

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	NO. 00-126
SALAH SIAM and FIHMI SIAM	:	

MEMORANDUM AND ORDER

YOHN, J. August , 2000

On March 9, 2000, a grand jury indicted defendants Salah Siam and Fihmi Siam. The indictment charged the defendants with one count of conspiracy to acquire, possess, and transfer food stamps in an unauthorized manner and seven counts of unauthorized acquisition or transfer of food stamps. The indictment also charged defendant Salah Siam with three counts of passing counterfeit food stamps, but these counts were later dismissed.

On May 16, 2000, a jury trial began in this case. On May 19, 2000, the jury returned verdicts of guilty against Salah Siam on the conspiracy count and on four of the unauthorized acquisition or transfer counts, acquitting him on the other three unauthorized acquisition or transfer counts. The jury also found Fihmi Siam guilty on the conspiracy count and on five of the unauthorized acquisition or transfer counts, acquitting him on the other two unauthorized acquisition or transfer counts.

Pending before the court are the defendants' motions for a new trial. The defendants claim that it was improper for the court to dismiss two jurors: Juror 146, who was dismissed for cause at the conclusion of voir dire, and Juror 77, who was dismissed for cause after deliberations had begun and whose dismissal resulted in verdicts being returned by a jury of

eleven. Because both Juror 146 and Juror 77 were properly dismissed, the court will deny the defendants' motions.

I. Background

Juror 146's dismissal stemmed from a question asked during voir dire. The court asked the panel the following question:

Have any of you at any time been involved in a criminal proceeding that concerned yourself, any member of your immediate family, or a close acquaintance, where you were either a defendant in the case or a witness, or a victim? In other words, you were involved in a criminal proceeding of some nature that might have any relationship to this type of case?

Tr. of May 16, 2000 (Doc. No. 38) at 40-41. To this question, Juror 146 responded that assault charges were pending against him in Berks County but that he was out on bail. *See id.* at 41.

Juror 146 did not, however, believe that "the fact that [he had] those charges pending would affect [his] ability to be fair and impartial in this case." *Id.* at 42.

Juror 77's dismissal stemmed from a note a juror gave to the court after deliberations had begun. The note contained the following message:

We have a problem and we need guidance.
One member has a belief that no individual is personally guilty of any crime involving the government. That member "wants out."
What should we do?

Note (Doc. No. 30). After receiving this note, the court read it to the prosecutor and to defense counsel. After some discussion, everyone agreed that the juror described in the note should be questioned by the court regarding the accuracy of the description of his belief. *See* Tr. of May 19, 2000 (Doc. No. 41) at 54-55. Specifically, the court would attempt to discern whether the

juror's belief was "a generalized belief that no individual is guilty" or a particular belief "that based on the evidence here no person is guilty." The following colloquy ensued:

THE COURT: Now, the note I received from one of the jurors is that they need guidance. It says that one member has a belief that no individual is personally guilty of any crime involving the Government, and that member wants out.

So I guess my first question is, you are the person who—

JUROR NUMBER 77: Yes—

THE COURT: —"wants out?"

JUROR NUMBER 77: —that's me, your Honor.

THE COURT: And could you tell me what you mean by "wants out?"

JUROR NUMBER 77: Well, I think it's the Government's fault for all this problem, giving out these tickets and stuff, you know what I mean? I think it's all a joke, I really do. Our system is so corrupt. That's—these people are all guilty of it, you know what I mean? It's wrong what they're, I mean accused of. The Government's doing all this stuff and they're never correcting it.

THE COURT: Okay. Well—

JUROR NUMBER 77: See, I don't understand this whole thing, but I think it's—I think they're—it's wrong, I really do. I think they were singled out for this whole thing.

THE COURT: Well, I think when you say wants out, you mean you want to be excused from the jury—

JUROR NUMBER 77: That's right.

THE COURT: —is that what you're saying? Okay. Now, the next question is, is your feeling about this based on the evidence you have heard in the case, or is this a feeling that you have about all cases that are brought?

JUROR NUMBER 77: All about the Government.

....

THE COURT: All about the Government.

JUROR NUMBER 77: I think our Government is screwed up, you know?

THE COURT: In all cases.

JUROR NUMBER 77: Yeah. I'm just making a stand for it. I think we all need, you know, just to go up to the White House and straighten this all out. That's where the whole problem is. It's not in this court system. I really do.

Look at Abdul. You don't think he's probably caught up on that stuff? It's the thing like I was telling them about the gun situation, too. they keep handing out the guns, you know what I mean? It's a joke. Why don't they just pass the law?

