the jury that each count had to be decided independently of the others.

The district court did not abuse its discretion in refusing to grant a mistrial based on a government witness's brief reference to a polygraph test. The witness did not testify about whether defendant was subjected to a polygraph test, nor did he testify about the results of any such test. As such, the statement about the polygraph test could not have prejudiced the jury, nor did it call into question the fairness of the jury's guilty verdict. Moreover, the district court's swift action in striking the testimony, and then instructing the jury to disregard it cured any possible harm.

ARGUMENT

I.

THE EVIDENCE IS SUFFICIENT TO SUSTAIN DEFENDANT'S CONVICTIONS

Defendant challenges the sufficiency of the evidence supporting his convictions for conspiring against the civil rights of the Durand family in violation of 18 U.S.C. 241, conspiring to make false statements in violation of 18 U.S.C. 371, and making false statements in violation of 18 U.S.C. 1001 (Def. Br. 12-18). Review of the sufficiency of evidence is "highly deferential to the jury's findings." United States v. Bancalari, 110 F.3d 1425, 1428 (9th Cir. 1997) (internal quotations omitted). In reviewing the sufficiency of the evidence supporting a conviction, this Court must review the record to determine "whether a reasonable jury, after reviewing the evidence in the light most favorable to the government, could have found the defendant guilty beyond a reasonable doubt of each essential element of the crime charged." United States v. Mares, 940 F.2d 455, 458 (9th Cir. 1991) (internal quotations omitted); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979). The "relevant inquiry is not whether the evidence excludes every hypothesis except guilt, but whether the jury could reasonably arrive at its verdict." Mares, 940 F.2d at 458. In this case, there is ample evidence to support convictions on each count.

A. The Evidence Is Sufficient To Sustain Defendant's Conviction For A Violation Of 18 U.S.C. 241

Defendant argues (Br. 15-16) that the evidence is insufficient to establish a violation of 18 U.S.C. 241 because he did not intend to "join[] an existing conspiracy to violate the rights of Mr. Durand or his family."

Section 241 makes it a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured * * * by the Constitution or laws of the United States." 18 U.S.C. 241. To prove a violation of Section 241, the government "must show that the offender acted with a specific intent to interfere with the federal rights in question." Anderson v. United States, 417 U.S. 211, 223 (1974).[2/] To establish the statutory violation, the government need not offer "direct proof of an express agreement on the part of the [defendant] to commit the constitutional violations * * * at issue." United States v. Reese, 2 F.3d 870, 893 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994). Rather, the "conspiracy may

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[2/] In addition to showing an agreement between two or more persons and an intent to commit the violation, defendant states (Br. 13) that the government must also prove an "overt act" in order to show the existence of a civil rights conspiracy under Section 241. This Court made clear in United States v. Skillman, 922 F.2d 1370, 1375 (9th Cir. 1990), cert. dismissed, 502 U.S. 922 (1991), however, that unlike the proof required by the general conspiracy statute, 18 U.S.C. 371, which requires proof of an overt act, Section 241 makes no mention of such a requirement.

be proved by circumstantial evidence that defendants acted together for a common illegal goal." United States v. Wiseman, 25 F.3d 862, 869 (9th Cir. 1994) (internal quotations omitted). Even a connection that is "slight" is "sufficient to convict defendant of knowing participation in the conspiracy." United States v. Stauffer, 922 F.2d 508, 514-515 (9th Cir. 1990); Skillman, 922 F.2d at 1373. That connection can be inferred from a combination of circumstances and reasonable inferences arising from the relationship of the parties, statements and conduct showing an agreement or common motive, as well as comments and activities to cover up the illegal activity. See United States v. Piche, 981 F.2d 706, 717 (4th Cir. 1992), cert. denied, 508 U.S. 916 (1993); United States v. Redwine, 715 F.2d 315, 320 (7th Cir. 1983), cert. denied, 467 U.S. 1216 (1984); United States v. Davis, 810 F.2d 474, 477 (5th Cir. 1987); United States v. Ellis, 595 F.2d 154, 160 (3d Cir.), cert. denied, 444 U.S. 838 (1979).

In the instant case, defendant does not dispute that there was a conspiracy to interfere with victim Durand's housing rights on the basis of race in violation of 18 U.S.C. 241.[3/] Instead, he asserts (Br. 15-16), that the evidence is insufficient to prove that he joined in the conspiracy. A review of the record, however, demonstrates that there was overwhelming evidence that

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[3/] The substantive right being violated is that protected by 42 U.S.C. 1982 and the Fair Housing Act, 42 U.S.C. 3601, et seq., which protects the right of all citizens to use and hold property without interference based on race.

defendant participated in the conspiracy.

