UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	CRIMINAL NO: 11-0015
VERSUS	JUDGE DONALD E. WALTER
KHALID ALI-M ALDAWSARI	

MEMORANDUM ORDER

Before the Court is a Motion to Vacate Verdict and Grant New Trial Pursuant to Rule 33 [Doc. #206] filed by Defendant Khalid Ali-M Aldawsari. The Government opposes this motion [Doc. #212]. For the reasons that follow, Defendant's Motion [Doc. #206] is hereby **DENIED**.

Federal Rule of Criminal Procedure 33(a) allows a district court to "vacate any judgment and grant a new trial if the interest of justice so requires." *See United States v. Wall*, 389 F.3d 457, 466 (5th Cir. 2004) (citing *United States v. McBride*, 862 F.2d 1316, 1319 (8th Cir. 1988) (the interest of justice standard "requires the district court to balance the alleged errors against the record as a whole and evaluate the fairness of the trial."). "[M]otions for new trial are not favored, and are granted only with great caution." *United States v. O'Keefe*, 128 F.3d 885, 898 (5th Cir. 1997). Furthermore, a new trial is granted only upon demonstration of adverse effects on the substantial rights of a defendant. *United States v. Rasco*, 123 F.3d 222, 228 (5th Cir. 1997). Because a district court may only grant a Rule 33 motion for a new trial on a basis raised by the defendant, the Court will address each of the arguments raised by Aldawsari in turn. *See United States v. Nguyen*, 507 F.3d 836, 839 (5th Cir. 2007).

Government's Comments During Closing Arguments.

Aldawsari argues that the prosecution made improper statements during its rebuttal closing, which affected Aldawsari's substantial rights and deprived him of a fair trial. Aldawsari

alleges the following three instances of reversible prosecutorial misconduct: (a) misrepresentations that Aldawsari did not have instructional videos on his computer regarding how to create video games; (b) misrepresentations that Aldawsari had been planning to attack the United States since he was eleven years old; and (c) references to Aldawsari's future dangerousness if he were to be acquitted. Aldawsari claims that each of these comments, if not alone, warrants a new trial when viewed cumulatively.

In considering whether allegations of prosecutorial misconduct warrant reversal, the "determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *United States v. Virgen–Moreno*, 265 F.3d 276, 290 (5th Cir. 2001) (quoting *United States v. Iredia*, 866 F.2d 114, 117 (5th Cir. 1989)). "Overturning a jury verdict for prosecutorial misconduct is appropriate only when, 'taken as a whole in the context of the entire case,' the prosecutor's comments 'prejudicially affect[ed the] substantial rights of the defendant.'" *United States v. Delgado*, 672 F.3d 320, 337 (5th Cir. 2012) (quoting *United States v. Risi*, 603 F.2d 1193, 1196 (5th Cir. 1979)). "In determining whether the defendant's substantial rights were affected, [the court should] consider three factors: '(1) the magnitude of the prejudicial effect of the prosecutor's remarks, (2) the efficacy of any cautionary instruction by the judge, and (3) the strength of the evidence supporting the conviction.'" *Id.* (quoting *United States v. Wyly*, 193 F.3d 289, 299 (5th Cir. 1999) (internal quotation marks omitted)). With these standards in mind, even if the prosecution's comments were inappropriate, they certainly do not warrant reversal of Aldawsari's conviction.

Aldawsari's first argument focuses on the following statement:

> [O]ne of the things [the defense] pointed out was that he had written in [his journals] that he wanted to create his own PC game. Well, guess what. There aren't any how-to videos of how to create your own PC game. There is a whole stinking room full of videos on how to create picric acid, how to create a

> detonator, how to create the fusing source, but there aren't any on how to create your own video game.[1]

Aldawsari argues that at least nineteen videos, relating to creating computer games, were provided in discovery and that the prosecutor was aware of their existence. Aldawsari argues that the existence of these instructional videos shows that Aldawsari was, very close to the time of his arrest, focused on things other than using a weapon of mass destruction.

