

FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,)
)
 Plaintiff,)
)
 vs.)
)
 BENETT EDMUND,)
)
 Defendant.)
 _____)

CRIMINAL CASE NO. 2021-503

ORDER GRANTING MOTION TO ACQUIT

Dennis L. Belcourt
Associate Justice

Trial: April 18-20, 2022
Decided: July 8, 2022

APPEARANCES:

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HEADNOTES

Criminal Law and Procedure – Motions for Acquittal; Evidence – Burden of Proof

The test on a Rule 29 motion is whether, taking the view most favorable to the government, a reasonably-minded trier of fact could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant’s guilt beyond a reasonable doubt. This test applies to the specific element of the perpetrator’s identification. FSM v. Edmund, 23 FSM R. 605, 608 (Pon. 2022).

Criminal Law and Procedure – Motions for Acquittal; Criminal Law and Procedure – Threat and Retaliation; Evidence – Burden of Proof

Although the court had previously found minimum basis for probable cause that the defendant was the person who made the threat, the test on a Rule 29 motion is several steps above the test for probable cause. FSM v. Edmund, 23 FSM R. 605, 608 (Pon. 2022).

Evidence – Authentication; Evidence – Relevant

Evidence Rule 901(a) requires proof of authentication or identification as a condition precedent to admissibility and dictates that such proof is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Authentication is a precondition, ultimately, to relevance. FSM v. Edmund, 23 FSM R. 605, 608 (Pon. 2022).

Criminal Law and Procedure – Threat and Retaliation; Evidence – Burden of Proof

Before the court may consider as evidence against the defendant a making of a threat over the internet against the FSM President’s life, under Rule 901(a), it must find evidence sufficient to support a finding that such a threat was made and that the defendant was a source of the threat. In other words, there must be some evidence that the defendant is a culprit FSM v. Edmund, 23 FSM R. 605, 608 (Pon. 2022).

Evidence – Interpretation of Rules

Insofar as the FSM Rules of Evidence are identical, or nearly so, to rules adopted in other jurisdictions, the court may look to case law in those other jurisdictions to assist in interpreting its own rules. FSM v. Edmund, 23 FSM R. 605, 609 (Pon. 2022).

Criminal Law and Procedure – Motions for Acquittal; Criminal Law and Procedure – Threat and Retaliation; Evidence – Authentication

If the issue were solely whether the defendant had made use of a certain Facebook username, the government’s evidence of authentication by content would suffice. But to make a prima facie case, as required to survive a Rule 29 motion to acquit, the government must provide proof that would support a finding that the defendant, acting under that username, made the threat in question. The way Facebook and other social media operate drives this requirement since anyone can create a fictitious account and masquerade under another’s name. FSM v. Edmund, 23 FSM R. 605, 609 (Pon. 2022).

Evidence – Hearsay

Former, pretrial testimony sought to be admitted at the trial stage of the proceeding, is inadmissible hearsay absent a showing that the witness was unavailable to testify or absent another applicable exception. FSM v. Edmund, 23 FSM R. 605, 610 n.4 (Pon. 2022).

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COURT’S OPINION

DENNIS L. BELCOURT, Associate Justice:

This matter came before the Court for trial April 18, 2022 through April 20, 2022 with the Government resting its case, followed by defendant’s motion for a judgment of acquittal pursuant to Rule 29 of the FSM Rules of Criminal Procedure. The main issue in dispute is whether a threat against the President of the Federated States of Micronesia, his excellency David W. Panuelo, appearing on the FSM Government’s Facebook on August 11, 2021 was posted by Defendant Benett Edmund (“Mr. Edmund”). While it was undisputed that the threat was posted by someone appearing under the Facebook pseudonym Jaylo David and while the Government was able to muster sufficient proof that this court could reasonably find beyond a reasonable doubt that Mr. Edmund has himself used the pseudonym Jaylo David, specifically in 2020 and at the beginning of 2021, the Government has failed to make a prima facie case that Mr. Edmund was the Jaylo David who made the post on August 11, 2021 threatening the FSM President. Given that the sole

evidence that Mr. Edmund was the person who committed the crimes alleged in the information fails to meet the test set forth in Rule 29, Mr. Edmund must be acquitted.¹

BACKGROUND

On August 10, 2021, President Panuelo issued a decree requiring categories of persons in the FSM employed by or otherwise receiving funds from the National Government to provide proof of vaccination as a condition for them to continue to be paid. A press release on the decree was posted on the FSM Facebook page the same day. On August 11, 2021, a threat was posted to the FSM Facebook page as follows:

Jaylo David

Mr. President--My Decision, My Body . . . And your Decision But Not your Money . . . You gona need an army to protect you from now and on . . . You will be assassinate for sure . . . Mark my word Mr. President . . . "POHNEI SAHPW SARAWI" apposite flamingo

Like Reply Message

See Gov't Ex. 14.