Evidence shows that prior to the assault on Durand, defendant had participated in conversations about getting the Durands to leave the apartment complex. Defendant was with his friends when they referred to the Durands as the "beaner" family, and expressed wanting to get the Durands out of Apartment 2 (p. 6, supra). Defendant also talked about "wetbacks" (p. 6, supra). On the night of the assault, Gary Wilkins called the defendant's house where Ray Parisi, Alvord and defendant were drinking (p. 7-8, supra). When Alvord hung up the phone, he told Parisi and defendant that there was a "problem with the wetback next door" (p. 8, supra). Defendant went into his room and grabbed a baseball bat, and the three drove to the apartment complex where Wilkins and Durand lived (p. 8, supra). During the drive, the men got "pumped up" and talked about "getting the beaner." Defendant entered the Wilkins' apartment with the bat, pounding it in his hand (p. 8, supra). Defendant then went with the other men to Durand's apartment where Carlos Durand was standing. The group surrounded Durand at his front door. They called him a "wetback," and defendant yelled that Durand was "going to get [his] ass kicked" (p. 8, supra). Alvord then hit Durand with the baseball bat. When Durand's son dragged him back into their apartment, defendant kicked on the front door yelling "Come out wetback" (p. 8-9, supra). After the assault, defendant rode with the other men first to Alvord's house, and then to defendant's house where they drank and joked about assaulting Durand. The

night of the assault, defendant told friends that he had hit the "wetback" over the head and "smacked him in the knee after that" (p. 10, supra). After the assault, defendant talked to Alvord and Parisi and the three men agreed that defendant would "take the rap" so that Alvord could avoid getting into more trouble (p. 9, supra).

Indeed, this evidence shows that defendant had more than just a slight connection to the offense. The evidence shows that defendant acted along with others for the common goal of driving the Durand family out of his apartment because of his race. Moreover, evidence of defendant's ongoing relationship with his co-conspirators, coupled with evidence of statements and conduct between the men showing an agreement to cover up Alvord's involvement in the assault and have defendant take the blame, is more than sufficient to show that defendant conspired to violate the rights of the Durand family in violation of 18 U.S.C. 241.

Despite this volume of evidence, defendant argues (Br. 15-16), that the evidence is insufficient to establish defendant's knowing involvement in the conspiracy because of inconsistencies in witness testimony. Inconsistencies in testimony do not, however, entitle a defendant to reversal of a conviction. Rather, the evaluation of conflicting testimony is a matter left to the jury. United States v. Messer, 197 F.3d 330, 343 (9th Cir. 1999). Accordingly, defendant's conviction for a violation of 18 U.S.C. 241 should be affirmed.

B. The Evidence Is Sufficient To Show That Defendant's False Statements Were Material To The FBI Agent's Investigation Of The Circumstances Surrounding The Assault

Defendant argues (Br. 16-18) that there is insufficient evidence to show that he made false statements in violation of 18 U.S.C. 1001. Section 1001 of Title 18 prohibits any person from "mak[ing] any materially false, fictitious, or fraudulent statement[s] or representation[s]" to a federal officer. Materiality is an element of the offense. United States v. Valdez, 594 F.2d 725, 728 (9th Cir. 1979). "[T]he test for determining the materiality of the falsification is whether the falsification is calculated to induce action or reliance by an agency of the United States[.] [I]s it one that could affect or influence the exercise of governmental functions, [or] does it have a natural tendency to influence or is it capable of influencing agency decision?" United States v. East, 416 F.2d 351, 353 (9th Cir. 1969); see also United States v. Talkington, 589 F.2d 415, 416 (9th Cir. 1978). While defendant does not deny that his statements were false, he argues that the jury's finding of materiality was erroneous because FBI Agent Kirkham never believed that defendant's statements regarding involvement in the assault of Carlos Durand were true.

Defendant's argument, however, is meritless in view of this Court's holding in Valdez, supra. Valdez involved a false statement in the course of a visa application. In Valdez, the defendant argued that it was impossible for the false statements to have the capacity or capability of influencing action by a

government official because the visas would have been denied regardless of the false statements. Ruling against the defendant, this Court stated:

> We believe that the conduct Congress intended to prevent by § 1001 was the willful submission to federal agencies of false statements calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons, impossible. We think the test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances.

Valdez, 594 F.2d at 729; see also United States v. Goldfine, 538 F.2d 815, 821 (9th Cir. 1976). This Court in Valdez concluded that the false statements satisfied the materiality requirement because the statements had the "intrinsic" capability of misleading a government official. Ibid.

Applying the materiality test to the present case, it is clear that defendant's undisputedly false statements to the FBI were "material," because the statements not only had the "intrinsic" capability of misleading FBI Agent Kirkham in his investigation of the circumstances surrounding the assault of Carlos Durand, but actually did mislead Agent Kirkham because it required him to extend his investigation and conduct additional interviews (Tr. 420).

