

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	No. 08 CR 846
vs.)	Judge Joan H. Lefkow
)	
JON BURGE)	

**GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION FOR
JUDGMENT OF ACQUITTAL AND ARREST OF JUDGMENT**

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, submits the following response to defendant’s *Motion for Judgment of Acquittal and Arrest of Judgment*. For the following reasons, defendant’s motion should be denied.

I. *Hobley v. Burge* was an Official Proceeding Within the Meaning of 18 U.S.C. § 1512(c)(2).

Defendant’s first argument is that the indictment fails to state an offense because there was no “official proceeding” within the meaning of 18 U.S.C. § 1512(c)(2). This issue was fully briefed and ruled upon prior to trial. *See* Doc. 50, 53, 94, 100, 138. Defendant offers no new arguments or case law in support of his position. In fact, the majority of defendant’s current argument is word-for-word repetition of his previous argument. *See* Doc. 53. As this Court already has held, if the defendant’s argument that obstruction of “official proceedings” is limited only to in-court obstruction, then “other conduct specified in the statute, such as witness intimidation and record destruction, could not be prosecuted.” Doc.138, p. 7. The Court’s decision is supported by recent case law interpreting § 1512(c)(2), as well as the

previous cases cited by the government. *See, e.g., United States v. Phillips*, 583 F.3d 1261, 1263 (10th Cir. 2009) (finding that obstruction of an official proceeding need not occur directly in the proceeding itself, but must rather have a “nexus in time, causation, or logic” with the proceeding such that “interference with the proceeding must be the natural and probable effect of the defendant’s conduct”). For the reasons stated in the government’s previous filings on this issue, and in the Court’s written opinion, *Hobley v. Burge* was an official proceeding within the meaning of 18 U.S.C. § 1512(c)(2), and defendant’s motion must be denied.¹

II. The Jury was Properly Instructed Regarding Attempt.

Defendant next contends that the jury was improperly instructed that the defendant could be found guilty of either a completed offense or an attempt. However, the statute under which defendant was charged plainly criminalizes both the completed offense and an attempt to commit the offense, and it is proper to charge both the attempt and the completed offense together. *See* 18 U.S.C. § 1512(c)(2); *United States v. Batista*, 2010 WL 1193314, *8 (E.D.N.Y. Mar. 24, 2010). Defendant does not mention any prejudice that could have resulted from the case going to the jury on both the attempt and completed offense – there is no unanimity problem since any juror who believed that the defendant completed the offense would believe him to be guilty of an attempt to do so, and there is no double jeopardy

¹ Defendant also argues that the jury should not have been instructed that the *Hobley* civil suit was an official proceeding. However, instructions of this nature are frequently upheld. *See United States v. Phillips*, 583 F.3d 1261, 1263 (10th Cir. 2009) (holding that the jury was “properly instructed that an ‘official proceeding’ includes proceedings before a grand jury”).

problem because defendant has been found guilty of, and will be punished for, only one offense. Defendant also does not cite a single case to indicate that the jury was improperly instructed; in fact, none of the three cases cited by defendant even mentions 18 U.S.C. § 1512(c)(2). Therefore, the jury was properly instructed that the defendant should be found guilty if he attempted or completed the obstruction.

Defendant next contends that the government did not prove a completed crime of obstruction or materiality, and at best proved only an attempt. A defendant making a sufficiency of the evidence challenge “bears a heavy burden and faces a nearly insurmountable hurdle.” *United States v. Seawood*, 172 F.3d 986, 988 (7th Cir. 1999). To determine whether a defendant satisfies that heavy burden the “test is whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Gardner*, 238 F.3d 878, 879 (7th Cir. 2001). “The evidence and all reasonable inferences that can be drawn from it must be viewed in the light most favorable to the government.” *Id.*

In this case, there was sufficient evidence for a reasonable juror to conclude that the defendant actually obstructed justice by his interrogatory answers, which were material. The evidence at trial established that answers to interrogatories can be used as admissions at trial or to obtain summary judgment. The evidence at trial also established that the Hobley lawsuit involved a *Monell* claim that the City of Chicago had a policy of, *inter alia*, failure to properly supervise its officers. It is a reasonable inference that if the defendant admitted that he had engaged in torture or had supervised others who engaged in torture, his

admissions would have been helpful to the plaintiff's *Monell* claim – especially if the defendant had admitted that he had done so while a Lieutenant with the Chicago Police Department over the course of many years. Defendant complains that there was no obstruction because his denial of torture was not used by any party in the proceeding. But, the denial of helpful evidence will never be useful in a proceeding. That does not mean, of course, that the denial that the evidence exists is not a way to “obstruct, influence, or impede” the proceeding. Nor does it mean, as defendant contends, that the denial was not material. Defendant did everything within his power to ensure that the plaintiff did not find out about his and other officers' torture of suspects. This is not a case where a defendant took a substantial step toward committing the offense; as far as defendant was concerned, the offense had been completed. For these reasons, the jury was properly instructed and the verdict should not be overturned.