Look at Jim Dwyer. Took a bullet for Ronald Reagan. And you think they'd sign the bill and say no more guns? Look at over in England, they don't have this problem. What happens is, somebody gets stabbed, right? That's about it. He lives. Look at George Harrison got stabbed. Bullets, people die from. And they have pictures of children. Look at these women, walked to the White House to show them, you know, how their daughters got killed and stuff.

THE COURT: Well, now, you were instructed during the trial to—

JUROR NUMBER 77: I didn't understand that part, but I thought I was making a good statement right here. Ain't that good enough?

THE COURT: You're—

JUROR NUMBER 77: And say, hey, let's make a change, huh?

THE COURT: Okay. Well, what I'm trying to—

JUROR NUMBER 77: People dying and starving, and we just look the other way. Is that what we're supposed to do, look the other way? I stand for America. I don't know—I don't know if I'm a [Christian] or whatever you want to call it, but I'm just saying this is—I'm nervous as all hell, but I just want to make this point and say, this is what's wrong with America.

THE COURT: Well—

JUROR NUMBER 77: It doesn't stem here. It's up there in the White House. Sign the bills and correct all this stuff.

THE COURT: Okay. So what I'm trying to find out is, I take it from what you're saying that you came into this case with this attitude.

JUROR NUMBER 77: No, I didn't even understand the whole thing.

THE COURT: Or that—

JUROR NUMBER 77: I really didn't know.

THE COURT: You didn't know—

JUROR NUMBER 77: No, I'm just telling you right now, this is the whole situation here.

THE COURT: What didn't you know?

JUROR NUMBER 77: I didn't know anything about this stuff. But it's a joke, ain't it, though, about these coupons? It's a joke. It's all a big joke.

THE COURT: Okay.

JUROR NUMBER 77: They were singled out.

THE COURT. Okay.

JUROR NUMBER 77: This is how this worked. They give these coupons to these people. How come they're not sent to their house if they're—and these people are giving them away because they got a drug problem or something like that. Then why do they still keep getting these tickets? That's what I'm trying to say. Is that a joke or what?

Just like I saw on TV. There's this one guy, he's dead and he's still receiving checks. And go take a look at our roads in our freakin—you hit a bump and everything. The roads are all beat up. I know people might think I'm all crazy, but I'm just speaking what I'm thinking.

THE COURT: Well, in other words, you're saying that you do not feel you could make a decision based on the evidence and the law in this case.

JUROR NUMBER 77: Yes. I think they're not guilty. That's what I told them in there. It's a wrongdoing.

THE COURT: Well, if you think they're not guilty, that's one thing, but if you cannot make a—if you think they're not guilty based on the evidence and the

law presented here, that's one thing. But if you just think nobody is guilty of anything, then that's—

JUROR NUMBER 77: Exactly.

THE COURT: That's what you think.

JUROR NUMBER 77: Yes.

THE COURT: All right. Ms. Winter, do you have any additional questions?

MS. WINTER: No.

THE COURT: Mr. Newman?

MR. NEWMAN: Do you believe that you could decide this case, their guilt or innocence, based on the evidence solely that you've heard in this courtroom? Can you do that? Because both the Government and the defense want a fair trial here. Can you do that?

JUROR NUMBER 77: I say they're not guilty right now, but they—I don't know. They think different in there. I'm telling you right now. I'm just saying not guilty, walk away from it all. I'm just trying to say to the court system, hey, it's all screwed up here, our Government's screwed up. Take a good look at it, view it. [to the court] Maybe you could pass the word on. Move it on to the other judges and lawyers and straighten this whole thing out. I know it's really true. It's sad what's going on, especially with the jails and stuff. They send them in there to the jails and stuff and they don't give rehabilitation, do they? They lift weights, get bulked up, kill each other. They don't care about them. You think they care about each other in there?

MR. NEWMAN: May I ask another question—

THE COURT: You may.

MR. NEWMAN: —your Honor?

Mr. Falbo, I understand. I'm not going to comment on your beliefs or your opinions. I mean I'm defending this gentleman here. What I'm really concerned about is, can you put aside those beliefs, those general beliefs, and decide, based on the evidence here, whether or not the Government has proved beyond a reasonable doubt that he committed these crimes? That's really my concern here today.

The broader issues are not issues that I can address in this courtroom. So I want to know if you can put aside those beliefs and give Salah Siam a fair trial, go back, deliberate, discuss with the other jurors, and determine, based on the evidence, whether or not the evidence proves beyond a reasonable doubt that he committed these crimes.

