UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

No. 2:23-cr-7

v.

Hon. Robert J. Jonker
United States District Judge

NATHAN WEEDEN,

Defendant.
_____/

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT AND FOR OTHER RELIEF

The indictment against Defendant Weeden alleges that he spray painted swastikas and other white supremacist symbols on Temple Jacob, a synagogue in this District, during his participation in "Operation Kristallnacht." He seeks dismissal of Count 1, which charges him with conspiring to injure, oppress, threaten, or intimidate non-white and Jewish citizens in the exercise of their constitutional right to hold property.

The defendant says Count 1 is insufficient because he only intended to promote his Nazi organization, and any interference with Jewish property rights was just incidental. While the indictment explains that the conspirators *also* wanted "Operation Kristallnacht" to promote their Nazi organization, that does not erase the clearly stated charge that they intended to deprive Jewish citizens of their federally protected rights. Because the indictment tracks the language of the statute and places him squarely on notice of the crime alleged, it is sufficient under

Fed. R. Crim. P. 7(c) and Supreme Court precedent. Weeden's alternative request that the Court order production of grand jury materials should also be denied because it is unsupported by any showing of particularized need.

BACKGROUND

Count 1 of the indictment charges a conspiracy against rights, in violation of 18 U.S.C. § 241. That statute prohibits a person from conspiring "to injure, oppress, threaten, or intimidate any person in any State . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Because the statute prohibits interference with *any* right secured by the Constitution or federal law, the government must identify in its indictment *which* underlying right has allegedly been violated. *United States v. Kozminski*, 487 U.S. 931, 940-41 (1988). Here, as stated clearly in the indictment, the applicable underlying right is the right, protected by 42 U.S.C. § 1982, to "hold . . . real and personal property" in the same manner "as is enjoyed by white citizens[.]" *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (holding that Section 1982 "forbids both official and private racially discriminatory interference with property rights.").[1]

[1] A section 241 charge incorporates the elements not only of that statute but also of the underlying right at issue in the case. Thus, when the underlying right protects individuals only against state action (such as is the Fourth Amendment), then a conspiracy to violate that right must also involve state action; however where, as here, the federally recognized right is one that protects against the actions of private citizens, § 241 has no state action requirement. *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971) ("It has long been settled that 18 U.S.C. § 241 . . . reaches wholly private conspiracies and is constitutional.") (collecting cases); *Memphis v. Greene*, 451 U.S. 100, 120, (1981) ("squarely decided . . . that § 1982 is directly applicable to private parties.")

Thus, to obtain a conviction under § 241, the government must prove that the defendant participated in a conspiracy, the purpose of which was to injure, oppress, threaten, or intimidate a person or persons in the free exercise or enjoyment of a federally-protected right (here, the right to hold real and personal property free from discrimination), and that he knowingly joined that conspiracy, intending to achieve its purpose. 18 U.S.C. § 241; 42 U.S.C § 1982; *see also United States v. Epley*, 52 F.3d 571, 575-76 (6th Cir. 1995) (in a Section 241 case, discussing elements of a knowing agreement to injure another in their exercise of a protected right, and "[s]pecific intent to deprive another of civil rights").

The indictment exactly tracks that language, alleging that "from on or about September 15, 2019, and continuing through on or about September 25, 2019 . . . Weeden knowingly and willfully conspired and agreed with R.T., Y.B., and other persons known and unknown to the grand jury, to injure, oppress, threaten, and intimidate non-white and Jewish citizens of the United States, including members and guests of the Temple Jacob Synagogue, in the free exercise and enjoyment of the right, secured by the Constitution and laws of the United States, to hold (i.e., to use) real and personal property in the same manner as that right is enjoyed by white citizens, as guaranteed by Title 42, United States Code, Section 1982." (R.1: PageID.1).

The indictment goes on to explain *how* Weeden committed the crime; in particular "by damaging and vandalizing property associated with non-white and Jewish citizens, including members and guests of the Temple Jacob Synagogue."

