UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-8321

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CURTIS LEON TARVER, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CR-107-1)

(December 30, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant Curtis Leon Tarver, Jr. was tried before a jury and convicted of threatening to take the life of the President of the United States, in violation of 18 U.S.C. § 871 (1988). The district court sentenced Tarver to a 25 month term of imprisonment and a three years of supervised release. Tarver now appeals his conviction and sentence. We affirm.

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

In September 1992, the Federal Bureau of Investigation ("FBI") received a letter that contained language threatening the life of then-President George Bush. Tarver, an inmate in the Texas prison system, was listed on the envelope containing the threatening letter as the addressee. The envelope also bore Tarver's inmate number and the address of the prison in Gatesville, where Tarver was imprisoned. The letter was signed "C.L.T." Based on this information, Secret Service Special Agent Robert Blossman traveled to Gatesville and obtained handwriting exemplars from Tarver. Tarver, pursuant to Blossman's request, also provided a writing sample consisting of the words contained in the letter, as dictated by Blossman. Agent Gregory Floyd, an expert in "questioned document" examination, subsequently examined the envelope, threatening letter, and handwriting exemplars taken from Tarver. Floyd concluded that Tarver wrote the threatening letter.

II

Tarver initially contends that the evidence was insufficient to support his conviction for threatening the life of the President because the government did not prove that he wrote the threatening letter. "In deciding the sufficiency of the evidence, we determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the verdict, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt." *United States v. Pruneda-Gonzalez*, 953 F.2d 190, 193 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2952,

119 L. Ed. 2d 575 (1992). "It is not necessary that the evidence exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt." *Id.* Moreover, "[w]e accept all credibility choices that tend to support the jury's verdict."[1] *United States v. Anderson*, 933 F.2d 1261, 1274 (5th Cir. 1991).

Tarver's argument ultimately rests on his claim that the jury erred by crediting the testimony of Agent Floyd over his own.[2] Tarver contends that his testimony, when combined with the differences between the letter and the handwriting exemplars

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[1] In order to prove that Tarver threatened the life of the President, the government must prove beyond a reasonable doubt that "(1) the threat was a true threat, and (2) that it was knowingly made. A true threat is a serious one, not entered in jest, idle talk, or political argument. Whether a threat is a true threat is to be decided by the trier of fact." *United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir. 1983) (citations omitted), *cert. denied*, 467 U.S. 1228, 104 S. Ct. 2683, 81 L. Ed. 2d 878 (1984). "A threat is knowingly made if the maker comprehends the meaning of the words uttered; it is willfully made if the maker voluntarily and intelligently utters the words in an apparent determination to carry out the threat." *Id.* (citations omitted). The government need not demonstrate that the defendant actually intended to carry out his threat. *United States v. Pilkington*, 583 F.2d 746, 747 n.1 (5th Cir. 1978), *cert. denied*, 440 U.S. 948, 99 S. Ct. 1427, 59 L. Ed. 2d 637 (1979); *United States v. Rogers*, 488 F.2d 512, 514 (5th Cir. 1974), *rev'd on other grounds*, 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975). Tarver, however, challenges only the jury's determination that he was the person who wrote the threatening letter. Consequently, we do not address the remaining elements of the substantive offense.

[2] Tarver testified that another inmate wrote the threatening letter and put Tarver's name on it as a practical joke to retaliate for an earlier prank pulled by Tarver. Agent Floyd, on the other hand, unequivocally testified that Tarver was the author of the letter.

obtained from him,[3] raises reasonable doubt as to the identity of the author of the letter. The jury, however, resolved this credibility issue in favor of the government. Because "[a]ssessing the credibility of witnesses and weighing the evidence is the exclusive province of the jury," *United States v. Greenwood*, 974 F.2d 1449, 1458 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2354, 124 L. Ed. 2d 262 (1993), we find sufficient evidence supporting Tarver's conviction.

III

Tarver next contends that the district court erred in refusing to instruct the jury as to his definition of the term "willfully." Tarver requested this instruction:

> A threat is "willfully" made if the maker voluntarily and intentionally writes the words in an apparent determination to carry out the threat.

The district court, however, gave the following instruction:

> The term "willfully" means that the act was committed voluntarily and purposefully, with the specific intent to do something that the law forbids, that is to say, with bad purpose either to disobey or disregard the law, and that it would have appeared to the person threatened that the actor had the determination to carry out the threat.