JUROR NUMBER 77: No, I can't. Honestly, that's my opinion, you know? I have nothing—you know what I mean? I spoke what I had to say.

MR. NEWMAN: I have no further questions, your Honor.

THE COURT: Mr. Simon?

MR. SIMON: I have no further questions, your Honor.

THE COURT: All right. You may step down.

Id. at 56-62.

The court then made findings as follows:

THE COURT: . . . But the overriding conclusion I draw is that he is mentally disturbed and also that he has a fixed opinion that nobody is guilty, and there are a lot of other problems around in the world that have created these situations, and that he could not make a rational judgment based on the facts of this case and the law that applies to this case.

Id. at 64. Based on these findings, the court dismissed Juror 77 “for cause, in accordance with Rule 23(b)” and instructed the jury to continue deliberations with only eleven jurors. *Id.* at 65. Defense counsel’s objections to the court’s actions were duly noted. *See id.* at 66.

II. Legal Standard

The defendants request that the court grant them a new trial pursuant to Federal Rule of Criminal Procedure 33. Rule 33 provides that “[o]n a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require.” Fed. R. Crim. P. 33. In the

context of a motion for a new trial because of legal error, the decision of whether to grant the motion is based on whether “there is a reasonable probability that error infecting the prior proceedings could have had a substantial influence on the jury's decision.” *United States v. Bevans*, 728 F. Supp. 340, 343 (E.D. Pa.) (citing *Government of Virgin Islands v. Bedford*, 671 F.2d 758, 762 (3d Cir. 1982)), *aff'd*, 914 F.2d 244 (3d Cir. 1990).

III. Discussion

A. Dismissal of Juror 146

Salah Siam argues that a new trial is warranted because the court committed a legal error when it dismissed Juror 146 for cause at the conclusion of voir dire. *See* Mem. in Supp. of Post-Trial Mots. (Doc. No. 33) [“Defs. Mem.”] at 3.¹ Specifically, he contends that the court erred in concluding that Juror 146 was biased because there was no indication that Juror 146 would have been unable to “decide the case fairly and impartially.” *Id.* at 3. Fihmi Siam makes the same argument, simply incorporating by reference Salah Siam’s post-trial motion and brief. *See* Post-Trial Mots. (Doc. No. 34) ¶ 1.² The government disagrees with the defendants and contends that it was proper for the court both “to infer that a person presently under indictment may harbor an anti-government sentiment despite an assertion that he ‘could be fair’” and to dismiss that person

¹Although the court is able to determine the page numbers of the defendants’ and the government’s briefs by counting pages, the court encourages the parties to number the pages of their legal memoranda in the future.

²For simplicity, in referring to the arguments made by the defendants, the court will cite only to Salah Siam’s filings.

for cause as a result of that inference. Gov't's Resp. to Defs.' Post-Trial Mots. (Doc. No. 37) ["Gov't Resp."] at 5.

In considering whether a potential juror should be dismissed for cause, a court must pay particular attention to "whether the juror holds a particular belief or opinion that will prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *United States v. Murray*, 103 F.3d 310, 323 (3d Cir. 1997) (internal quotation marks omitted). The decision of whether to dismiss a potential juror for cause is, however, committed to the sound discretion of the trial court. *See id.*

At the time of the trial Juror 146 was under indictment for the crime of assault. The court observed the demeanor of Juror 146 when he responded to the question as to whether he could be fair and impartial despite the outstanding charge against him. Even though Juror 146 responded in the affirmative, I had no confidence that he was being truthful and accurate and did not credit the response. The court reasonably inferred that the juror would be biased in favor of the government in an attempt to curry favor with the government or that he would be biased against the government because he had criminal charges pending against him. Either way, I concluded that he could not be fair and impartial.

The Third Circuit has made it clear that my decision not to credit Juror 146's response was proper: "the district court should not rely simply on the jurors' subjective assessments of their own impartiality." *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 153 (3d Cir. 1995). After considering the situation, I drew the reasonable inference that in view of the pending charges

against him he was not able to be an impartial juror, despite his assurances to the contrary. As a result, I sustained the challenge for cause and dismissed Juror 146.³

The court concludes that it did not abuse its discretion in ordering Juror 146's dismissal. Accordingly, the court concludes that Juror 146's dismissal did not constitute a legal error that warrants a new trial. *See Bevans*, 728 F. Supp. at 343.