(R.1: PageID.2). It also explains that part of the conspirators' *motive* was "to show the strength and cohesion of 'The Base,' a multi-state white supremacist organization to which Weeden and his co-conspirators belonged." (R1: PageID.2). Specifically, the indictment alleges the plot was "a coordinated effort to damage and vandalize non-white and Jewish owned or associated properties, in what they called 'Operation Kristallnacht." (R.1: PageID.2-3).

ARGUMENT

I. The Court Should Deny the Defendant's Motion to Dismiss

A. Legal Standard Governing the Sufficiency of an Indictment

An indictment need only provide "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c). An indictment is sufficient if it accomplishes two purposes: "first, [it] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and second, [it] enables [the defendant] to plead an acquittal or conviction in bar of future prosecution for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also United States v. Landham*, 251 F.3d 1072, 1079 (6th Cir. 2001). "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." *Hamling*, 418 U.S. at 117-18; *Landham*, 251 F.3d at 1079. A facially valid indictment "is

enough to call for trial of the charge on the merits." *United States v. Short*, 671 F.2d 178, 182 (6th Cir. 1982) (citing *Costello v. United States*, 350 U.S. 359, 363 (1956)).

Because Section 241 incorporates *all* federally protected rights, a § 241 indictment must also put the defendant on notice of which right he is accused of violating. *United States v. Rosser*, No. 22-3887, 2023 WL 4080095, at *2 (6th Cir. June 20, 2023) (rejecting a Section 241 sufficiency of the indictment challenge where the government clearly articulated the underlying right). Ultimately, the language of the statute, together with the accompanying "statement of the facts and circumstances" must "inform the accused of the specific offense . . . with which he is charged." *Hamling*, 418 U.S. at 117-18; *Landham*, 251 F.3d at 1079.

The validity of an indictment is an issue of law, not fact. *See United States v. Samson*, 371 U.S. 75, 78-79 (1962). A district court ruling on a motion to dismiss does not evaluate the evidence on which the indictment is based. *See Landham*, 251 F.3d at 1080 (citing *Costello*, 350 U.S. at 362-63). Allegations in an indictment are assumed to be true and are viewed in the light most favorable to the government, *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952), and a court is limited to reviewing the four corners of the indictment. *See United States v. Ferguson*, 681 F.3d 826, 831 (6th Cir. 2012) (citing cases). Courts "routinely rebuff efforts to use a motion to dismiss as a way to test the sufficiency of the evidence behind an indictment's allegations." *United States v. Guerrier*, 669 F.3d 1, 4 (1st Cir. 2011) (collecting cases).

B. Application

The defendant argues that the indictment is insufficient for failure to state an offense because, he claims, it alleges only incidental interference with property rights (R.44: PageID.96-100); relatedly, he claims that the government has failed to allege a sufficient factual basis to support the charge. (R.44: PageID.100-03). These arguments mischaracterize the actual language of the indictment, which properly sets forth the statutory elements of Section 241 and clearly and unambiguously identifies the underlying property right incorporated into that offense. Additionally, the indictment sets forth ample factual allegations to put the defendant on notice of the crime alleged. The defendant can of course try to convince the jury that he did not intend to threaten or intimidate any Jewish or non-white citizens, but only wanted to boost the popularity of his Nazi organization. That argument, however, is a matter for the trier of fact, not an argument for dismissal of the indictment.

1. The Indictment Properly Alleges Specific Intent to Interfere with Property Rights

The defendant correctly asserts that the government must prove that the specific intent of the conspiracy was to interfere with the identified underlying right (R.44; PageID.96). That is precisely what the indictment alleges. Contrary to the defendant's claim, the indictment does not merely charge the defendant with a conspiracy to promote The Base; rather, Count One expressly alleges that the defendant "knowingly and willfully conspired and agreed . . . to injure, oppress, threaten, and intimidate [persons] . . . in the free exercise and enjoyment of the right . . . to hold (i.e., to use) real and personal property . . ." (R.1: PageID.1). Then

again under the Purpose of the Conspiracy portion, the indictment explicitly states that "a plan and purpose of the conspiracy was to injure, oppress, threaten, and intimidate persons in their right to hold (i.e., to use) real and personal property by damaging and vandalizing property . . . " (R.1: PageID.2). This language explicitly puts the defendant on notice that he is accused of doing more than incidentally interfering with property rights.

