

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

United States of America,
Plaintiff,

v.

Robert Mikell Ussery (1),
Defendant.

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No. SA-18-CR-390-1-OLG

**GOVERNMENT’S RESPONSE TO
DEFENDANT’S MOTION IN LIMINE**

The United States of America, by and through the undersigned Assistant United States Attorney, responds to Robert Mikell Ussery’s Motion in Limine (ECF No. 151).

I. Procedural History

The Government charged Ussery by complaint on May 22, 2018, indicted him in June 2018, and superseded in January 2020, charging him with two counts of felon in possession of firearms in violation of 18 U.S.C. § 922(g)(1). ECF Nos. 1, 15, 113. Ussery filed Defendant’s Motion *In Limine* (ECF No. 151) on May 23, 2021. The Court advised the Government that, if it wished to respond, it should do so by noon on May 25, 2021.

II. Defendant’s Motion

In his Motion, Ussery asks this Court to:

“[D]isallow any and all usage of or reference to an event, herein referred to as the November 5, 2017, Sutherland Springs First Baptist Church shooting (“Church Shooting”), and all reference and variations thereof by attorneys for the Government and for this Honorable Court to order those attorney representatives for the government (“AUSAs”), and their witnesses, to avoid all usage of the same, directly or indirectly, during any stage of the trial proceeding, including but not limited to the voir dire examination, opening & closing statements, and direct and cross-examination.” Def. Mot 1-2.

Ussery argues that “any reference(s) to the November 5, 2017, Sutherland Springs First Baptist Church shooting and massacre are so grossly prejudicial that the admission of said

evidence, references and testimony should and must be included.” He further argues that the Court is unable to fashion a limiting instruction that would be capable of insulating the jury from undue prejudice. Ussery relies upon Federal Rules of Evidence 401, 403, and 404(b).

III. Argument

For the reasons detailed below, the Government is opposed to Ussery’s Motion and asks the Court to deny it in full because the request for relief is overbroad and, as phrased by Ussery, would prevent the jury from hearing relevant evidence that is essential to form an understanding of the facts surrounding the charges. Ussery’s Motion appears to rely predominantly on Federal Rule of Evidence 403, which describes a balancing test whereby a “court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. “Relevant evidence is inherently prejudicial; but it is only *Unfair* prejudice, *Substantially* outweighing probative value, which permits exclusion of relevant matter under Rule 403. Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.” *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979) (emphasis added).

As a preliminary matter, the Government makes explicit that which is obvious: the Government has no intention of putting on evidence describing the mass shooting and murders that occurred at the First Baptist Church of Sutherland Springs, in Sutherland Springs, Texas on November 5, 2017. If Ussery’s request was phrased to limit the Government from putting into evidence images and testimony describing the events of that day, the Government would not

oppose his Motion. However, Ussery's request is phrased far too broadly, overreaching from protecting the jury from irrelevant or prejudicial information, and straying fully into the realm of preventing the selection of an unbiased jury, excluding the Government from describing the narrative of its case, and preventing the Government from displaying audio and video files within any rational context. Specifically, Ussery's Motion seeks to exclude the Government from eliciting relevant testimony that describes how law enforcement initially became involved with him and obtained critical evidence, such as Ussery's Go-Pro videos, that assist the Government in proving essential elements. Some discussion as to the background of why Ussery was present at the First Baptist Church of Southerland Springs on March 5 is necessary to illustrate how the Government obtained key audio and video files and so that when the Government displays that evidence and testimony it can do so in a rational, narrative context, that will avoid misleading or confusing the jury.

One example of the overbreadth of Ussery's request is that he asks that there be no mention of the Southerland Springs mass shooting in *voir dire*. Given that the mass shooting occurred within the Western District of Texas, within the area that makes up the San Antonio Division, all parties should endeavor to make sure that no members of the jury have personal connections that would prevent them from acting as unbiased jurors. Ussery's request is worded so broadly that, if granted, the Government would not be permitted to ask if any potential jurors shared beliefs in Ussery's conspiracy theories, so that the Government and Court could test whether those jurors could set aside those beliefs, and any resulting sympathies, to act as unbiased jurors.

