IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Staff Sergeant (E-6) **LADONIES P. STRONG** United States Army Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. ARMY 20200391 USCA Dkt. No. 23-0107/AR

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Issues Presented

I.

WHETHER THE ARMY COURT ERRED WHEN IT DETERMINED THAT AGENTS WERE STILL "ENDEAVORING TO SEIZE" THE DIGITAL MEDIA ON APPELLANT'S PHONE AFTER AGENTS HAD ALREADY SEIZED THE PHONE.

II.

WHETHER APPELLANT WAS PREJUDICED WHERE THE MJ FAILED TO INSTRUCT THE PANEL IN ACCORDANCE WITH THE PLAIN LANGUAGE OF THE CHARGE SHEET.

Statement of the Case

On June 23, 2023, this Court granted Appellant's petition for a grant of review. (JA 1). On July 14, 2023, Appellant filed her brief with this Court. The Government responded on August 14, 2023. This is Appellant's reply.

I.
WHETHER THE ARMY COURT ERRED WHEN IT DETERMINED THAT AGENTS WERE STILL "ENDEAVORING TO SEIZE" THE DIGITAL MEDIA ON APPELLANT'S PHONE AFTER AGENTS HAD ALREADY SEIZED THE PHONE.

Argument

A. An ability to destroy is not, by itself, sufficient indicia of possessory interest.

The Government argues that an accused's ability to destroy[1] is the only possessory interest that matters in determining whether a seizure is complete under Article 131e, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 931e (2019). (Appellee's Br. 12). Though claiming this is "consistent with . . . this Court's precedent," the Government cites to no precedent which so narrows possessory interests. (Appellee's Br. 11). Indeed, often the ability to destroy is no indication of a possessory interest at all and instead is a criminal—or at least tortious—act. *See, e.g.*, Article 108, UCMJ (destruction of military property); Article 109, UCMJ (destruction of non-military property); Restatement (Second) of Torts § 223 (Am. Law Inst. 1965) ("A conversion may be committed by . . . intentionally destroying or altering a chattel . . . .").

Precedent actually undermines the Government's position. In *United States v. Hahn*, Hahn maintained apparently unfettered access to the stolen property.

[1] The Government did not charge Appellant with destroying anything. (JA 29).

44 M.J. 360, 361 (C.A.A.F. 1996). Hahn was, with "ease . . . able to gather up the property and move it to his car." *Id.* at 362. Presumably Hahn could have used the property for its intended purpose. *Id.* In finding law enforcement had not seized the property, this Court did not focus solely on Hahn's ability to destroy the property, but instead looked at the totality of the circumstances. *Id.* This Court should do so again here.

Even if Appellant's ability to destroy the digital content of her cell phone is the only possessory interest that matters, the government still meaningfully interfered with that interest when it seized her cell phone. Appellant then had to—at a minimum—find another device that could connect to the internet, find internet access, and complete the steps necessary to remotely wipe her cell phone. This is a meaningful interference when compared to the ease with which she could have destroyed the digital content on her cell phone had she possessed her cell phone.

B. The Government's interpretation would have no definite termination of a seizure.

While acknowledging that the completion of a seizure places subsequent conduct beyond the reach of Article 131e, UCMJ, the Government embraces an interpretation that conceivably has no termination. It notes that finding a seizure occurred would not make sense, even if there was interference with a possessory interest, when the "ability to destroy the property was unaffected by the interference." (Appellee's Br. 12). While the destruction of property, to include

digital content, may become more difficult the more it is secured and copied, a resourceful—and/or violent—individual can always theoretically find a way. Eventually, the reach of Article 131e, UCMJ must end and those that interfere with law enforcement are subject to other sanctions. *Cf. United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute."). This Court should reject the Government's interpretation.

C. The actions of law enforcement indicate they believed they had seized the digital contents of Appellant's phone.

Even assuming this Court adopts the Army Court's test for seizure under Article 131e, UCMJ, Appellant's conduct was still beyond the reach of the statute. The Army Court found that digital media is seized "when the device containing it is secure from passive or active manipulation, even if that does not occur until the targeted data is copied or otherwise transferred." *United States v. Strong*, 83 M.J. 509, 516 (A. Ct. Crim. App. 2023). This leaves open the possibility, as the Government notes, of a seizure not occurring until data is copied. But it does not foreclose the possibility of a seizure happening earlier, if, for example, it is placed in a container that is "foolproof." *Id.* at 517.