The threat was referred to Sergeant Darrel Poll of the FSM National Police to reach out to Facebook. Facebook has an online reporting portal that he checked. The information he provided to the portal included the Pohnpeian words set forth above, which, according to Poll, assisted in identifying the IP address related to Jaylo David. Through open-source methods, Sgt. Poll determined that the IP address was in the FSM. A search warrant to FSM Telecom yielded that the IP address was related to FSM Telecom's Kaboom service, but no information regarding the location (even which FSM state) or the true identity of the Jaylo David who posted the threat.

Adam Caldwell, FSM DOJ Cyber Operations Officer, who was in quarantine, took a screenshot of the names of Jaylo David's Facebook friends, introduced as Government's Exhibit 16 during Captain Kasner Aldens' testimony. Captain Aldens did not testify as to the circumstances under which the screenshot was captured or as to how other Jaylo David friends were identified. Mr. Caldwell was not called to testify at trial.

According to testimony of Captain Aldens, a National Police investigative team began reaching out to persons who Mr. Caldwell had identified as Facebook friends of Jaylo David or whose names appeared on Exhibit 16 (e.g., Johnny Nogs (a pseudonym of Johnny Musrasrik)) and Benneth [sic] Edmund) and some whose names were elsewhere on Jaylo David's friend page, e.g., Rob Solomon and Kalio Edwin. It is from these contacts that the investigators learned of messages between Jaylo David on one hand and either Johnny Musrasrik or Rob Solomon on the other), occurring in the latter part of 2000 or early 2001, in which Jaylo David discussed salary, family size, business licensing, and gross revenue tax payments. At trial, witnesses were called on behalf of the Government, to support its position that Mr. Edmund was Jaylo David, including a number of the National Police investigative team and non-police witnesses Musrasrik, Solomon, Kalio Edwin, Nett District employee Francis Silbanuz, and a Nett business owner.

At the close of the Government's case, Mr. Edmund moved for acquittal pursuant to Rule 29 of the

¹ Mr. Edmund is charged with violating 11 F.S.M.C. 517 (threat to influence public official, etc.), 11 F.S.M.C. 518 (harms another by an unlawful act in retaliation for lawful official action of that person), 11 F.S.M.C. 603 (criminal mischief—intentionally or recklessly causes another person by threat to suffer any loss), 11 F.S.M.C. 609 (assault), 11 F.S.M.C. 701 (deprivation of rights). This Court dismissed the assault charge its Order after Preliminary Hearing and on Motion to Disqualify Defense Counsel, entered November 19, 2021. [FSM v. Edmund, 23 FSM R. 444, 449 (Pon. 2021).]

FSM Rules of Criminal Procedure. After limited oral argument from both sides, the Court requested counsel to file written briefs, which counsel did.

STANDARD FOR GRANTING A RULE 29 MOTION TO ACQUIT

Rule 29(a) provides in pertinent part as follows:

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the information after the evidence of either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

“[T]he test is whether taking the view most favorable to the Government, a reasonably-minded [trier of fact] could accept the relevant evidence as adequate and sufficient to support the conclusion of the defendant’s guilt beyond a reasonable doubt.” FSM v. Andohn, 1 FSM R. 433, 438-39 (App. 1984).

The above test applies to the specific element of identification of the perpetrator. *Id.* at 442. While this Court previously found minimum basis for probable cause that Defendant was the person who made the threat, the test on a Rule 29 motion is several steps above the test for probable cause. FSM v. Wainit, 10 FSM R. 618, 621 (Chk. 2002) (comparing probable cause and proof beyond a reasonable doubt); Monroe v. Sigler, 353 S.E.2d 23, 25 (Ga. 1989) (standard on motion for acquittal is “thrice removed” from standard for “mere probable cause”).

DISCUSSION

In its motion, Mr. Edmund puts forward an array of hurdles, such as IP address issues, faced (but not met) by the Government in its effort to prove that Mr. Edmund was the person behind the computer that made the threat against the President and had created the fake Facebook Jaylo David account through which the threat was posted.

The Government’s opposition counters with reference to substantial evidence it brought forward to show that Mr. Edmund made the threat based on the pseudonymous Jaylo David’s prior communications. Put simply, the Government contends that Mr. Edmund looks enough like the Jaylo David whom Rob Solomon and Johnny Musrasrik know from their online interaction, notably his salary, his retail business, and timing of his payment of taxes, that this Court must not acquit, as there is sufficient identification evidence that Mr. Edmund was the Jaylo David who posted a threat on the FSM Government’s Facebook page.

The Facebook Identification Issue

FSM Rule of Evidence 901(a) requires proof of “authentication or identification as a condition precedent to admissibility” and dictates that such proof is “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Authentication is a precondition, ultimately, to relevance. MCCORMICK ON EVIDENCE § 218, at 686 (3d ed. 1984). Rule 901(b) provides a number of examples of ways to meet that requirement, such as testimony of a witness with knowledge that the “matter is what it is claimed to be.” FSM Evid. R. 901(b)(1).