Similarly, Ussery asks the Court to "disallow any and all reference to ... the November 5, 2017, Sutherland Springs First Baptist Church shooting ... and all reference and variations

thereof...”. Def. Mot. 1 (emphasis added). While the Government has no intention of putting in evidence describing the events of November 5, 2017, it must illicit testimony describing what Ussery was doing on March 5, 2018, the date alleged in Count 1, when the Government alleges he was in possession of a firearm in Southerland Springs, Texas. On March 5, 2018, Ussery was trespassing on the grounds of the church. He argued with the pastor regarding whether the church shooting occurred. As a result of his conduct parishioners called the police, who arrested Ussery. The facts show that Ussery was there proclaiming his beliefs in a conspiracy theory, in which he alleges that the mass killings at the church was a hoax carried out by “crisis actors.” The Government is entitled to provide that crucial context to the jury so that the Government can provide a coherent narrative explaining why he was there that day, including to put the video and audio excerpts from Ussery and his co-defendant’s own Go-Pro cameras in context. The Government does not wish to provide details about the mass killing, but it must be allowed to present testimony explaining why Ussery was there that day and what he was doing. To do so, the Government must be able to briefly elicit testimony that reflects Ussery’s stated belief that the murders were a hoax.

Ussery’s request is phrased so broadly that it would force the Government to severely edit its video and audio evidence to exclude Ussery’s own mentions of his Southerland Springs conspiracy theory. Such editing would leave the Government with snapshots of audio and video, reducing the jurors’ ability to understand the context around the evidence and preventing them from accurately assessing its credibility and weight. For example, the Government’s evidence includes a video in which Ussery appear on an internet radio program to be interviewed about his conspiracy theories. During the interview, he acknowledges that he knows he is a felon and is not allowed to possess firearms. He makes this statement in the

context of an interview that is focused on his conspiracy theory about Southerland Springs. The Government does not wish to play the whole video, but it should not be made to edit the video to such a narrow sound bite that there is no mention of Southerland Springs and the Government should not be prevented from explaining why Ussery appeared on the radio show in the first place. Placing these limits on the Government would prevent it from telling a coherent and credible story.

Additionally, the Government argues that Ussery's belief in the conspiracy theory surrounding Southerland Springs is central to understanding his motives for possessing firearms. The Government expects some testimony to show that Ussery claimed to have received death threats because of his actions toward the survivors and parishioners of First Baptist Church of Sutherland Springs. The jury can view this evidence and conclude, in part based on Ussery's own statements, that he was motivated to possess a gun to protect himself. The fact that he professes such a strong motivation to possess a firearm is strong circumstantial evidence explaining why he would take the risk of possessing a firearm, given the criminal consequences.

As a last example of the overbreadth of Ussery's request, the Government objects that his proposal would prevent the Government from making any reference to the Southerland Springs murders even during cross-examination. Under the terms proposed by Ussery, if he chose to testify on his own behalf, the Government would not be able to ask what he was doing in Southerland Springs, Texas during the time on March 5, 2018 when the Government alleges he possessed a firearm. Notably, Ussery does not set any similar limits on what testimony he might elicit or give. The fact that he places no such limits on himself is further evidence that he does not intend his Motion to spare the jury from prejudice, but that his goal is to deprive the

Government of the basic narrative structure of its case.

In summary, the Government ask the Court to deny Ussery's Motion in full because it is overly broad; he is seeking to use Rule 403 as a sword, rather than the shield for which it is intended; and the effect of such an order would be to so circumscribe the Government's evidence to a degree that would deprive the jury of relevant context to understand the facts supporting the charges against Ussery. Should the Court determine to grant the Motion in-part, the Government asks for narrowly tailored instructions that: (1) prevent either party from presenting evidence in direct testimony describing, calling into question, or showing images of, the events at the First Baptist Church in Southerland Springs on November 5, 2017 and (2) the Government is permitted to introduce testimony and evidence that conveys that Ussery has professed a belief that the Southerland Springs mass shooting was a hoax in order to provide context for the events of March 5, 2018 and the other videos and evidence the Government intends to produce.

WHEREFORE, PREMISES CONSIDERED, the United States prays that the Court DENY the Defendant's Motion In Limine (ECF No. 151).

Respectfully submitted,

ASHLEY C. HOFF
UNITED STATES ATTORNEY

Kelly Stephenson
Assistant United States Attorney
Texas Bar # 24079823
601 NW Loop 410, Suite 600
San Antonio, Texas 78216
Tel: (210) 384-7100

CERTIFICATE OF
SERVICE

I certify that on May 25, 2021, I caused a true and correct copy of the foregoing instrument to be electronically filed with the Clerk of the Court using the CM/ECF System, which will transmit notification of such filing to counsel of record to counsel for the Defendant.

/s/ _____
Kelly Stephenson
Assistant United States Attorney

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ORDER

Having considered the Defendant’s Motion, the Governments Response, and after considering the entire record, the Defendant’s Motion *In Limine* (ECF No. 151) is **DENIED**.

SIGNED AND ENTERED this _____, 2021.

UNITED STATES DISTRICT JUDGE