UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-5404

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ROBERT ALPHONSO BROWN,

Defendant - Appellant,

ALL AFRICAN PEOPLES' REVOLUTIONARY PARTY; AMERICAN INDIAN MOVEMENT/INTERNATIONAL INDIAN TREATY COUNCIL; EL PORTIDO LA RAZA UNIDA; NEW AFRIKAN PEOPLES' ORGANIZATION; NATIONAL BLACK UNITED FRONT; REPUBLIC OF NEW AFRIKA; PISCATAWAY INDIAN NATION; CENTER FOR CONSTITUTIONAL RIGHTS; COMMISSION FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST; NATIONAL RAINBOW COALITION,

Amici Curiae.

No. 89-5405

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MAISOUN BEN MOHAMAD, a/k/a Maisun Hawamda,

Defendant - Appellant,

ALL AFRICAN PEOPLES' REVOLUTIONARY PARTY; AMERICAN INDIAN MOVEMENT/INTERNATIONAL INDIAN TREATY COUNCIL; EL PORTIDO LA RAZA UNIDA; NEW AFRIKAN PEOPLES' ORGANIZATION; NATIONAL BLACK UNITED FRONT; REPUBLIC OF NEW AFRIKA; PISCATAWAY INDIAN NATION; CENTER FOR CONSTITUTIONAL RIGHTS; COMMISSION FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST; NATIONAL RAINBOW COALITION,

Amici Curiae.

No. 89-5406

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JAFAR JAFARI,

Defendant - Appellant,

ALL AFRICAN PEOPLES' REVOLUTIONARY PARTY; AMERICAN INDIAN MOVEMENT/INTERNATIONAL INDIAN TREATY COUNCIL; EL PORTIDO LA RAZA UNIDA; NEW AFRIKAN PEOPLES' ORGANIZATION; NATIONAL BLACK UNITED FRONT; REPUBLIC OF NEW AFRIKA; PISCATAWAY INDIAN NATION; CENTER FOR CONSTITUTIONAL RIGHTS; COMMISSION FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST; NATIONAL RAINBOW COALITION,

Amici Curiae.

No. 89-5407

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

OMAR AL-MADANI,

Defendant - Appellant,

ALL AFRICAN PEOPLES' REVOLUTIONARY PARTY; AMERICAN INDIAN MOVEMENT/INTERNATIONAL INDIAN TREATY COUNCIL; EL PORTIDO LA RAZA UNIDA; NEW AFRIKAN PEOPLES' ORGANIZATION; NATIONAL BLACK UNITED FRONT; REPUBLIC OF NEW AFRIKA; PISCATAWAY INDIAN NATION; CENTER FOR CONSTITUTIONAL RIGHTS; COMMISSION FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST; NATIONAL RAINBOW COALITION,

Amici Curiae.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan Jr., Chief District Judge. (CR-89-56-03-A, CR-89-56-02A, CR-89-56-07-A, CR-89-56-08-A)

Argued: February 6, 1990 Decided: June 21, 1990

Before ERVIN, Chief Judge, and RUSSELL and CHAPMAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Jonathan Mark Smith, Washington, D.C.; William Benjamin Moffitt, WILLIAM B. MOFFITT & ASSOCIATES, Alexandria, Virginia; Richard Charley Shadyac, Jr., SHADYAC & SHADYAC, Arlington, Virginia, for Appellants. Lawrence Joseph Leiser, Assistant United

States Attorney, Alexandria, Virginia, for Appellee. **ON BRIEF:** Lisa B. Kemler, WILLIAM B. MOFFITT & ASSOCIATES, Alexandria, Virginia; Richard C. Shadyac, Sr., SHADYAC & SHADYAC, Arlington, Virginia; Richard Joseph Brownell, John A. Keats, Fairfax, Virginia, for Appellants. Henry E. Hudson, United States Attorney, Patricia S. Cassell, Third-year Law Student, Alexandria, Virginia; Mary C. Lawton, Lubomyre M. Jacknycky, Special Attorneys, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. Frank E. Deale, Margaret Bellamy, Stephanie Y. Moore, CENTER FOR CONSTITUTIONAL RIGHTS, New York, New York, for Amici Curiae.