Here, the facts indicate law enforcement believed the data was beyond the reach of Appellant's ability to manipulate or destroy it. Reading the portion of the

record the government cites in context also supports an interpretation that the seizure was completed. (Appellee's Br. 14; JA 43–48). The trial counsel specifically asked about a "digital forensic *examination*." (JA 43 (emphasis added)). More importantly, following the seizure of the cell phone, law enforcement took no measures to ensure Appellant could no longer manipulate the device, as they did earlier by placing a guard with Appellant. (JA 37). This is behavior of agents who believe their "endeavoring to seize" is complete. Therefore, even if the data was not actually seized, law enforcement believed it was, and Appellant's conviction must be set aside.

D. Even under its novel test, the Government still loses.

Should this Court accept the Government's invitation to abandon precedent, Appellant still prevails. Law enforcement—in possession of the phone itself—was in possession of the cell phone's digital contents.

The Government's hypothetical regarding copying the digital content of—and returning—a cell phone would, as it suggests, constitute possession of the digital content. (Appellee's Br. 17). But, as discussed *supra*, the Government also would have possessed the digital content earlier. Someone would be guilty of possession of child pornography if he exercised control over a cell phone, or other storage device, that he knew contained child pornography, whether or not he viewed or copied it. Article 134, UCMJ. *Cf. United States v. Perez*, 484 F.3d

735, 745 (5th Cir. 2007) ("[T]he downloaded files often had file names that summarized their images, implying that Perez could have been aware of the contents even without viewing each image."). *See also United States v. Croghan*, 973 F.3d 809, 825 (8th Cir. 2020) ("[C]onstructive possession of [child pornography] is established when a person has ownership, dominion, or control over the [pornographic material] itself, or dominion over the premises in which the [pornographic material] is concealed." (alterations in original)).

Under whatever test employed, this Court should hold that Appellant's alleged conduct was beyond the reach of the statute, and the Specification of Charge III should be set aside.

II.
WHETHER APPELLANT WAS PREJUDICED WHERE THE MJ FAILED TO INSTRUCT THE PANEL IN ACCORDANCE WITH THE PLAIN LANGUAGE OF THE CHARGE SHEET.

Argument

A. This Court specifically requested the parties analyze prejudice.

The Government notes that an appellant cannot cleverly craft an issue to avoid the issue of waiver. (Appellee's Br. 19, n.4). While this may be true, it overlooks the fact that this Court *sua sponte* specified the second issue.

In arguing that Appellant waived any claim regarding the constructive amendment and material variance that occurred in this case, the Government fails to point to any case where this Court found that occurred. In fact, in *United States v. Lubasky*, cited by the Government, the trial was by military judge alone and thus no instructions were given. (Appellee's Br. 21); 68 M.J. 260, 265 (C.A.A.F. 2010). This refutes the Government's argument that the military judge's failure should be viewed as an instructional error.

Regarding prejudice, the Government argues that (1) the length of time spent discussing the digital content of the cell phone compared to its physical seizure, and (2) the flyer referencing "digital content," absolved the military judge of any failure. (Appellee's Br. 22–23). But during instructions the military judge did not instruct the panel they should refer to the flyer; he told them they "must resolve the

ultimate question of whether [Appellant] is guilty or not guilty based upon the evidence presented here in court and upon the instructions that I will give you." (JA 72). The Government introduced evidence that Appellant resisted giving up her cell phone to law enforcement. (JA 38). The military judge instructed the panel to focus on Appellant's actions regarding her cell phone. (JA 77). Indeed, the military judge reiterated Appellant's "specific intent to prevent the seizure of her *phone* must be proved beyond a reasonable doubt." (JA 83 (emphasis added)).

The Government concedes that, to avoid prejudice, the error in this case must be harmless beyond a reasonable doubt. (Appellee's Br. 23). Given the evidence presented, and the instructions by the military judge, this Court cannot be sure of what the panel convicted Appellant and the Specification of Charge III should be set aside.

