No. 19-50231

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NIKISHNA POLEQUAPTEWA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California
The Honorable Cormac J. Carney, Presiding
No. CR-16-00036-CJC

Appellant's Further Excerpts of Record

[Single Volume]

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NIKISHNA POLEQUAPTEWA, Defendant.	No. SA CR 16-00036-CJC GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTIONS *IN LIMINE* TO EXCLUDE: (1) EVIDENCE OF THE MACBOOK PRO LAPTOP; (2) EVIDENCE OF DEFENDANT'S TERMINATION FROM UCI; AND (3) ALL EXPERT TESTIMONY AND/OR REPORTS; DECLARATION OF VIBHAV MITTAL Hearing Date: June 11, 2018 Hearing Time: 9:00 a.m. Location: Courtroom of the Hon. Cormac J. Carney

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorneys Vibhav Mittal and Bradley E. Marrett, hereby files its Opposition To Defendant's Motions In Limine To Exclude: (1) Evidence Of The Macbook Pro Laptop;

(2) Evidence Of Defendant's Termination From UCI; and (3) All Expert Testimony And/Or Reports.

This opposition is based upon the attached memorandum of points and authorities, Declaration of Vibhav Mittal, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: June 9, 2018

Respectfully submitted,

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/s/
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On Friday, June 8, 2018, defendant Nikishna Polequaptewa ("defendant") filed two motions in limine. (CR 55; CR 56.) In the first motion, defendant moves to exclude: (1) evidence of a Macbook Pro laptop owned by the University of California at Irvine ("UCI") and (2) evidence of defendant's termination from employment with UCI prior to his employment with Blue Stone Strategy Group ("Blue Stone"). (CR 55.) In the second motion, defendant moves to exclude all expert testimony and/or reports. (CR 56.) Each motion is addressed in turn. For the reasons stated below, both motions should be denied.

II. EVIDENCE SEIZED FROM THE MACBOOK PRO LAPTOP IS RELEVANT TO THE CHARGE

Defendant contends that evidence FBI Special Agent Todd Munoz seized from the MacBook Pro laptop is not relevant or should be excluded under Fed. R. Evid. 403 because "[a]ny actions that are subject of the indictment were done by Defendant on his personal cell phone." (CR 55 at 5.) This argument goes too far.

Evidence from the MacBook Pro laptop is inextricably intertwined with the offense charged.[1] As the Court is aware, the government

[1] Alternatively, the evidence is properly admitted under Fed. R. Evid. 404(b) and the government has provided ample notice of its intent to use this evidence with discovery letters dating back to June 2016 (where the government produced items seized from the laptop and made the laptop available to defendant). Moreover, the parties previously litigated a motion to suppress related to the laptop and the government summarized in its opposition items seized from the laptop (CR 36 at 9), further demonstrating the government's intent to use evidence seized from the laptop. Finally, the government's exhibit list (CR 50 at 5-6) identifies items seized from the laptop that it intends to introduce. As a courtesy, on June 6, 2018, the government has provided these exhibits with the exhibit numbers marked to defense counsel.

must prove that defendant "knowingly caused the transmission of a program, a code, a command, or information to a [protected] computer," "intentionally cause[d] damage without authorization," and "loss to 1 or more persons during any 1-year period (and . . . loss resulting from a related course of conduct affecting 1 or more other protected computers) aggregating at least $5,000 in value." 18 U.S.C. §§ 1030(a)(5)(A), (c)(4)(A)(i)(I). That is precisely what the evidence seized from the MacBook Pro laptop shows. Namely, exhibits 31 to 52 (CR 53 at 3-6) are the evidence seized from the laptop that the government currently intends to admit at trial via SA Munoz. Those exhibits are, among other things:

- system files showing that the laptop was used to connect to the Blue Stone Synology server and remote accounts during the relevant time period;
- search history showing the user of the Macbook Pro laptop had conducted internet searches related to file deletions for a Synology server and MailChimp account; and
- emails showing defendant had requested IT administrator access for Blue Stone on November 17, 2014 and November 18, 2014 (despite being re-assigned from IT) and exported information from Blue Stone's MailChimp account.

The evidence seized from the MacBook Pro laptop is highly probative evidence related to the intent and loss requirements for the charged crime.