PER CURIAM:

Robert Alphonso Brown, Maisoun Ben Mohamad, a/k/a Maisun Hawamda, and Omar Al-Madani were found guilty by a jury of committing wire fraud in violation of 18 U.S.C. §§ 1343 & 2, of credit card fraud in violation of 18 U.S.C. §§ 1029(a)(1) & (b)(1) & 2, of credit card conspiracy in violation of 18 U.S.C. § 1029(b)(2), and of conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371. Jafar Jafari was convicted of conspiracy to commit an offense against the United States in violation of 18 U.S.C. § 371 and credit card conspiracy in violation of 18 U.S.C. § 1029(b)(2). On appeal the appellants argue that their convictions should be overturned because (1) the Federal Bureau of Investigation ("FBI") failed to comply with minimization procedures as required by the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq., (2) the district court refused to disclose FISA documents, and (3) the telephone access numbers used by appellants were not counterfeit. Ben Mohamad also argues that her conviction should be overturned because the government violated the rule on witnesses and because the motive instruction given to the jury was erroneous. Jafari argues that there was insufficient evidence to support a guilty verdict in his case. And finally, Amici Curiae argue that the government violated Brown's first, fourth and fourteenth amendment rights by retaining telephone conversations. After reviewing the record and listening to oral argument, we affirm the convictions for the reasons provided below.

I.

The facts leading up to the convictions are as follows. On or before May 1986, the government placed wiretaps on the phones of several Arab and African nationals, including the home phones of Mousa Hawamda and Saleh Al-Rajhi, and the telephone at Manara Travel Agency which is the business of Hawamda. Mousa Hawamda and Saleh Al-Rajhi are Libyan agents. The wiretaps were authorized by the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. ("FISA" or "Act"), to monitor foreign intelligence information.

Because many of the conversations were in Arabic, the FBI recorded all conversations with an automatic recording device. An FBI agent listened to the recordings, then translated, summarized and indexed all calls which had foreign intelligence value or which contained evidence of other illegal activities.

The appellants in this case, Robert Alphonso Brown, Maisoun Ben Mohamad, a/k/a Maisun Hawamda (wife of Mousa Hawamda), Jafar Jafari and Omar Al-Madani, are not known Libyan agents nor are they involved in foreign intelligence. However, they routinely used the wiretapped phones and, as a result of information provided by the wiretaps, were charged with wire fraud, credit card fraud, and conspiracy to commit the substantive offenses.

II.

Appellants argue that evidence collected as a result of the wiretaps should have been suppressed because the FBI failed to follow the minimization procedures required by the Act.

In 1978 Congress enacted the FISA "to establish procedures for the use of electronic surveillance in gathering foreign intelligence information." Matter of Kevork, 788 F.2d 566, 569 (9th Cir. 1986); see also United States v. Belfield, 692 F.2d 141, 145 (D.C. Cir. 1982). FISA provides that federal officers may, with the approval of the Attorney General, apply to a special FISA court for an order approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information. 50 U.S.C. §§ 1802(b), 1803, 1804(a). The application must contain a statement of proposed minimization procedures. Before the judge approves the surveillance, he must find that "the proposed minimization procedures meet the definition of minimization procedures under section 1801(h)" of the FISA. 50 U.S.C. § 1805(a)(4). Section 1801(h) states in pertinent part:

> "Minimization procedures", with respect to electronic surveillance, means --
>
> > (1) Specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

> (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, . . . shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;
>
> (3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; . . . .

50 U.S.C. § 1801(h).

In this case the FBI automatically recorded all calls conducted on the wiretapped phones. The government argues that it was reasonable and necessary to use automatic tape recording equipment because many of the calls were in Arabic and could only be understood fully if they were recorded.

We find that the minimization procedures used in this case were not unreasonable. The legislative history of the FISA indicates that in some cases it may not be possible to avoid acquiring all information. See S. Rep. No. 95-604 Pt. 1, 95th Cong. 2nd Sess. 37-39, reprinted in 1978 U.S. Code Cong & Admin. News, 3904, 3938-3940. In such cases, "minimizing retention and dissemination becomes important." Id. at 3939.