B. This Court should overrule *Davis*.

Should this Court consider the military judge's failure an instructional error, it should overrule, or create an exception to, *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020). Considering the application of stare decisis, *Davis* should be overruled because—even if there are no intervening events given the recency of the decision[2]—*Davis* was poorly reasoned, servicemembers have not relied on its

[2] *Davis* was decided under a prior version of the Rules for Court-Martial [R.C.M.] which noted that "[f]ailure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the

decision, and overruling *Davis* will align military practice with federal practice which will boost public confidence in the law. *United States v. Quick*, 74 M.J. 332, 336 (C.A.A.F. 2015).

1. Davis placed undue reliance on an inapposite, and split, prior decision.

In *Davis*, this Court relied on its earlier decision in *United States v. Smith* to find that "by 'expressly and unequivocally acquiescing' to the military judge's instructions, [Davis] waived all objections to the instructions . . . ." *Davis*, 79 M.J. at 331 (quoting *United States v. Smith*, 2 C.M.A. 440, 442 (C.M.A. 1953). But in *Smith*, the law officer did not read the elements of an offense that had already been read to the panel *by the defense counsel*. 2 C.M.A. at 441–42. Then the law officer asked Smith's counsel if anything more was necessary, and counsel responded that the "law officer has adequately covered the instructions in this case." *Id.* at 442. In *Smith*, it appears that Smith's counsel did not think it was necessary for the panel to hear the instructions—which counsel just read to them—twice. This was indeed "the intentional relinquishment of a known right," unlike

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objection in the absence of plain error." *Davis*, 79 M.J. at 331 (citing R.C.M. 920(f) (2016)). The current version of the R.C.M. explicitly states that a failure to object only constitutes forfeiture. R.C.M. 920(f) (2019). While this court previously considered the older version of R.C.M. 920(f) to refer to forfeiture, *Davis*, 79 M.J. at 331, the change to the plain language of the rule by the President should make this Court even more hesitant to find waiver.

many instructional errors which involve oversights by military judges or counsel. *Davis*, 79 M.J. at 331.

Moreover, the holding in *Smith* was even narrower than noted by this Court in *Davis*, as the *Smith* court also stated "where defense clearly and unequivocally assents *to minimal instructions*, he will not be heard thereafter . . . ." *Id.* at 442 (emphasis added). The instructions provided in Appellant's case were not minimal, but voluminous, consisting of 19 single-spaced pages. (JA 72–90). The counsel at trial, and the military judge, did not make a conscious decision to instruct the panel differently than the charge sheet; they just made a mistake. In such a circumstance, instructional errors—which do not involve an intentional waiver—should be reviewed for plain error.

2. Servicemembers have not relied on Davis.

There is no evidence that servicemembers have relied on *Davis*. It only serves to eliminate a possible avenue for relief on appeal, even in circumstances, as here, where the Government is also at fault for the military judge's instructional error.

3. Overruling Davis will align military courts with the federal circuits and therefore boost public confidence in the law.

The overwhelming majority of federal circuits review acquiesced, and sometimes even proposed, jury instructions for plain error.[3] This Court should do the same. Barring evidence that an accused knew about an error and intentionally avoided objecting, this Court should treat the error as it treats other unpreserved objections and subject it to plain error review.