Defendant also argues that "[t]he fact that Defendant had in his possession the Macbook Pro Laptop in Florida is irrelevant and will only serve to confuse and mislead the jury and waste judicial time and resources." (CR 55 at 5.) Defendant's possession of the laptop

in Florida is relevant. It demonstrates that defendant was the person in front of the laptop screen when the acts described above were executed.

Defendant also claims that the seizure in Florida "will create the appearance that the Macbook Pro Laptop was somehow Blue Stone's property." (CR 55 at 5.) This is wrong. The government will introduce the UCI receipt showing that defendant bought it while working at UCI (Exhibit 20). There will be no such appearance.

To date, defendant has not agreed to meet and confer with the government on any evidentiary and factual stipulations. The government has proposed various stipulations on undisputed issues. However, the government would agree to a stipulation that the MacBook Pro laptop was purchased using a research account of a UCI professor while defendant worked there and was, in fact, UCI's property. In any event, the evidence may show that Blue Stone employees assumed that defendant was using a Blue Stone laptop in November 2014, but the receipt (Exhibit 20) and the government's position will be that the laptop was purchased when defendant was employed with UCI.

III. EVIDENCE OF DEFENDANT'S TERMINATION FROM UCI MAY BE RELEVANT

The government recognizes the sensitivity related to the admission of evidence from a sexual harassment-related termination. However, this does not preclude all such evidence. As noted in the government's pending and currently unaddressed to motion in limine, the government notes that defendant falsely stated to Blue Stone when he was being considered for employment in March and April 2014 that he was employed with UCI. (CR 43 at 6). Moreover, defendant made false statements during the UCI investigation. (CR 43 at 5.)

Accordingly, the government should be permitted to introduce that evidence under Rule 607 and 608(b) if defendant opens the door.

That said, the government would only introduce evidence related to the termination if defendant elects to open the door, as permitted under Fed. R. Evid. 404(a), 607, and 608(b). Defendant certainly cannot have it both ways. More importantly, the rules recognize that defendant cannot paint a false picture of who he is to the jury. "[W]hen the defendant 'opens the door' to testimony about an issue by raising it for the first time himself, he cannot complain about subsequent government inquiry into that issue." United States v. Mendoza-Prado, 314 F.3d 1099, 1105 (9th Cir. 2002) (quoting United States v. Hegwood, 977 F.2d 492, 496 (9th Cir. 1992)). Specifically, "a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it." Fed. R. Evid. 404(a)(2)(A) (emphasis added).[2]

In Mendoza-Prado, the Ninth Circuit affirmed the admission of rebuttal character evidence (a transcript where defendant bragged about committing many uncharged crimes) where defendant and a character witness testified, among other things, that defendant was a family man and worked hard (i.e., he was too busy to get involved with drugs). The Ninth Circuit has recognized that the ball is in

[2] The government also filed a motion in limine to ensure defendant's testimony and case focus (including cross-examination of government witnesses) on "pertinent trait[s]" and not merely jury nullification. (CR 43 at 11-12.) The government has requested a proffer from defendant of various witnesses he identified (John Kindt, Chuck Thompson, Gina Arvizu-Sanchez, Alisha Dishman, Rose June Clown, and Melinda Andrews) because they appear irrelevant to the government. To date, the government has not received a response from defendant. There is a concern that the defense case may be made up of improper nullification evidence.

defendant's court about the government's ability to introduce character evidence when it stated the following:

> Unlike character witnesses, who must restrict their direct testimony to appraisals of the defendant's reputation, a defendant-witness may cite specific instances of conduct as proof that he possesses a relevant character trait such as peaceableness. And "(o)nce a witness (especially a defendant-witness) testifies as to any specific fact on direct testimony, the trial judge has broad discretion to admit extrinsic evidence tending to contradict the specific statement, even if such statement concerns a collateral matter in the case." United States v. Benedetto, 571 F.2d 1246, 1250 (2d Cir. 1978). Professor McCormick's treatise states that where the defendant implicitly invites the jury to infer something about his character from his description of his background and conduct, he opens the door to cross-examination on all reasonably related matters:
>
> "Ordinarily, when courts speak of an accused's putting his character in issue, it is assumed that the means by which he does so is introducing witnesses who testify to his good character in terms of reputation, or, more currently, opinion. Note should be taken, however, that by relating a personal history supportive of good character, a defendant may be opening the door to rebuttal evidence along the same line."
>
> McCormick's Handbook of the Law of Evidence s 191, at 59 (2d ed. Supp. Cleary et al. 1978).
>
> Because character testimony alone may be enough to raise a reasonable doubt, defendants traditionally have been afforded considerable latitude when they testify about their personal histories. Sometimes they commit tactical blunders. We are cognizant of the limitations inherent in the use of literature as proof of character, and we do not applaud the strategy employed by Giese and his attorney. Nor do we bestow our imprimatur on the concept of trial by books. Nevertheless, the question before this court is not whether we think books are a persuasive form of character evidence; the issue is whether the government had a right to respond once the defendant had, of his own volition, chosen that method of proving he was a peaceable, law-abiding individual.