B. Dismissal of Juror 77

The defendants claim that a new trial is also warranted because the court committed a legal error when it dismissed Juror 77 for cause during deliberations. *See Defs. Mem.* at 1-3. They argue that it was unclear whether Juror 77's desire to be dismissed might have been related to the sufficiency of the evidence presented by the government. *See id.* The government disagrees and contends that it was clear that Juror 77's desire to be dismissed was totally unrelated to the merits of this case. *See Gov't Resp.* at 1-3.

Federal Rule of Criminal Procedure 23(b) allows a court to dismiss a juror "for just cause" during deliberations.⁴ Fed. R. Crim. P. 23(b). Although the Third Circuit has not

³At the conclusion of the court's voir dire questioning, I gave the prosecutor and defense counsel the opportunity to ask additional questions. *See Tr. of May 16, 2000* at 56. Defense counsel did not ask additional questions. *See id.* Challenges for cause were then heard at sidebar. The audio tape of this untranscribed portion of the record, *see id.* at 57, reveals that while the court was reviewing the prosecutor's challenge for cause of Juror 146 at sidebar, defense counsel objected to the court drawing the inference that Juror 146 was biased. Defense counsel failed, however, to ask that any further inquiry of Juror 146 be conducted to counter the court's tentative decision to sustain the challenge for cause. Had either attorney expressed a desire to ask any further questions, the court would, of course, have granted the request.

⁴Rule 23(b) provides as follows:

Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with approval of the court that the jury shall consist of any number less

addressed the issue of the standard that should be applied by a court in deciding whether to dismiss a juror during deliberations, three other Circuits have considered this issue and have adopted roughly the same standard. In *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987), the D.C. Circuit held “that if the record evidence discloses any possibility that the [juror’s] request to [be] discharge[d] stems from the juror’s view of the sufficiency of the government’s evidence, the court must deny the request.” *Id.* at 596. Ten years later, in *United States v. Thomas*, 116 F.3d 606 (2d Cir. 1997), the Second Circuit “adopt[ed] the *Brown* rule as an appropriate limitation on a juror’s dismissal in any case where the juror allegedly refuses to follow the law.” *Id.* at 622. Last year, in *United States v. Symington*, 195 F.3d 1080 (9th Cir. 1999), the Ninth Circuit adopted a slightly less strict standard. After considering *Brown* and *Thomas*, the Ninth Circuit held “that if the record evidence discloses any *reasonable* possibility that the impetus for a juror’s dismissal stems from the juror’s views on the merits of the case, the court must not dismiss the juror.” *Id.* at 1087. The Ninth Circuit “emphasize[d] that the standard is any *reasonable* possibility, not any possibility whatever” and noted that “[a]nything is possible in a world of quantum mechanics.” *Id.* at 1087 n.5 (quoting *United States v. Watkins*, 983 F.2d 1413, 1424 (7th Cir. 1993) (Easterbrook, J., dissenting)).

than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after the trial commences. Even absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors. Fed. R. Crim. P. 23(b).

It is irrelevant to the defendants' motions whether the court applies the *Brown* and *Thomas* standard of "any possibility" or the *Symington* standard of "any reasonable possibility." Under either standard, their motions fail.

Juror 77 was irrational and mentally disturbed. There was a disconnect between the questions asked and his answers, as well as within his answers themselves. When asked what he meant by "wants out,"⁵ Juror 77 launched into a somewhat free-flowing diatribe about irrelevant issues: the corruption of government, the proliferation of guns and violence, the benefits of U.K.-like gun control laws, the poor condition of local roads, the stupidity of continuing to send food stamps to people who sell them to support a drug habit, and his personal "stand for America." Tr. of May 19, 2000 at 58; *see id.* at 56-60. Throughout the colloquy, Juror 77 repeatedly interrupted the court and gave non-responsive answers to those questions that were asked. He also said different things at different times.

⁵Juror 77 confirmed that he was the juror referred to in the note. *See* Tr. of May 19, 2000 at 56.

Although the bare transcript could be read otherwise in view of his contradictory statements, it was crystal clear to the court from his demeanor, intonation, and emphasis that Juror 77's view of the case had nothing to do with the evidence in the case or the law that applied to it. Instead, to the extent that Juror 77's view of the case had any relationship with reality, it was motivated by a hope that by taking a stand in this case he would send a message about the current state of the entire legal system and about how "our Government is screwed up." *Id.* at 57. He even asked the court's help in sending his message: "[M]aybe you could pass the word on. Move it on the to other judges and lawyers and straighten this whole thing out." *Id.* at 61.

After allowing Juror 77 to speak his mind, the court concluded its colloquy as follows:

THE COURT: Well, in other words, you're saying that you do not feel you could make a decision based on the evidence and the law in this case.