The Fifth Circuit has emphasized that "context is crucial to determining the effect of the statement." *Delgado*, 672 F.3d at 335. As the Government explains, the instructional videos were not introduced into evidence and were not found on Aldawsari's computer. Instead, these videos were simply marked as "favorites" on the YouTube accounts tied to Aldawsari's various user names: "overtime00" and "abuzidan00."[2] In contrast, the videos demonstrating how to create an improvised explosive device were saved to Aldawsari's Lacie thumb drive, viewed repeatedly, and admitted into evidence for the jury's consideration at trial.[3] The defense did not offer the contested videos or ask any questions of the Government's computer forensics experts regarding these videos. Moreover, the defense did not object to the prosecution's statements during closing arguments nor was a curative instruction requested. The Court did include a clear admonishment, in both its preliminary and final instructions, that neither opening statements nor closing arguments were evidence.

"If the evidence to support a conviction is strong, then it is unlikely that the defendant was prejudiced by improper arguments of the prosecutor and reversal is not required." *Delgado*,

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[1] Doc. #206-1, p. 50 (Transcript of Closing Arguments).

[2] Doc. #212, p. 5 (citing Gov. Exh. 148, 152, 187, and 188).

[3] Doc. #212, p. 5 (citing Gov. Exh. 169-186; Doc. #212-1 ("Transcript of Testimony of FBI Special Agent Michael S. Morris"), pp. 20-23, 26-29).

672 F.3d at 337 (internal citations omitted). The Court finds that the existence of these videos in Aldawsari's YouTube "favorites" is simply immaterial when viewed in the context of the evidence admitted at trial. Furthermore, that Aldawsari may have marked or liked other types of videos on the internet is not mutually exclusive with the jury's conclusion that Aldawsari clearly had the requisite intent to attempt to use a weapon of mass destruction. The Court cannot conclude that Aldawsari's substantial rights were prejudiced in any way by these statements.

Aldawsari next contends that there was no evidence to support the prosecutor's "rather outrageous claim" that Aldawsari had been "marching down the road to jihad" since he was eleven years old.[4] Aldawsari argues that, "[a]t most, the Government's evidence showed that Aldawsari wrote in his journals that he studied hard in Saudi Arabia so that he could come to the United States to commit an attack."[5] Although Aldawsari admits such a claim is "at least somewhat supported by evidence," he claims it is "strongly refuted both by other portions of Aldawsari's journals that show he came to the U.S. with purely good intentions" and did not start preparations until late 2010.[6]

The Court finds no merit to this argument. From the outset, the defense's assertion that Aldawsari's journals show that he came to America with "purely good intentions" is clearly a distortion of the truth, as shown by the evidence admitted at trial. Further, the entirety of the prosecution's relevant statement reads as follows:

> Now, I want to make sure I get this right, too. I believe one of [the defense's] statements was, "You get dizzy trying to follow the prosecutorial trail." Well, Mr. Aldawsari's trail won't make you dizzy. Let me just give you a few samples of that.

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[4] Doc. #206, p. 7 (citing Doc. #206-1, p. 51).

[5] Doc. #206, p. 7.

[6] *Id.*

> First of all, we know that before he ever stepped foot on American soil he had planned to kill Americans. By his own words. We didn't make that up. Those were his own words.
>
> And on his [m]arch down the road to jihad, he was marching. He has been marching since he was 11 years old, studying hard to get that scholarship, getting over into the United States, going and learning English at Vanderbilt University, transferring to Texas Tech. And in December, at least December of 2010, we have records between the bank records, the Amazon records, he starts marching much more quickly down that road to jihad. ...[7]

When we view the excerpt in context, it is clear that the Government made the exact argument, which even the defense suggests was "at least somewhat supported by evidence," *supra.* The Government described Aldawsari's actions, which included diligent studies in Saudi Arabia, in order to obtain a scholarship and journey to America. The Government's comments portrayed the path taken by Aldawsari, as evidenced by his journal entries, and later, his purchases and various computer searches.