The defendant tacitly admits the sufficiency of the indictment when he acknowledges that it "tracks the statutes and case law establishing the contours of 241 and 1982[,]" (R.44; PageID.98); and that it "tracks the requirements of a charge under 241, initial[ly] asserting that Mr. Weeden deprived protected groups of their rights under 1982." (R.44; PageID.100). Nevertheless, the defendant claims, somewhat confusingly, that "even if The Base intended to intimidate Jewish people, members of synagogues, or other racial minorities, that is not enough." (R.44: PageID. 101). The defendant is wrong. Although the question of whether the defendant and his coconspirators did in fact intend to intimidate Jewish people is an issue of fact for the jury to decide at trial, it is clear as a matter of law that if the jury were to find that the defendant did what he is alleged to have done—conspired with others for the purpose of intimidating (*i.e.*, "injur[ing], oppress[ing], threaten[ing], *or intimidate[ing]*") Jewish people in the enjoyment of their federally protected property rights—that would satisfy the requirements of the statute and therefore be "enough" to constitute a violation of Section 241.

2. The Indictment is Not Rendered Invalid By the Inclusion of Allegations Regarding the Defendant's Motive

Even while acknowledging that the indictment tracks the language of the statute, the defendant suggests that it is nevertheless insufficient because it *also* alleges that the defendant wanted "to show the strength and cohesion of 'The Base.'" (R.1: Page ID.2); (R.44: PageID.100-01). The defendant essentially claims that even though the indictment *does* specifically allege an intent to violate a federally protected right, that allegation is undone by a description of his motives. The defendant cites no case law in support of his argument, which would lead to absurd results. Under his theory, Klansmen could try to drive a Black family out of the community by burning a cross in front their home, so long as they also hoped to boost recruiting for the KKK.

Of course, there has never been any requirement that a defendant have only one goal in a conspiracy. *Anderson*, 417 U.S. at 226 ("A single conspiracy may have several purposes, but if one of them—whether primary or secondary—be the violation of a federal law, the conspiracy is unlawful under federal law."); *United States v. Ferrara*, 788 F. App'x 748, 755 (2d Cir. 2019) (holding that "a conspiracy can have more than one objective."); *see also Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739 (2020) ("[A] defendant cannot avoid liability just by citing some other factor that contributed to its challenged [] decision"; noting that "[o]ften, events have more than one but-for cause.") If the proscribed motivation is the proverbial straw that broke the camel's back, that is sufficient. *Burrage v. United States*, 571 U.S. 204, 211 (2014). In this case, the intent that the government has alleged—to

interfere with the property rights of Jews and nonwhites—is in no way undermined by the additional allegation that one of the reasons the conspirators wanted to interfere with those property rights was to promote the anti-Jewish, white-supremacy organization to which they belonged.

In support of his motion, Weeden cites the inapposite *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), where the plaintiff sued protestors blocking access to an abortion clinic. That case is distinguishable both factually and legally: First, the plaintiffs in *Bray* alleged the defendants interfered with patients' right to interstate travel, rather than with their access to the clinic. The Court found the protestors' efforts had only an incidental effect on the right to interstate travel, and that the protesters therefore had not engaged in a conspiracy "*at least in part* for the very purpose of" interfering with that right. *Bray*, 506 U.S. at 276 (emphasis added). In other words, the underlying right and the motive were not a match. Here, the conduct alleged (e.g. defacing a synagogue) was aimed directly at interfering with the right charged in the indictment.

Second, *Bray* stemmed from a civil suit, and says nothing about the sufficiency of a criminal indictment. It does not hold that a defendant must only have one purpose for violating another's constitutional rights. In any event, the indictment against Weeden *does* allege that he acted with the specific intent to interfere with his victims' federally protected property rights, as required under Section 241.