JUROR NUMBER 77: Yes. I think they're not guilty. That's what I told them in there. It's a wrongdoing.

THE COURT: Well, if you think they're not guilty, that's one thing, but if you cannot make a—if you think they're not guilty based on the evidence and the law presented here, that's one thing. But if you just think nobody is guilty of anything, then that's—

JUROR NUMBER 77: Exactly.

THE COURT: That's what you think.

JUROR NUMBER 77: Yes.

Id. at 60. Although he did say, "I think they're not guilty," I was firmly convinced that Juror 77's "not guilty" had nothing to do with the evidence and the law and instead referred to nobody ever being guilty of anything. *Id.*

Even when the court allowed the prosecutor and defense counsel to question Juror 77, it became even more clear that Juror 77 could not impartially decide the case before him based on the evidence and the law. Counsel for Salah Siam conducted the following colloquy:

MR. NEWMAN: . . . What I'm really concerned about is, can you put aside those beliefs, those general beliefs, and decide, based on the evidence here, whether or not the Government has proved beyond a reasonable doubt that he committed these crimes? That's really my concern here today.

The broader issues are not issues that I can address in this courtroom. So I want to know if you can put aside those beliefs and give Salah Siam a fair trial, go back, deliberate, discuss with the other jurors, and determine, based on the evidence, whether or not the evidence proves beyond a reasonable doubt that he committed these crimes.

JUROR NUMBER 77: No, I can't. Honestly, that's my opinion, you know? I have nothing—you know what I mean? I spoke what I had to say.

Id at 61-62.

From his responses to all of the questions asked of him, *see supra* Part I, as well as from his intonation, demeanor, and emphasis throughout the colloquy with him, particularly in answering the questions reproduced above, the court concluded that Juror 77 did not think anybody was guilty of anything in any case and that his desire to be dismissed was not based on the evidence and the law presented in this particular case. Thus, by revealing that his desire to be dismissed from the jury had nothing to do with the evidence, Juror 77 distinguished himself from the dismissed jurors under consideration in *Brown*, *Thomas*, and *Symington*, all of whom had either expressed dissatisfaction with the evidence presented or held a view of the evidence contrary to that held by the other jurors. *See Symington*, 195 F.3d at 1088; *Thomas*, 116 F.3d at 623-24; *Brown*, 823 F.2d at 596-97.

After a review of the record, the court is still of the firm conviction that Juror 77's desire to be dismissed had nothing to do with the merits of the case or the law that applied to the facts of the case, but was rather the result of a disturbed mind and a view of the world that was not based on reality. Consequently, the court concludes that it properly dismissed Juror 77 for cause pursuant to Rule 23(b) and allowed the remaining eleven jurors to continue deliberating and ultimately return verdicts.⁶ Accordingly, the court's dismissal of Juror 77 was not a legal error that would warrant a new trial. *See Bevans*, 728 F. Supp. at 343.

IV. Conclusion

Because it was reasonable for the court to infer that Juror 146 could not be impartial, the court did not abuse its discretion by dismissing him at the conclusion of voir dire. Thus, Juror 146's dismissal was not a legal error and does not warrant a new trial. Because there was no possibility that Juror 77's desire to be dismissed was based on his view of the merits of the case, and because he could not be impartial, the court properly dismissed Juror 77 pursuant to Federal Rule of Criminal Procedure 23(b). Thus, Juror 77's dismissal was not a legal error and does not warrant a new trial. Consequently, the court will deny the defendants' post-trial motions. An appropriate order follows.

⁶In their motions, the defendants also claim that the court abused its discretion by allowing deliberations to continue with only eleven jurors after the dismissal of Juror 77. *See* Post-Trial Mots. (Doc. No. 33) ¶ 2. The defendants do not, however, address this issue in their brief. *See* Defs. Mem. Because the court instructed the jury both that Juror 77's dismissal was "not any indication about the merits of the case in any way" and that the jury should continue to deliberate based on their own "individual judgments about the merits of the case," the court concludes that it did not abuse its discretion by allowing the remaining eleven jurors to continue deliberating and return verdicts. Tr. of May 19, 2000 at 67; *see* Fed. R. Crim. P. 23(b).

**IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA	:	
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v.	:	
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SALAH SIAM and FIHMI SIAM	:	NO. 00-126

ORDER

YOHN, J.

AND NOW, this day of August, 2000, upon consideration of the defendants' post-trial motions (Doc. Nos. 33, 34) and the government's response (Doc. No. 37), IT IS HEREBY ORDERED that the defendants' motions are DENIED.

William H. Yohn, Jr.