III. The Defendant Took an Oath Within the Meaning of 18 U.S.C. § 1621(1).

Defendant next argues that “administration of an oath is an essential element of a §1621(1) charge,” and that the government failed to prove this element at trial. Defendant misstates the law, and cannot meet the “nearly insurmountable hurdle” of challenging the sufficiency of the evidence on this element of the offense.

According to the plain language of §1621(1), the defendant must have “taken an oath.” *See* 18 U.S.C. §1621(1) (“Whoever – having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered . . .). There is no requirement that a particular person *administer* an oath

to the defendant. In this case, the evidence showed that defendant took an oath when he went to a notary public who showed him a document that had an oath on it, directed his attention to that portion of the document, and asked him to ensure that it was correct. The oath read: “I, Jon Burge, after first being duly sworn, state on oath that I have read the foregoing . . . and that the answers therein are true and correct to the best of my knowledge and belief.” After apparently reading the oath, the defendant then signed his name below it. This is all that is required under §1621(1). *See United States v. Yoshida*, 727 F.2d 822 (9th Cir. 1983) (finding that it was enough to satisfy the oath requirement of §1621(1) that the defendant appeared before a notary who witnessed his signature after asking if the contents of the affidavit were true and the affidavit contained a statement that it was “on oath”).

Defendant does not cite a single case to establish that this is not enough to have “taken an oath” within the meaning of §1621(1). The jury was properly instructed that it had to find that the defendant took an oath, and the jury concluded that the defendant did take an oath when it found him guilty. Defendant’s conviction should not be overturned on this basis.

IV. The Government did not Need to “Prove up” the Hobley Case.

Defendant’s final argument is that the government needed to “prove up” the Hobley civil suit, and that because Hobley’s lawsuit allegedly was baseless, the defendant cannot be found guilty of obstruction of justice and perjury. Defendant does not cite a single case to support his argument that perjury and obstruction of justice do not exist if someone else committed perjury or obstruction of justice first. Nor does defendant cite a single case to support his argument that someone is free to commit perjury or obstruction of justice if he

decides that he is facing a meritless lawsuit.

Each of the cases the defendant does cite stand for the same proposition – that false statements designed to influence the criminal justice system, especially those of law enforcement officers, are abhorrent to the pursuit of justice and should not be countenanced. *See, e.g., Franks v. Delaware*, 438 U.S. 154, 164 (1978) (discussing that affidavits signed by law enforcement officers containing deliberately or recklessly false statements are an “unthinkable imposition” upon the judiciary if they cannot be challenged); *United States v. Cortina*, 630 F.2d 1207, 1214 (1980) (discussing that an agent’s lies in an affidavit for a search warrant are “a manipulation of the judicial process” and the constitution). While the government wholeheartedly agrees that “a threshold wrong cannot serve as the springboard for an acceptable criminal indictment,” Def. Mot. at 9, and will argue at sentencing that this is precisely the harm caused by defendant’s perjury in criminal proceedings over a number of decades, the only relevant perjury and obstruction of justice at defendant’s criminal trial was his own. It is a standard jury instruction in the Seventh Circuit that jurors are not to consider other wrongdoers – who may or may not have been charged – when determining whether the defendant has committed a crime.² Defendant’s argument that “Hobley lied first,” is in essence only an argument for jury nullification, was properly excluded from trial, and does not serve as a proper basis for a judgment of acquittal.

² In fact, the government offered, and the Court gave, an instruction stating: “You should not speculate why any other person whose name you may have heard during the trial is not currently on trial before you.” Government’s Proposed Jury Instruction #20.

CONCLUSION

For these reasons, the government requests that defendant's *Motion for Judgment of Acquittal and Arrest of Judgment* be denied.

Respectfully submitted,

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