The defendant also misconstrues the statute's intent requirement by insinuating that the defendant must have specifically intended to "intimidate members from gathering at the synagogue again, or to make them less inclined to 'use' that property in the future." (R.44: PageID.101). But Section 241 contains no such limitation; it prohibits all conspiracies intended to "injure, oppress, threaten, or intimidate" persons in their right to hold property. Whether the conduct that the defendant and his coconspirators agreed to engage in (including defacing synagogues with swastikas, among other acts) constitutes intimidation of Jewish persons in the exercise of their property rights is a question for the jury to answer at trial.[2] At this stage, it is sufficient that the indictment alleges that the conspirators intended to achieve that objective; it is immaterial whether they also hoped to prevent people from coming back to their synagogue, or to get news coverage in order to spread fear to a wider audience.

Contrary to the defendant's allegations, the conspiracy's additional goal of showing the strength of The Base, a white-supremacist organization, by targeting Jewish property rights in no way negates the required *mens rea* for a conviction. More importantly at this pretrial stage, it does nothing to undercut the sufficiency of the indictment, which expressly alleges that "Operation Kristallnacht" conspiracy was aimed at depriving Jewish persons of their property rights.[3]

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[2] *See e.g.*, *United States v. Three Juveniles,* 886 F. Supp. 934, 943 (D. Mass. 1995) ("Defendants' use of swastikas and the equally threatening message "All Jews Must Die" on the temple wall at Temple Young Israel is the most persuasive evidence of defendants' intent to *intimidate* Jews into leaving the area.").

[3] The defendant ironically appears to be arguing that no reasonable jury could conclude the intent of "Operation Kristallnacht" was to interfere with the property rights of Jews. (ECF No. 44; PageID.102). The historical "Kristallnacht" ("night of broken glass") involved widespread property

In sum, the detailed language of the indictment entirely meets the requirements set forth in *Hamling* and Fed. R. Crim. P. 7(c). The facts and circumstances set forth in the indictment "fairly inform [the] defendant of the charge against which he must defend." *Landham*, 251 F.3d at 1079; *Hamling,* 418 U.S. at 117. Limiting its review to the four corners of the indictment, as it must, *Ferguson*, 681 F.3d at 831, and assuming the allegations to be true and viewed in the light most favorable to the government, *Boyce Motor Lines, Inc.*, 342 U.S. at 343 n.16, this Court should deny Weeden's motion to dismiss.

II. The Court Should Deny Weeden's Request for Grand Jury Transcripts

The defendant argues in the alternative that if the Court does not dismiss Count 1, it should nonetheless order the production of transcripts of grand jury proceedings, including transcripts of the legal presentation by prosecutors to the grand jury. The defendant provides no legitimate basis for this extraordinary request.

A. Legal Standard Governing Requests for Grand Jury Materials

Grand jury proceedings are secret, and this secrecy may be pierced only upon a showing by the defendant of a "particularized need" for pre-trial disclosure of a grand jury transcript. *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958);

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destruction targeting Jewish synagogues, homes, and businesses in Germany on the eve of the Holocaust. While the perpetrators may also have hoped to show the strength and cohesion of the Nazi party, they obviously intended to injure, oppress, threaten and intimidate Jewish property holders. The indictment simply observes that Weeden was channeling the same motivation. *See United States v. Magleby*, 241 F.3d 1306, 1313 (10th Cir. 2001) (". . . a burning cross, like a swastika, [is] a universal symbol of racial hatred.")

United States v. Short, 671 F.2d 178, 186-87 (6th Cir. 1982) (district court abused its discretion by ordering production of grand jury transcripts in absence of finding particularized need); *see also* Fed. R. Crim. P. 6(e). This "principle of grand jury secrecy has long been deeply ingrained in American legal jurisprudence[,]" and is "codifie[d]" in Rule 6(e)(2) to "prohibit[] the disclosure of any matters occurring before the grand jury." *In re Grand Jury* 89-4-72, 932 F.2d 481, 483 (6th Cir. 1991). What transpires during a grand jury investigation, including "the prosecutor's advice and recommendation on who[m] to indict and for what," are secret, and "free from scrutiny by the public, the press, the court, and *even the defendant and defense counsel*." *United States v. Inman*, Order Denying Motion to Dismiss, 1:19-cr-117-RJJ (ECF No. 34, PageID: 216) (W.D.MI, 2019) (emphasis added), quoting 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, CRIMINAL: FEDERAL PRACTICE & PROCEDURE § 106 (4th ed. 2008).