Further, "[i]t is well established that an attorney may recite to the jury those inferences and conclusions he wishes them to draw from the evidence so long as they are based on the evidence." *United States v. Webb*, 950 F.2d 226, 230 (5th Cir. 1991). As the Government points out, Aldawsari was born on April 24, 1990.[8] At trial, the Government offered journal entries, in which Aldawsari refers to the September 11, 2001 terrorist attacks, as follows: "It did not take long for me to see the two blessed assaults, New York and Washington, so I tasted joy and happiness as the infidel Americans and their supporters tasted sorrow and terror."[9] Based on Aldawsari's own journal entries and simple math, the prosecution made a fair and logical inference in concluding that Aldawsari's mal-intentions began as early as 2001, when he would

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[7] Doc. #206-1, p. 51.

[8] Doc. #3, p. 3; Doc. #212, p. 4.

[9] Doc. #212, pp. 3-4 (citing Gov. Exh. 123 ("Scanned Copy of Black Mead Deluxe Journal (26) with Translation"), p. 27).

have been eleven years old.

Finally, Aldawsari claims that the Government made the following prejudicial remarks about Aldawsari's future dangerousness:

> Knowing what you know right now about Mr. Aldawsari, is that okay with you – that he would just go back to Saudi Arabia? Do you have more of a responsibility that to just say, "Well, you know, this case might be a little hard to decide. He is going back to Saudi Arabia anyway. What difference does it make?" Who is going to keep him there? Where will he go next? We don't know that.[10]

Aldawsari argues that this statement was an improper appeal to the jurors' passions. This Court fully agrees with the Government's contention that its contested statement was an invited response. As the Government correctly points out, the defense plainly referenced Aldawsari's future in its own closing argument:

> It is not an easy verdict at all, but it is the right verdict if you base your evidence on what the facts are and not what the passions are. It is a verdict of not guilty. It may offend you to your core to see him get on a plane and go back to Saudi Arabia, and you know exactly what is going to happen, but that is the verdict, the law calls for. ...
> He is not guilty. It doesn't mean you agree with what he did. It doesn't mean he shouldn't be sent away, whatever.[11]

"A prosecutor may respond in rebuttal to improper arguments by defense counsel, even though such a response might not be permissible in the absence of provocation." *United States v. Saenz*, 747 F.2d 930, 939 (5th Cir. 1984). The prosecution, in its rebuttal, addressed the defense's arguments head-on. *See Delgado*, 672 F.3d at 335. Therefore, even if the contested statement was inappropriate, it was invited by defense counsel and certainly does not warrant a new trial.

In sum, the Court agrees with Aldawsari that the statements made by the prosecution in

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[10] Doc. #206-1, pp. 48-49.

[11] Doc. #206-1, pp. 20-21, 42.

its closing rebuttal were slightly inappropriate and weakly prejudicial. However, viewed in the context of the entire case and the evidence presented to the jury, the Court does not find that the statements affected the substantial rights of Aldawsari. *See Saenz*, 747 F.2d at 939 ("Allegedly improper prosecutorial comments must be considered in context when determining their propriety."). The contested statements were neither "persistent nor pronounced" and thus do not warrant a new trial. *See Delgado*, 672 F.3d at 338 (citing *Bradford v. Whitley*, 953 F.2d 1008, 1013 (5th Cir. 1992) and *United States v. Wyly*, 193 F.3d 289, 299 (5th Cir. 1999) ("For prosecutorial misconduct to warrant a new trial, it must be so pronounced and persistent that it permeates the entire atmosphere of the trial.")).

Substance of the Jury Instructions.