In the context of this case, before this Court may consider as evidence against Mr. Edmund a making of a threat over the internet against the life of the FSM President, under Rule 901(a), it must find “evidence sufficient to support a finding that such a threat was made” and that the Mr. Edmund was a source of the threat. In other words, there must be some evidence that the Mr. Edmund is a culprit.

The threshold issue is whether the threat against the FSM President by someone with a Facebook name Jaylo David can be attributed to the Mr. Edmund based on the evidence that he conducted certain

other activities under the pseudonym Jaylo David. A point asserted by the Government, which the Mr. Edmund does not concede, is that Mr. Edmund has posted under a Facebook pseudonym Jaylo David in his conduct of certain activities—looking for small business loans and other government assistance—none of which, it might be noted, are apparently of a criminal nature.

The matter of applying the FSM Rules of Evidence to the proof of identity of persons posting on social media, such as Facebook, appears to be of first impression for this Court or of any court in the Federated States of Micronesia. Insofar as the FSM Rules of Evidence are identical, or nearly so, to rules adopted in other jurisdiction, this Court may look to case law in those other jurisdictions to assist in interpreting its own rules. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507 (App. 2016).

Other jurisdictions have found that the requirements of Rule 901 must be applied with equal or greater care to social media postings as they are applied in non-social media circumstances. *Compare* Griffin v. State, 19 A.3d 415 (Md. 2011) (trial judge abused his discretion in admitting the MySpace evidence pursuant to Rule 5–901(b)(4), because the picture of Ms. Barber, coupled with her birth date and location, were not sufficient “distinctive characteristics” on a MySpace profile to authenticate its printout, given the prospect that someone else may have created site or posted comment), *with* State v. Hannah, 151 A.3d 99 (N.J. Super. 2016) (court declines to apply greater scrutiny standard of Griffin, holds that ordinary standards of Rule 901 apply to authentication of social media postings).

Government’s Approach to Authentication in this Case

The Government’s effort at proving authentication has been in two directions: (1) authentication by IP address and (2) authentication by content. Authentication by IP address did not provide the Government investigators with any direct identification of the person who posted the threat.²

The Government’s authentication by content has been largely built around information that a user profile named Jaylo David provided Johnny Musrasrik and Rob Solomon concerning his income, taxes, and business licensure, information that matches up on a number of points with Mr. Edmund’s personal circumstances. This approach comes closest to the type of authentication or identification described in Rule 901(b)(4) as authentication by “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.”

If the issue on the Rule 29 motion were solely whether Mr. Edmund had made use of a Facebook username Jaylo David, the Government’s evidence would be sufficient. However, this Court finds that in order to make a prima facie case, as required to survive a Rule 29 Motion to Acquit, the Government must provide proof that would support a finding that Mr. Edmund, acting as Jaylo David, made the threat in question. The manner in which Facebook and other social media operate drives that requirement. Among the concerns noted by the Maryland court in Griffin, applicable to Facebook and MySpace, was that “anyone can create a fictitious account and masquerade under another person’s name.” Griffin, 19 A.3d at 421.³ There being no further proof that the person who posted as Jaylo David to witnesses Solomon and Musrasrik in 2020 and early 2021 was the same person who posted as Jaylo David in the threat against President Panuelo, this Court concludes that the evidence is insufficient for a reasonably-minded trier of fact to base a finding that Mr. Edmund is guilty beyond a reasonable doubt.

² Information from the search warrants did rule out any user from Nett District computers or a user using Defendant’s home internet connection, as FSM Telecommunications indicated in response to search warrants that the Facebook post containing the threat was from a device that accessed the internet through its Kaboom service, and neither Nett District nor Defendant had Kaboom service.

³ Testimony of Mr. Caldwell at the probable cause hearing and Mr. Edwin at trial also noted the Facebook feature that made it possible for a person to freely mimic another’s name.

Request for Court to Consider Mr. Caldwell's Former Testimony

The Government requests in page 4 of its opposition brief that the Court take a look at the testimony of Adam Caldwell taken at the probable cause hearing. The Government had rested prior to the request, and it did not, in its brief or elsewhere, identify how Mr. Caldwell's former testimony would prove that the Jaylo David communicating with witnesses Musrasrik and Solomon on requests for government assistance was the Jaylo David who made the threat. Further, the testimony would likely be inadmissible hearsay.⁴ The Government's request is denied as untimely and lacking in merit.

CONCLUSION

The Government failed to make a prima facie case, sufficient for a reasonably-minded trier of fact to base a finding that Mr. Edmund is guilty beyond a reasonable doubt, Mr. Edmund is therefore acquitted of all counts.

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