The problem in this case is that many of the conversations were in Arabic. As the district court in Matter of Kevork, 634 F. Supp. 1002, 1017 (C.D. Cal. 1985), aff'd, 788 F.2d 566 (9th Cir. 1986), recognized,

> Congress intended that in counterintelligence and counter-terrorism cases the government have the opportunity to analyze the information it is acquiring, particularly where, as here, most of the critical conversations occurred in the Armenian language. The monitoring of targets who speak a foreign language raises additional concerns justifying the need for automatic tape recording. Any requirement for the live monitoring of all such conversations would place unrealistic constraints on the resources of the government.

In this case, the FBI minimized information after it was recorded. An FBI agent listened to the recorded calls, and summarized and indexed only those calls which involved foreign intelligence or criminal activity.

III.

Appellants filed pre-trial motions for discovery relating to the surveillance pursuant to section 1806(f) of the Act. Section 1806(f) provides that when the Attorney General files an affidavit under oath stating that disclosure of the documents would harm the national security, the district court shall review the documents in camera and ex parte. The judge has discretion to disclose portions of the applications and orders only if he determines that disclosure is "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. § 1806(f).

The district court reviewed the applications for surveillance authorization, affidavits in support of the applications, and orders resulting from the applications. The court determined that the surveillance was authorized and conducted in conformity with 50 U.S.C. § 1805. Judge Bryan also found that disclosure of the requested information would harm the national security. He denied

appellants' motion for disclosure and refused to hold an adversary hearing on the legality of the wiretaps. Appellants now argue that the court abused its discretion by refusing to disclose the FISA applications.

We find that the lower court properly denied the motion for discovery. The court ordinarily reviews FISA wiretap applications in camera and ex parte. See, e.g., United States v. Pelton, 825 F.2d 1067 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988); Belfield, 692 F.2d at 146-47; United States v. Duggan, 743 F.2d 59 (2d Cir. 1984). As we explained in In Re Grand Jury Proceedings, Grand Jury No. 87-4, 856 F.2d 685, 687 n.3 (4th Cir. 1988), when the Attorney General files an affidavit stating that disclosure would compromise the national security, the only exception to in camera, ex parte review "occurs when the documents submitted are not sufficient to allow the court to make a facial determination of legality." The documents in this case are sufficient to determine the legality of the surveillance.

IV.

The district court, pursuant to Fed. R. Evid. 615 and at the request of appellants, excluded all witnesses from the courtroom until called to the witness stand. This procedure is known as the "rule on witnesses." The purpose of the rule is to "prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial." United States v. Leggett, 326 F.2d 613 (4th Cir.), cert. denied, 377 U.S. 955 (1964). When

the rule is violated, "[t]he question of exclusion of the testimony of the offending witness . . . depends upon the particular circumstances and lies within the sound discretion of the trial court." Id. at 614.

Ben Mohamad argues that the prosecutor violated the rule twice during the course of the trial. The first alleged violation occurred when the prosecutor telephoned John Ostby, the attorney for witness Layla Juma, wife of Saleh Al-Rajhi, and asked him to appear as a government witness. The prosecutor called Ostby because Juma, an immunized prosecution witness, testified falsely. The alleged violation occurred when the prosecutor explained to Ostby why he was being asked to testify.

The second alleged violation occurred during the testimony of government witness Agent Bartnik and involved a brief conversation during a break after cross examination concerning the prosecutor's failure to ask Bartnik a question about telephone toll records.

After reviewing the record, we do not find any reason to overturn Ben Mohamad's convictions. There is no evidence in this case that the prosecutor was intentionally trying to tell witness Ostby what to say on the stand or that the alleged violation prejudiced Ben Mohamad. And, while it was improper for the prosecutor to discuss testimony with Agent Bartnik between cross examination and redirect, witness Bartnik was not subject to the court's order because he was the case agent and thus permitted to sit in the courtroom during all of the testimony. Thus the communication between the prosecutor and Agent Barnik did not

violate the rule on witnesses. The lower court refused to allow the prosecutor to ask any question concerning the toll records on redirect. This seems an appropriate response to this incident, and we find no reversible error with respect to this issue.

V.