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[3] *See, e.g.*, *United States v. Thomas*, 377 F.3d 232, 239 (2d Cir. 2004) ("Indeed, Thomas and his counsel acquiesced in the jury instruction. Thus, we will review only for plain error."); *Virgin Islands v. Rosa*, 399 F.3d 283, 293 (3rd Cir. 2005) ("Despite his repeated acquiescence to the instructions, it is clear he did not knowingly and intentionally waive his right to the proper charge."); *United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006) ("The government's only evidence of waiver is counsel's statement that, other than the *Blakely* objection, he had no problem with the [presentencing report]. This statement, alone, is insufficient to establish that Arviso's counsel abandoned a known right."); *United States v. Cleaves*, 299 F.3d 564, 567 (6th Cir. 2002) ("Because Cleaves did not object to the jury instruction that produced a general verdict at his trial—indeed, he acquiesed [sic] in it—we review his claim for plain error only."); *United States v. Longstreet*, 567 F.3d 911, 921 (7th Cir. 2009) ("[B]ecause Longstreet agreed to the instructions as written . . . he forfeited this challenge on appeal."); *United States v. Perez*, 116 F.3d 840, 845–46 (9th Cir. 1997) ("Although Cruz and Perez did submit erroneous instructions, there is no evidence that they affirmatively acted to relinquish a known right."); *United States v. Zubia-Torres*, 550 F.3d 1202,1207 (10th Cir. 2008) ("[W]e do hold . . . that there must be some evidence that the waiver is 'knowing and voluntary,' beyond counsel's rote statement that she is not objecting to the [presentencing report]."); *United States v. Onafowokan*, 1987 U.S. App LEXIS 9193 (D.C. Cir. 1987) ("Because Appellant acquiesced to the jury instructions he now challenges on appeal, we may only review the instructions to determine whether they constitute plain error."); *United States v. Adekoya*, 1996 U.S. App. LEXIS 17611, *15 (1st Cir. 1996) ("As defense counsel expressly agreed to the charge both before and after it was given, we review for plain error only.").

While members of this Court have acknowledged "that trial defense counsel generally cannot 'stand mute' when a military judge asks a question," this does not provide an alternative to defense counsel who are simply unaware of a mistake. *United States v. Schmidt*, 82 M.J. 68, 80 (C.A.A.F. 2022) (Maggs, J., concurring). Under this court's current precedent, defense counsel may be encouraged to come up with clever ways to avoid affirmatively saying "no objection" to the instructions on the chance something was missed. This elevates form over substance and may result in relief being granted arbitrarily.

4. Even if unwilling to overrule Davis, this Court should still grant Appellant relief.

Should this Court decline to overturn *Davis*, it should craft an exception to the waiver provision in circumstances where the military judge instructs a panel it may convict an accused for uncharged misconduct for two reasons. First, the instructional error here involved Appellant's constitutional right to due process. *See United States v. Paul*, 73 M.J. 274, 278–79 (C.A.A.F. 2014) ("It is a fundamental principle of due process that in order to prove its case, the government must present evidence at trial supporting each element of the *charged offenses* beyond a reasonable doubt." (emphasis added)). And "[t]here is a presumption against the waiver of constitutional rights . . . ." *Brookhart v. Janis*, 384 U.S. 1 (1966). Therefore, as Appellant's acquiescence was not explicit and involved a constitutional issue, this court should not find waiver.

Second, this Court has recognized that "[u]ncharged-misconduct evidence . . . is a dangerous commodity" and given its risks, military judges "should employ effective limiting instructions." *United States v. Levitt*, 35 M.J. 114, 119 (C.M.A. 1992). The concern that a panel would base a conviction solely on evidence of uncharged misconduct should also extend to a conviction *for* uncharged misconduct. Therefore, this Court should not find waiver where the instructional failure changes the elements of an offense as the result of an oversight by the military judge and the parties at trial.

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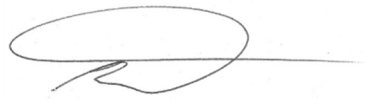

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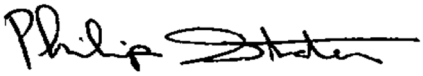

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CERTIFICATE OF COMPLIANCE WITH RULE 24(B)

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 2,802 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of *United States v. Strong*, Crim. App. Dkt. No. 20200391, USCA Dkt. No. 23-0107/AR was electronically filed with the Court and served on the Government Appellate Division, the Army Court of Criminal Appeals, and the Defense Appellate Division on August 23, 2023.

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United States v. Adekoya

United States Court of Appeals for the First Circuit

July 18, 1996, Decided

No. 95-1123

Reporter
1996 U.S. App. LEXIS 17611 *

UNITED STATES, Appellee, v. MOJISOLA A. BIODUN ADEKOYA, Defendant, Appellant.

Notice: [*1] RULES OF THE FIRST CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Subsequent History: Reported in Table Case Format at: *89 F.3d 824, 1996 U.S. App. LEXIS 32570*.

Prior History: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. William G. Young, U.S. District Judge.

Disposition: Affirmed.

Counsel: Robert M. Greenspan, for appellant.