Agent Kirkham testified that during the span of his investigation he interviewed a number of witnesses, including Durand and defendant, about the assault. Agent Kirkham stated that defendant's statements about his role in the assault conflicted with information given to him by Durand and other witnesses, and that this extended Agent Kirkham's investigation

so that he could reconcile the contradiction (Tr. 420). Defendant's false statements were also material because they were calculated to induce agency action, i.e., direct the agent's attention away from Alvord as the assailant who inflicted bodily injury on the victim, Carlos Durand, and shift that blame to defendant. In view of evidence of the agreement reached between defendant and his co-conspirators the night of the assault (p. 9, supra), defendant's false statements were intentional and calculated to spare Alvord prosecution for beating Durand. Defendant's false statements thus satisfy the materiality requirement of 18 U.S.C. 1001.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO SEVER COUNTS I AND III FROM COUNTS IV AND V

Defendant argues (Def. Br. 18-19) that his convictions should be reversed because the district court abused its discretion by refusing to sever counts I and III (involving the assault) from counts IV and VI (involving the false statements). Defendant does not dispute that the counts were properly joined pursuant to Fed. R. Crim. P. 8(a). Because the counts were properly joined in the indictment, defendant has a heavy burden to prove that the court's refusal to sever counts was an abuse of discretion.

Federal Rule of Criminal Procedure 14 permits a district court to sever multiple counts brought in an indictment "[i]f it appears that a defendant or the government is prejudiced by a

joinder of offenses." Fed. R. Crim. P. 14. Defendant claims (Br. 19) that he was prejudiced by the district court's refusal to sever counts because the counts were inconsistent, and required his conviction on one set of counts in any event. Defendant argues (Br. 19) that "admission to [the conspiracy counts] means a denial of the [false statement counts], meaning there was no way for Downen to be acquitted on all counts." This claim of prejudice is without merit. Defendant could have avoided conviction on all counts if the evidence had shown that he had, in fact, no involvement in the conspiracy to beat Durand and had not lied to federal officials about his non-involvement. Furthermore, "an important factor in determining whether prejudice exists is whether the evidence of one of the crimes would be admissible in a separate trial for the other crime." United States v. Begun, 446 F.2d 32, 33 (9th Cir. 1971) (internal quotations omitted). "If the answer is affirmative, the joinder of offenses, in most instances, will not be prejudicial." Ibid. In this case, it is clear that the evidence proving the existence of the offenses in counts I and III (conspiracy against rights) would be admissible in a separate trial for offenses in counts IV and V (false statements regarding the conspiracy). Such evidence is based upon related actions stemming from the assault, and would be admissible to prove all of the counts charged against the defendant.

Moreover, the jury was well instructed by the district court that each count had to be decided independently of the others,

and the evidence as it relates to each count was "easily compartmentalized." United States v. Patterson, 819 F.2d 1495, 1501 (9th Cir. 1987); United States v. Ford, 632 F.2d 1354, 1374 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981). The district court told the jury: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count" (Tr. 547). The district court then gave detailed instructions to the jury of the elements of each independent count, and described the kind of evidence that could be considered in determining whether the elements of the offense have been met (Tr. 549-560). Based on these detailed instructions, the jury was able to compartmentalize the counts, and properly apply the evidence to reach their verdict. This is underscored by the fact that the jury found insufficient evidence to support a conviction of the housing violation set out in count III and declared a mistrial on that charge, while finding defendant guilty on counts I, IV and V. Thus the district court did not abuse its discretion in denying defendant's motion to sever counts.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED ON A WITNESS'S BRIEF REFERENCE TO A POLYGRAPH TEST

Defendant contends (Br. 22) that the government witness's remarks prejudiced his right to a fair trial because they implied that he failed a polygraph test and therefore made a false statement. This contention is without merit.

The only statement that Agent Kirkham made about a polygraph examination was brief and did not say that defendant had taken a polygraph test. Agent Kirkham testified that when he interviewed defendant about the events surrounding the assault, defendant's statements contradicted information that he received from Carlos Durand, the victim of the assault (Tr. 419). He stated that in view of the conflicting information, he intended to bring in a "polygraph examiner or lie detector test person in" to help determine which witness was telling the truth (Tr. 419). After Agent Kirkham's remark about possibly bringing in a polygraph examiner, the district court granted defendant's objection to the testimony and ordered it stricken (Tr. 420). At the conclusion of trial, the district court instructed the jury that "any testimony that has been * * * stricken * * * is not evidence and must not be considered" (Tr. 545). Defendant could not reasonably have been prejudiced by the mere mention by Agent Kirkham of the possibility of bringing in a polygraph examiner to reconcile conflicting witness statements. Agent Kirkham never testified that he actually brought in a polygraph examiner to assist in the investigation. Moreover, Agent Kirkham did not testify about whether defendant was subjected to a polygraph examination at all, nor did he testify about the results of any such examination. The district court's swift action in striking the testimony and then instructing the jury to disregard all such testimony cured any harm that may have resulted. See, e.g., United States v. Wills, 88 F.3d 704, 713 (9th Cir.) (government

witness's reference to the fact that she had been scheduled for polygraph exam did not require mistrial where district court ordered stricken the reference to the polygraph exam and explained to jury that polygraph examination results are inadmissible), cert. denied, 519 U.S. 1000 (1996).

CONCLUSION

For the foregoing reasons, the district court's judgment of conviction and sentence should be upheld.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no cases pending in this Court related to this appeal.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief for the united States as appellee is monospaced, has 10.5 characters per inch, and contains 6,378 words.

Lisa Wilson Edwards
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2000, two copies of the Brief For The United States were served by first-class mail, postage prepaid, on the following counsel:

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