Jafari was convicted of credit card conspiracy. He argues that the evidence is insufficient to sustain his conviction because there was no evidence of an agreement between Jafari and any of the other defendants. Under our standard of review, we must sustain the jury verdict if there is substantial evidence, taking the view most favorable to the government, to support the verdict. United States v. Steed, 674 F.2d 284, 286 (4th Cir.) (en banc), cert. denied, 459 U.S. 829 (1982).

The evidence against Jafari at trial included two taped telephone conversations. The first taped conversation occurred on October 8, 1986. Mousa Hawamda asked to speak to Jafari saying, "I want to get from him a number." The relevant portions of the conversation are as follows:

Hawamda:	I give you a call when I want a number.
Jafari:	That's for sure, the one I had has expired today.
Hawamda:	Ha . . ha. Oh really.
Jafari:	Yeh.
Hawamda:	This is something.
Jafari:	A number will be available to you when you attend to the two pending matters.
Hawamda:	It is not problem, when I spend two minutes dialing few digits, I will come up with a number.
Jafari:	Yeh

. . .

Hawamda: Give me whatever number you have.
Jafari: Believe me, I do not have.
Hawamda: You do not have.
Jafari: I am expecting to get one from the guys this afternoon.
Hawamda: Then I will give you a call this afternoon.

Hawamda and Jafari spoke again on November 4, 1986. In this second conversation they exchanged access numbers:

Hawamda: Yes, I will see . . . is the other guy there . . is Abdul-five there? What?
Jafari: Would you like five?
Hawamda: Yes, . . . and I will give you fourteen . . .
Jafari: Um. Good deal . . . Just a moment . . . 429
Hawamda: Um . . .
Jafari: 2200
Hawamda: Then what?
Jafari: 700
Hawamda: Six seven . . .
Jafari: eight seven.
Hawamda: Eight seven?
Jafari: Yes . . .
Hawamda: And six . . .
Jafari: That is to say, seventy-eight . . . Seven hundred seventy-eight.
Hawamda: Seventy-eight, or eight seven.
Jafari: Seven-two zeros-seven-eight
Hawamda: Seven eight?
Jafari: Yes.
Hawamda: And, seven-two zeros-six-seven . . . And, in addition, six-five . . . too.
Hawamda: Ha . . . Ha . . . Are you trying to give me extra?
Jafari: Yes . . . Ha.
Hawamda: Okay sir . . .
Jafari: Yes . . . Were you able to get something out of it?
Hawamda: There is
Jafari: Um.
Hawamda: You too can try it?
Jafari: Yes.
Hawamda: After which 484 . . .
Jafari: Aha.
Hawamda: 901
Jafari: Aha.
Hawamda: 27233.
Jafari: 313?
Hawamda: Oh man? No . . . Where is there conference? It is in Boston.

Jafari: I see . . . Okay.
Hawamda: Look up the area code of Boston, and that is it . . .
Jafari: Okay.
Hawamda: Okay?

Other evidence showed that 'five' stood for an MCI number and 'fourteen' stood for an AT&T number. Jafari gave Hawamda an MCI access code and three five-digit MCI access authorization numbers. Hawamda gave Jafari the AT&T credit number belonging to Stella Bekarian.

Stella Bekarian, a resident of Boston, Massachusetts, testified that in October or November of 1986, AT&T called her to ask about the use of her credit card number. Bekarian determined that her number was being used without authorization and asked AT&T to change the number.

Pittman Coleman Rock, Jr., a corporate security investigator for AT&T, also testified. A part of Rock's job involves investigating toll fraud. Rock explained that AT&T has "a system that keeps a record of the attempted use of the credit card . . . " Rock testified that,

> . . . based upon experience that the fraud activity increases the usage of the card, we have the ability to detect that increase or excessive usage. Once that occurs, we have representatives who will try to contact the subscriber to determine if there is a valid reason for the increased usage and if there isn't, then that number is then taken out of service.

According to Rock, Hagop Bekarian, the husband of Stella Bekarian, was the subscriber with the number 617-484-9012-7233.

Considering this and other evidence in the record in the light most favorable to the government, we find that the conversations

and other evidence clearly provide substantial evidence of an agreement to engage in illegal activity. The evidence thus supports the jury's verdict finding Jafari guilty of credit card conspiracy.

VI.