Paula J. DeGiacomo, Assistant United States Attorney, with whom Donald K. Stern, United States Attorney, was on brief for appellee.

Judges: Before Torruella, Chief Judge, Campbell, Senior Circuit Judge, and Lynch, Circuit Judge.

Opinion

Per Curiam. Defendant-appellant Mojisola Biodun Adekoya, a Nigerian woman traveling from Nigeria by way of Switzerland to the United States, was arrested at Logan Airport in Boston on October 10, 1993 after a customs inspection of her baggage revealed two kilograms of heroin. Following a three-day jury trial, she was convicted of importation and possession of heroin with intent to distribute, in violation of *21 U.S.C. §§ 952(a)* and *841(a)(1)* and *18 U.S.C. § 2*. Adekoya challenges her convictions, claiming the district court inadequately questioned prospective jurors about possible race- and nationality-based **[*2]** bias, denied her the right to be present during the questioning of certain jurors,

and failed to define "reasonable doubt" in the instructions to the jury. Finding that the court did not commit reversible error, we affirm.

Adekoya argues that the district court should have included among the questions it asked the venire the following question proposed by defense counsel: whether any prospective juror had "any fixed opinions, biases or prejudices about Black people which would affect your ability to render a fair and impartial verdict in this case based solely on the law and evidence in this case?" Defense counsel suggested this question in writing along with more than twenty others on the day trial commenced, but never thereafter requested that the court ask it, even after the court had questioned the jurors more generally about possible bias. [1] Nor did the defendant raise the argument she advances now, that, had her race-specific question been asked, other questions might have followed which would have allowed her to probe bias stemming from the fact that she was a Nigerian national -- a fact that, rather than her race, forms the basis for her argument on appeal. Such bias, defendant **[*3]** says, could have stemmed from panel members' awareness of a few court opinions, unrelated to this case, which refer to Nigeria as a drug source country. Because defendant did not properly preserve an objection to the district court's questioning, we review for plain error only. *See* *United States v. Olano, 507 U.S. 725, 732, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993)*.

Generally, a trial court has considerable discretion in conducting voir dire and "need not pursue any specific line of questioning . . . provided it is probative on the **[*4]** issue of impartiality." *United States v. Brown, 938 F.2d 1482, 1485* (1st Cir.), *cert. denied, 502 U.S. 992, 116 L. Ed. 2d 633, 112 S. Ct. 611 (1991)*; *see also* *Fed.R.Crim.P. 24(a)* (a court conducting voir dire shall permit the defendant or the attorneys "to supplement the examination by such further inquiry *as it deems proper* or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys *as it deems proper*[]") (emphasis supplied); *Rosales-Lopez v. United States, 451 U.S. 182, 189, 68 L. Ed. 2d 22, 101 S. Ct. 1629 (1981)* (plurality) (as voir dire examinations "rely largely on . . . immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*[]").

When the circumstances of the trial indicate that racial or ethnic prejudice is likely, however, it is advisable for the court to question jurors on such bias. *See* *Brown, 938 F.2d at 1485* (citing *Ristaino v. Ross, 424 U.S. 589, 597 n.9, 47 L. Ed. 2d 258, 96 S. Ct. 1017 (1976)*). The federal Constitution requires a specific inquiry into racial bias when racial

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[1] The district court asked the venire in open court:

> Are any of you sensible of any bias or prejudice whatsoever with respect to this case? When I say are you sensible of it I mean are you aware of any, do you know of any? Do you know of any reason why you do not stand indifferent in this case? When I say stand indifferent, I'm trying to search out any feelings about these people or me, because you've met us, feelings about the criminal justice system, feelings about these particular charges.

issues are "'inextricably bound up with the conduct of the trial'" or "substantial indications of the likelihood of racial or ethnic **[*5]** prejudice affecting the jurors" are present. *Rosales-Lopez, 451 U.S. at 189-190* (quoting *Ristaino, 424 U.S. at 596*). Apart from constitutional considerations, an appellate court, in the exercise of its supervisory authority over the federal courts, should find reversible error if a lower court does not acquiesce in a defendant's request for a specific inquiry into racial bias and there is a "reasonable possibility that racial or ethnic prejudice might have influenced the jury." *451 U.S. at 191*.