United States v. Giese, 597 F.2d 1170, 1190-91 (9th Cir. 1979)

The government has limited discovery to date regarding the nature of the sexual harassment that resulted in defendant's termination from UCI. However, there is public reporting of his

termination. Bobby Lee, Former UC Irvine employee Nikishna Polequaptewa found to have violated UC Policy on Sexual Harassment, The Daily Californian, http://www.dailycal.org/2017/05/11/former-uc-irvine-employee-nikishna-polequaptewa-found-violated-uc-policy-sexual-harassment/ (last visited June 9, 2018). The incident described in the article is certainly troubling but not on the scale of the celebrity cases cited to in defendant's motion (CR 55 at 7). Defendant and counsel are privy to more details about the termination as it is the government's understanding that counsel represented defendant in the administrative proceedings before UCI. That said, defendant's arguments regarding unfair prejudice are overstated. Regardless, defendant should be not be permitted to falsely suggest facts about his pertinent traits without the government able to respond.

IV. DEFENDANT'S TIMELINESS OBJECTION FAILS TO DEMONSTRATE ANY PREJUDICE OR UNTIMELY DISCLOSURE

At the outset, the government does not believe that the forensic examiners at issue require notice under Fed. R. Crim. Proc. 16(a)(1)(G). These examiners will describe, among other things, how they extracted data from Blue Stone's Mac Pro desktop and the UCI MacBook Pro laptop (which was addressed earlier) as well as their findings.

Defendant's motion fails to explain how he has been prejudiced. It is undisputed that the MacPro desktop was wiped. (CR 56 at 3-4 ("Defendant enabled a two-factor authentication to prevent further unlawful access, which allegedly caused a 'wipe command' to be issued that allegedly caused the deletion of files from a desktop computer at Blue Stone.").) Moreover, defendant has been aware of the data

extracted from the MacBook Pro laptop and the lack of data in the MacPro desktop since June 2016 and October 2017.

With some specificity as to what defendant needs to do, the government may have no objection to a brief continuance to permit defendant's investigation. However, the motion fails to demonstrate what defendant would like to do now that he has not already done. According to defense counsel, defendant's expert has already reviewed the discovery and analyzed it. In addition, defendant informed the Court and the government that he was prepared to proceed to trial on May 26, 2018. Ultimately, there has been no showing of prejudice in defendant's motion.

Defendant's objection to the government's "expert" disclosures misstates the record. Defendant's objection should be overruled because the government's disclosures (to the extent required) were timely. First, the government disclosed with forensic reports in June 2016 and October 2017 that: (1) Blue Stone's Mac Pro desktop was wiped by an Apple command that defendant executed and (2) the items seized from the MacBook Pro laptop. (Mittal Decl. ¶ 2.) That discovery clearly demonstrated what the government's forensic analysis was. The government also made the MacPro desktop and MacBook Pro laptop available for defendant's review in June 2016. (Id.) Second, as the parties informed the Court's courtroom deputy clerk, the parties engaged in plea negotiations following the denial of the motion to suppress in May 2018 and had reached an agreement in principle even requesting change of plea dates from the Court's clerk. (Id.) Then, on Saturday, May 26, 2018, defense counsel informed the Court's clerk that there would not be a resolution and "the defense [was] prepared to proceed to trial." (Id.) On May 28,