In order to pierce grand jury secrecy, a party seeking disclosure "must show a 'compelling necessity for the material—that is, that (a) the material sought will prevent a possible injustice, (b) the need for disclosure outweighs the need for secrecy, and (c) the request is narrowly tailored to provide only material so needed.'" *Inman*, 1:19-cr-117-RJJ (ECF No. 34, PageID: 217), quoting *FDIC v. Ernst & Whinney*, 921 F.2d 83, 86 (6th Cir. 1990). This must be shown with particularity. *United States v. Kirkpatrick*, 172 F.3d 50 (6th Cir. 1998).

Grand jury proceedings are accorded "[a] presumption of regularity," *United States v. Azad*, 809 F.2d 291, 295 (6th Cir.1986), and mere suspicion or allegations

of wrongdoing are insufficient to justify piercing grand jury secrecy. *Id.* ("[A]llegations that the government improperly tainted the grand jury proceedings fail to meet the rigorous standard that must be met in order to fall within one of the exceptions to the general rule of secrecy."); *United States v. Malinga*, No. CRIM. 04-80372, 2005 WL 517966, at *1 (E.D. Mich. Mar. 2, 2005) ("mere suspicion that the grand jury may not have been properly instructed with respect to [a] legal definition ... is insufficient to establish [a sufficient reason] to disclosure of grand jury materials.") (collecting cases); *United States v. Arrick*, No. 18-3479, 2018 WL 8344588, at *1 (6th Cir. Nov. 28, 2018) ("Rule 6(e) forbids a 'fishing expedition.'"); *Morris v. United States of Am.*, No. 1:11-CR-149-01, 2018 WL 11306071, at *3 (W.D. Mich. Nov. 15, 2018) (rejecting the defendant's "fishing expedition," the Court stated that "mere speculation that something beneficial to [the defendant's] claim might be found in a grand jury transcript will not overcome the policy of maintaining secrecy).[4]

B. Weeden Has Not Demonstrated a Particularized Need for Protected Grand Jury Material.

None of the defendant's arguments shows a "compelling necessity for the material" he seeks, as he has failed to establish any one of the three *Ernst & Whinney* prongs. The defendant bases his extraordinary request for transcripts of grand jury proceedings on his mistaken legal arguments discussed and rebutted in Section II, above; and on an inadvertent and quickly corrected misstatement by the

[4] Even "[w]here a particularized need for disclosure has been demonstrated," a court still maintains "wide discretion to decide whether it is the need for secrecy that predominates, or the need for disclosure." *In re Grand Jury Proceedings*, 841 F.2d 1264, 1268-69 (6th Cir. 1988).

government, during a status conference, about the federal right underpinning the conspiracy charge. After initially identifying the right underlying Count 1 as a right to practice religion, the government corrected this misstatement, and clarified that the right involved in Count 1 is the right to hold property. The government noted that the religious-practice-related right it had mentioned referred to Count Two, which alleges that the defendant intentionally defaced, damaged, and destroyed religious real property because of the race and ethnic characteristics of any individual associated with that religious property, protected under 18 USC § 247(c).

The plain language of the indictment the grand jury returned makes it clear that the underlying right the conspirators intended to interfere with is the right to hold property. Assuming as we must that the grand jurors read the indictment they returned, the true bill facially establishes they considered the correct underlying right.

CONCLUSION

The indictment in this case meets the requirements set forth in *Hamling*, as it tracks the language of the statute and puts the defendant on notice of the charges against him. The defendant has also failed to show any particularized need for transcripts of proceedings in the grand jury.

WHEREFORE, the United States respectfully requests that this Court deny Weeden's motion in its entirety.

Respectfully submitted,

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Dated: November 22, 2023

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