After examining the record, we discern no error, let alone plain error, in the district court's failure to ask the question submitted by counsel or to frame a question sua sponte going to Nigerian nationality. To prove the importation charge, the government had to show that defendant traveled to the United States from Nigeria; her Nigerian passport and airline ticket were accordingly introduced as evidence. The bulk of the government's case, however, came from U.S. Customs and Immigration employees, who testified to the suspicious circumstances (independent of her passport) that led to their further inspection of her luggage; from a forensic chemist with the Drug Enforcement Administration, **[*6]** who testified to the nature of the seized controlled substance and the chain of custody; and from a person who lived at the Chelsea, Massachusetts address that defendant named as her relative's home and her own destination, who testified that she did not know the defendant. Adekoya, testifying in her own defense (in English), made several references to Nigeria, [2] but also stated that she had been in the United States since 1980 (except for a few trips home), and most recently lived in Maryland and worked as a nursing assistant and homemaker. Her defense was essentially that she did not pack her own bags, that her anxiety at the airport was due to medications and coffee, and that there was some doubt as to whether the authorities had mishandled the substance that tested positive for heroin.

[*7] Nothing causes this case to fall within the limited category of cases in which a specific inquiry concerning racial bias is constitutionally required. *See, e.g.*, *Brown, 938 F.2d at 1485* (unlike cases involving a racially charged defense or jury deliberations that are unique or highly subjective, no specific inquiry into racial bias was constitutionally required where defendant charged with altering notes was a young black male and all government witnesses and jurors were white). The circumstances at trial, including the evidence pertaining to defendant's nationality, do not indicate "a reasonable possibility that racial or ethnic prejudice might have influenced the jury." *Rosales-Lopez, 451 U.S. at 191*. While some references were made to defendant's home country and culture, more would be needed to create a "reasonable possibility" on these facts that the jury was influenced by

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[2] For example, she stated that her roundtrip ticket had been purchased by a relative in Nigeria; she had made the trip to prepare with family for her engagement to a fiance who remained in the Washington D.C. area for lack of traveling papers; her family had packed her bags for the return trip to the United States; and she had required new luggage for the return trip because her bags were lost when she arrived in Nigeria and encountered turmoil at the airport. Adekoya also attempted to correct a possible inconsistency in her statements about whom she was visiting in Chelsea by saying that in Nigeria, a "cousin" is sometimes called a "sister."

prejudice. *See, e.g.*, *id. at 192-194* (interracial crime satisfies "reasonable possibility standard," but racial or ethnic difference between defendant and key government witness did not); *United States v. Kyles, 40 F.3d 519, 525 (2d Cir. 1994)* (though cases of interracial violence **[*8]** generally require a specific inquiry into racial bias, circumstances of armed robbery "did not rise to the level of violence that would likely ignite a jury's potential prejudices[]"), *cert. denied, 514 U.S. 1044, 131 L. Ed. 2d 302, 115 S. Ct. 1419 (1995)*. There is nothing to support defendant's contention that the jurors were likely to be aware of cases that have referred to Nigeria as a drug source country. *See United States v. Okoronkwo, 46 F.3d 426, 434* (5th Cir.) (rejecting similar assertion that local public bias against Nigerians warranted a specific inquiry into nationality-based bias where Nigerian defendants were charged with conspiracy to commit tax fraud), *cert. denied, 133 L. Ed. 2d 60, 116 S. Ct. 107 (1995) and 116 S. Ct. 958 (1996)*. The prosecution did not highlight defendant's national origin, referring to it no more than in connection with the charge of importation. Nor was the evidence presented by either side the type that created a reasonable possibility that race- or nationality-based prejudice might have influenced the jury. [3] A more specific inquiry during voir dire was not required.