2018 (Memorial Day), defense counsel provided a resume of Neil Broom and stated in an email that there was no report but his understanding was that Mr. Broom has reviewed the discovery and will testify as to "alternative explanations for the supposed deletion of material." (Id.) In that email, counsel also stated that he would get the government more "ASAP." (Id.) The government requested additional notice that day from defendant regarding Neil Broom and notified defendant that it would have expert disclosures that week. (Id.) On June 1, 2018, to the extent it was required, the government provided formal notice with a summary report regarding an examiner that extracted data from the wiped MacPro desktop, and, on June 4, 2018, the government provided formal notice with a summary report regarding an examiner that extracted data from the MacBook Pro laptop. (Id.) In these notices, the government requested reciprocal notice as to Mr. Broom's testimony. (Id.) The government received no response. (Id.) Then, on June 8, 2018, the government advised defendant that it intended to move orally to exclude the testimony of Neil Broom at the June 11, 2018, status conference and requested to know if defendant intended to call him or whether defendant would plan to provide the required notice on June 8, 2018. (Id.) Defense counsel informed the government that he had been out of the office all week on other matters and his associate just saw the government's expert notice on June 8, 2018. (Id.) Later in the day, defense counsel's associate provided a summary of Mr. Broom's testimony.[3] (Id.) The government attempted to meet and confer with defendant on these

[3] The government is still evaluating whether the disclosure is sufficient. Oddly, defendant is moving to exclude his own expert.

issues on June 8, 2018, but the government got no response from its requests to meet and confer on these issues. (Id.)

With the government's discovery in June 2016 and October 2017, defendant has had sufficient notice to investigate the government's forensic analysis. Moreover, the government made both digital devices available to defendant in June 2016. That said, the government only received a request for expert disclosures on May 28, 2018, to the extent defendant's email was a request. Fed. R. Crim. P. 16(a)(1)(G)("At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial." (emphasis added)). Defendant never objected to getting the expert disclosures after May 28, 2018, until June 8, 2018. Had counsel asked the government about the status of its disclosures, the government would have provided an update. Moreover, the government has been working closely with counsel's associate on trial issues (including jury instructions and other pretrial filings) and never in those communications has defense counsel raised a concern about the disclosures. Given the record, a claim of untimely notice is unsupported.

V. CONCLUSION

For the foregoing reasons, defendant's motions in limine should be denied.

DECLARATION OF VIBHAV MITTAL

I, Vibhav Mittal, declare as follows:

1. I am one of the attorneys assigned to represent the United States in this matter.

2. The government disclosed forensic reports in June 2016 and October 2017 related to Blue Stone's Mac Pro desktop and the items seized from the MacBook Pro laptop. The government also made the MacPro desktop and MacBook Pro laptop available for defendant's review in June 2016. The parties informed the Court's courtroom deputy clerk that they were engaged in plea negotiations following the denial of the motion to suppress in May 2018 and had reached an agreement in principle even requesting change of plea dates from the Court's clerk. Then, on Saturday, May 26, 2018, defense counsel informed the Court's clerk that there would not be a resolution and "the defense is prepared to proceed to trial." On May 28, 2018, defense counsel provided me a resume of Neil Broom and stated in an email that there was no report but his understanding was that Mr. Broom has reviewed the discovery and will testify as to "alternative explanations for the supposed deletion of material." In that email, counsel also stated that he would get the government more "ASAP." The government requested additional notice that day from defendant regarding Neil Broom and notified defendant that it would have expert disclosures that week. On June 1, 2018, to the extent it was required, the government provided formal notice with a summary report regarding an examiner that extracted data from the wiped MacPro desktop, and, on June 4, 2018, the government provided formal notice with a summary report regarding an examiner that extracted data from the MacBook Pro laptop. In these notices, the government requested

reciprocal notice as to Mr. Broom's testimony. The government received no response. Then, on June 8, 2018, the government advised defendant in an email that it intended to move orally to exclude the testimony of Neil Broom at the June 11, 2018, status conference and requested to know if defendant intended to call him or whether defendant would plan to provide the required notice on June 8, 2018. In response, defense counsel informed the government that he had been out of the office all week on other matters and his associate just saw the government's expert notice on June 8, 2018. Later in the day, defense counsel's associate provided a summary of Mr. Broom's testimony. The government attempted to meet and confer with defendant on these issues on June 8, 2018, but the government got no response from its requests to meet and confer on these issues.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed at Santa Ana, California, on June 9, 2018.

VIBHAV MITTAL