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[3] Floyd testified to the following differences between the threatening letter and the handwriting exemplars obtained from Tarver: (1) a variation in the spacing, (2) a difference in the height ratios of the characters, (3) a difference in the right margin, and (4) some differences in punctuation, spelling, and the use of capital letters. Floyd, however, also testified that he took these variations into account in reaching his conclusion that Tarver wrote the letter.

Tarver argues that the latter instruction irreconcilably conflicts with the instruction defining the term "threat"[4] because the jury first was told to determine whether the threatening letter would have caused apprehension in a reasonable person and then was told that Tarver willfully made a threat only if "it would have appeared to be a threat from the standpoint of the particular individual threatened." In other words, Tarver complains that the district court should have instructed the jury that Tarver "willfully" made a threat only if a reasonable person would have believed the letter was a threat.

We review the district court's refusal to give a requested instruction for an abuse of discretion. *United States v. Sellers*, 926 F.2d 410, 414 (5th Cir. 1991). Under this standard of review, the district court has "substantial latitude in tailoring instructions so long as they fairly and adequately cover the issues presented," *United States v. Pool*, 660 F.2d 547, 558 (5th Cir. Unit B Nov. 1981), and is "under no obligation to give a requested instruction that misstates the law, is argumentative, or has been adequately covered by other instructions." *United States v. L'Hoste*, 609 F.2d 796, 805 (5th Cir.), *cert. denied*, 449 U.S. 833, 101 S. Ct. 104, 66 L. Ed. 2d 39 (1980).

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[4] Tracking our Pattern Jury Instructions, the district court defined "threat," as it is used in 18 U.S.C. § 871, as "a serious statement expressing an intention to kill or injure the President, and which under the circumstances would cause apprehension in a reasonable person, as distinguished from words used as mere political argument, idle talk, exaggeration or something said in a joking manner."

We find that the district court's instructions fairly and adequately covered the issues presented. Tarver's proposed instruction was substantially subsumed by the district court's instruction defining "willfully." Moreover, we find that, reading the instruction defining "willfully" in light of the instruction defining "threat," the district court instructed the jury to apply a reasonable person standard. Thus, the jury could convict Tarver of threatening the life of the President only if Tarver willfully made "a serious statement expressing an intention to kill or injure the President, and which under the circumstances would cause apprehension in a reasonable person"))i.e., a statement that *would have appeared* to a reasonable person be an indication that the writer had the determination to carry out the threat. Accordingly, we find that the district court did not abuse its discretion in refusing to give the jury instruction that Tarver sought.

IV

Tarver's final contention is that the district court erred in adding two points to his base offense level for obstruction of justice. *See* United States Sentencing Commission, *Guidelines Manual*, § 3C1.1 (Nov. 1992).[5] The district court found that Tarver obstructed justice when he lied under oath about whether he wrote the threatening letter. The guidelines provide that the enhancement is appropriate if the defendant commits perjury. *Id.*,

[5] This section provides that the district court should increase the defendant's offense level by two levels "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense."

comment. (n.3(b)); *see also United States v. Dunnigan*, ___ U.S. ___, 113 S. Ct. 1111, 1116-17, 122 L. Ed. 2d 445 (1993). In determining whether the enhancement is appropriate, the district court should evaluate the defendant's testimony "in a light most favorable to the defendant." U.S.S.G. § 3C1.1, comment. (n.1). "We review a district court's determination that a defendant has obstructed justice under section 3C1.1 for clear error." *United States v. Laury*, 985 F.2d 1293, 1308 (5th Cir. 1993).

The district court found that Tarver obstructed justice by giving perjurious testimony regarding the identity of letter's author. A defendant commits perjury under § 3C1.1 if he "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." *Dunnigan*, 113 S. Ct. at 1116. Here, Tarver testified that he did not write the threatening letter. Because this testimony, if the jury had believed it, would have affected the determination of guilt, it concerns a material matter. *See Laury*, 985 F.2d at 1309. Moreover, the district court specifically found that Tarver "intentionally testified falsely under oath." Because the record supports the finding that Tarver committed perjury, the district court did not clearly err in finding that Tarver had obstructed justice.

V

For the foregoing reasons, we AFFIRM the district court's judgment.