[*9] Defendant also asserts that her rights under the *Fifth* and *Sixth Amendment* and under *Fed.R.Crim.P. 43* [4] were violated when she was allegedly not permitted to be present at sidebar for the court's individual questioning of prospective jurors. The sidebar was held after the district judge posed several questions to the venire in open court and stated that any juror answering a question affirmatively should line up to meet with him. The court also invited counsel to the bench. Defense counsel then asked, "Your Honor, do you want the defendant present?", to which the court responded, "I don't think it's necessary. It's all on the record." At no point did the defendant or her counsel tell the court that the defendant actually wanted to participate at sidebar or object to the procedure the judge announced in open court that he would follow. Defendant remained in the courtroom throughout the questioning, but was apparently unable to see or hear the jurors at the sidebar. Following the questioning, [5] removals for cause, and peremptory strikes, only two venire members who had approached the bench became actual jurors. At the end of jury selection, in response to the court's inquiry, defense **[*10]** counsel stated, "The panel is acceptable to the defense, Your Honor."

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[3] *Cf. United States v. Alzanki, 54 F.3d 994, 1007 & n.14 (1st Cir. 1995)* (noting approvingly the district court's careful inquiry into ethnic- or nationality-based bias during jury impanelment in an involuntary servitude case where jury heard evidence of repressive Kuwaiti customs and practices toward domestic workers), *cert. denied*, ***133 L. Ed. 2d 841, 116 S. Ct. 909 (1996)***.

[4] *Rule 43* provides:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

[5] The questions centered around whether a prospective juror was inclined to favor or disfavor testimony by law enforcement officers and whether she or he could be fair and impartial.

Because defendant's claim may be resolved on statutory grounds, we need not discuss her constitutional arguments. [6] *Federal Rule of Criminal Procedure 43(a)* provides that a defendant's presence is required "at every stage of the trial including the impaneling of the jury . . . ." Assuming a sidebar conference during voir dire is a "stage of the proceeding" at which defendant's presence is required, *cf.* *United States v. Gagnon, 470 U.S. 522, 527, 84 L. Ed. 2d 486, 105 S. Ct. 1482* ***[*11]*** *(1985)* (assuming arguendo that defendants had a right under *Rule 43* to be present at court's conference with a juror about his continuing impartiality), a strong argument can be made that she waived her right to be present, though we need not decide the issue, *see infra*. The district court announced in open court, in defendant's presence, that it would question individually the venire members who answered "yes" to any of the general questions. In response to counsel's query whether the court "wanted" the defendant present, the court said it did not think defendant's presence was necessary, but in no way indicated hostility to allowing the defendant to be present if she had so requested. No objection or express request for defendant to be present at sidebar followed. *See* *id. at 528* (absence of objection to, or request to be present at, a conference that the court announced it would hold with a juror, and which one defendant's counsel attended, constituted waiver of any personal right to presence under *Rule 43*); *but see* *United States v. Gordon, 264 U.S. App. D.C. 334, 829 F.2d 119, 126 n.8 (D.C. Cir. 1987)* (distinguishing *Gagnon* and requiring on-the-record personal waiver where right to **[*12]** be present concerns the jury impanelment stage and is grounded in both the *Fifth Amendment* and *Rule 43*).

We need not decide if an effective waiver occurred since we can see no harm or prejudice to the defendant by her absence at sidebar when these individual jurors were questioned. Adekoya heard and observed the initial general questioning by the court, and her counsel was present throughout the sidebar portion. At the latter, the district court questioned nineteen prospective jurors, excluded five for cause, and permitted the government and defense counsel to exercise numerous peremptory challenges. Only two of the nineteen were selected to be jurors. Adekoya subsequently heard and observed these two along with other panel members being **[*13]** questioned in open court concerning their places of employment and spouses' places of employment. In the absence of any objection to either the jurors or the process, and given defense counsel's assurance to the court at the end of jury selection that the panel was acceptable to the defense, the district court had no reason to believe that the defendant was dissatisfied, and indeed nothing that then occurred indicates she was. We can see no reversible error. *See* *United States v. Pappas, 639 F.2d 1, 2-3 (1st Cir. 1980)* (district court's exclusion of counsel and court reporter from individual voir dire, while disfavored, did not prejudice defendant where her counsel had ample

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[6] Defendant's right under *Rule 43* to be present at trial proceedings is broader than the constitutional right alone. *See* *United States v. Gagnon, 470 U.S. 522, 526-527, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985)*; *United States v. Gordon, 264 U.S. App. D.C. 334, 829 F.2d 119, 123 (D.C. Cir. 1987)* (citing circuit cases).