The jury found appellants Ben Mohamad, Brown and Al-Madani guilty of violating 18 U.S.C. §§ 1029(a)(1) and (b)(1). Section 1029 proscribes fraud and related activity in connection with access devices. Section 1029(a)(1) makes it illegal to "knowingly and with intent to defraud" produce, use or traffic in "one or more counterfeit access devices." Section (b)(1) makes it a crime to attempt to commit an offense described in section 1029(a). Appellants argue that the government failed to meet its burden of proof because the access devices were not counterfeit but were, instead, legitimate working numbers.

The statute defines "access device" as

> any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value.

18 U.S.C. § 1029(e)(1). It defines counterfeit access device as

> any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or counterfeit access device.

18 U.S.C. § 1029(e)(2).

We find that the access devices used by the appellants were counterfeit within the meaning of the statute. In United States v. Brewer, 835 F.2d 550 (5th Cir. 1987), the court discussed the

meaning of counterfeit in section 1029. Brewer argued that a legitimate access code cannot be counterfeit. The court found, however, that "an equally plausible interpretation is that [the defendant] did not 'obtain' the codes from the computer but fabricated codes that just happened to be identical to the [access] codes." Id. at 554. The court thus held, in effect, that fabricated codes that are identical to the telephone access codes are counterfeit. The court explained, by analogy, that "someone who manufactures phony credit cards is no less a 'counterfeiter' because he happens to give them numbers that match valid accounts." Id. We agree that access codes which were created by the appellants to use in place of those provided by the telephone companies are counterfeit as defined by the statute.

VII.

Ben Mohamad's defense at trial was that she lacked specific intent because Islamic law required her to be obedient to her husband and not question his actions. She argues that her conviction should be overturned because the court failed to instruct the jury as she requested by not including the following sentence:

> [T]he motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent.

When reviewing jury instructions, the court looks to the trial court's instructions as a whole. Murphy v. Holland, 776 F.2d 470, 476 (4th Cir. 1985), vacated on other grounds, 475 U.S. 1138

(1986). A party has no right to dictate the exact wording of an instruction. It is sufficient if the instructions taken as a whole "fairly and adequately" state the applicable legal principles. Hogg's Oyster Co. v. United States, 676 F.2d 1015, 1019 (4th Cir. 1982).

The court gave the following jury instruction:

> The defendant Maisoun Ben Mohamad, Mrs. Hawamda, has suggested that she may have performed any acts chargeable to her because under the tenets of the Islamic faith, she was compelled to obey the wishes of her husband. This may have been her motive. However, intent and motive should never be confused. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done. Good motive alone is never a defense where the act done is a crime. One may not commit a crime and be excused from criminal liability because she desired or expected that ultimate good would result from her criminal act or was obeying the wishes of her husband.
>
> Moreover, if one commits a crime under the belief, however sincere, that her conduct was religiously or morally required or required by her marital obligations, that is no defense to the commission of a crime if the elements of the crime have been proved, other elements of the crime have been proved beyond a reasonable doubt.

We find that the jury instruction was not erroneous. The court instructed the jury that the government was required to prove specific intent beyond a reasonable doubt. The court did not state that Mohamad's motive was completely irrelevant. Rather, the court properly explained that motive is not an excuse for committing a crime where the government has provided proof of all of the elements of the crime.

VIII.

Amici Curiae claim that the government violated the first amendment by retaining conversations in which Brown discussed his political activities. They argue that, as applied in this case, the FISA is an unconstitutional content-based restriction on speech that is not narrowly tailored to serve a compelling state interest.

It is, of course, true that the first amendment protects political speech. However, Amici fail to show how the statute regulates or restricts speech. "Nothing in the FISA permits the government to conduct electronic surveillance of United States persons because of activities protected by the first amendment." Kevork, 634 F. Supp. 1002, 1012; see 50 U.S.C. §§ 1801(b)(2), 1804(a)(4)(A). While the government may retain conversations which concern political activities, the government is neither restricting those conversations nor is it penalizing Brown or others on account of their speech. Rather, Brown has been punished for trading in and using counterfeit telephone access numbers. This penalty in no way restricts political speech.

IX.

Because appellants fail to identify any error in the proceedings below, their convictions are

AFFIRMED.