challenges available and further opportunity to observe and to question prospective jurors but did not do so), *cert. denied, 451 U.S. 913, 68 L. Ed. 2d 304, 101 S. Ct. 1988 (1981).* [7] Moreover, the very substantial evidence against the defendant on the drug importation and possession counts makes it highly unlikely that she was convicted because the two jurors questioned at sidebar had some unfavorable characteristic that defendant could have discerned had she been present at the time. *Cf. United States v. Bullard, 37 F.3d 765, **[*14]** 767-768 (1st Cir. 1994)* (pro se defendant's absence from court conference inquiring into a juror's attentiveness was not prejudicial where standby counsel participated in the conference, evidence against the defendant was substantial, and nothing indicated that the juror had missed crucial evidence), *cert. denied, 514 U.S. 1089, 131 L. Ed. 2d 734, 115 S. Ct. 1809 (1995).*

[*15] Lastly, defendant contends that the court erred in instructing the jury that the government must prove its case "beyond a reasonable doubt" without defining or explaining "reasonable doubt." As defense counsel expressly agreed to the charge both before and after it was given, we review for plain error only. Having examined the record, we conclude that the instruction "adequately apprised the jury of the proper burden of proof." *See United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009, 100 L. Ed. 2d 202, 108 S. Ct. 1739 (1988).*

Affirmed.

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[7] *See also United States v. Washington, 227 U.S. App. D.C. 184, 705 F.2d 489, 498 (D.C. Cir. 1983)* (exclusion of defendant from individual voir dire was harmless error under *Rule 43* where she was present in the courtroom the entire time, a limited portion of the voir dire was conducted at the bench where she was represented by counsel, she had time to confer with counsel about jurors' responses at the bench, and substantial evidence supported a finding of guilt); *United States v. Alessandrello, 637 F.2d 131, 139-143 (3d Cir. 1980), cert. denied, **451 U.S. 949, 68 L. Ed. 2d 334, 101 S. Ct. 2031 (1981)***; *United States v. Dioguardi, 428 F.2d 1033, 1039-1040* (2d Cir.), *cert. denied, **400 U.S. 825, 27 L. Ed. 2d 54, 91 S. Ct. 50 (1970)***; *cf. Gordon, 829 F.2d at 127-129* (distinguishing the above cases and holding that exclusion of defendant in custody from entire jury selection process was not harmless error, where he would have sought to challenge a juror with personal and family connections to law enforcement, and jury first saw defendant midway through the first day of trial).

United States v. Onafowokan

United States Court of Appeals for the District of Columbia Circuit

April 16, 1987, Filed

No. 86-3043

Reporter
1987 U.S. App. LEXIS 9193 *; 815 F.2d 724

United States of America Appellee v. Olushola O. Onafowokan Appellant

Notice: UNPUBLISHED DISPOSITION - NOT TO BE CITED AS PRECEDENT. SEE LOCAL RULE 8(f) D.C. CIRCUIT.

Prior History: Appeal from the United States District Court for the District of Columbia, Criminal No. 86-00092-01.

Opinion

BEFORE: SILBERMAN, BUCKLEY and D. H. GINSBURG, Circuit Judges.

ORDER

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. [1] While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the trial court is hereby affirmed. Because Appellant acquiesced to the jury instructions he now challenges on appeal, we may only review the instructions to determine whether they constitute plain error. It is clear that any arguable insufficiency in the instructions did not "seriously affect the fairness, integrity, or public reputation of the judicial proceedings," *United States v. Atkinson, 297 U.S. 157, 160 (1936)*, **[*2]** so as to rise to the level of plain error under *Fed. R. Crim. P. 52(b)*. *See United States v. Burkley, 591 F.2d 903, 920 (D.C. Cir. 1978)* (evidence of defendant's involvement in other drug transaction admissible to show common scheme or plan). We also hold that with respect to the remarks by a government

[1] Appellant was represented on appeal by court appointed student counsel from the Georgetown University Law Center's Appellate Litigation Clinical Program. We thank them for their service to the Court.

witness, which Appellant challenges, the trial judge's instruction adequately cured any prejudice. It is

FURTHER ORDERED, by this Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam.