Aldawsari next claims that the Court's jury instructions misstated the law and strongly prejudiced Aldawsari's substantial rights by including the following explanation of what constitutes a substantial step: "[On the other hand,] some preparations, when taken together with intent, may amount to an attempt."[12] Aldawsari objects on the basis of Fifth Circuit language, which "demand[s] that in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying *mens rea*, mark the defendant's conduct as criminal in nature." *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976). Aldawsari further contends that the instruction was made even more prejudicial by the Government's reliance on the contested portion of the instruction as a "key phrase" in closing argument.[13] And, finally, Aldawsari argues that an instruction allowing "some preparations" to

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[12] Doc. #206 (citing Doc. #195, p. 6).

[13] Doc. #206, p. 10 (citing Doc. #206-1, p. 7) (Government stated, in its closing argument: "We believe the Court will instruct you that mere preparation, without more, is not an attempt. On the other hand, some preparations – and this is the key phrase here – when taken together

amount to an attempt misstates clearly established law that "mere preparation" is not sufficient to constitute attempt.

The Court's instructions, regarding what constitutes a substantial step under the law, read as follows:

> To find that the defendant "attempted" to use a weapon of mass destruction, you must find that the defendant both intended to commit the offense and did an act constituting a substantial step towards the commission of that crime which strongly corroborates the defendant's criminal intent and amounts to more than mere preparation.
>
> In determining whether the defendant's actions amounted to a substantial step toward the commission of the crime, you must distinguish between mere preparation on the one hand, and the actual doing of the criminal deed on the other. Mere preparation, without more, is not an attempt. On the other hand, **some preparations, when taken together with intent, may amount to an attempt.** The question for you to decide is whether the acts of the defendant you are considering clearly indicate a willful intent to commit the crime, and whether those acts are a substantial step in a course of conduct planned to culminate in the commission of the crime.
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> In other words, liability for attempt attaches if the defendant's actions have proceeded to the point where, if not interrupted would culminate in the commission of the underlying crime.[14] (emphasis added).

Aldawsari properly objected to the contested portion of the instructions, highlighted above, in accordance with Federal Rule of Criminal Procedure 30(d). When a defendant claims that a jury instruction was erroneous, the question is "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them." *United States v. Daniels*, 281 F.3d 168, 183 (5th Cir. 2002) (quoting *United States v. Dien Duc Huynh*, 246 F.3d 734, 738 (5th Cir. 2001)).

The Fifth Circuit has described the "preparation–attempt continuum with such language

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with intent, may amount to an attempt.").

[14] Doc. #206-1, p. 61 (contested portion highlighted).

as 'no definite line' and 'matter of degree.'" *United States v. Ellis*, 564 F.3d 370, 374 (5th Cir. 2009) (quoting *United States v. Mandujano*, 499 F.2d 370, 375 (5th Cir. 1974) ("for there is, and obviously can be, no definite line... It is a question of degree.")). Although the Fifth Circuit has recently examined two of its prior decisions on this point – *Mandujano, supra* and *United States v. Oviedo,* 525 F.2d 881 (5th Cir. 1976) – the court ultimately found "that the potential inconsistency ... was more apparent than real." *United States v. Sanchez*, 667 F.3d 555, 563 (5th Cir. 2012) (noting the potential inconsistency flagged in *United States v. Hernandez-Galvan*, 632 F.3d 192 (5th Cir. 2011)). The *Sanchez* court explained that the two decisions "are not inconsistent when it is recognized that the substantial step test requires an act that is *both* strongly corroborative of the actor's criminal purpose and more than mere preparation." *Id.* at 562-563. Accordingly, the first sentence of the Court's instructions, quoted above, mirrors this language.

The Court's instructions went on to explain that:

> Mere preparation, without more, is not an attempt. On the other hand, some preparations, when taken together with intent, may amount to an attempt. The question for you to decide is whether the acts of the defendant you are considering clearly indicate a willful intent to commit the crime, and whether those acts are a substantial step in a course of conduct planned to culminate in the commission of the crime.

Reading the Court's charge, as a whole, it is clear that this is a correct statement of the law, written so as to clearly instruct the jurors on the applicable principles of law. That an attempt requires more than "mere preparation" is well established in the Fifth Circuit. *See Mandujano*, 499 F.2d at 378 ("Mere preparation ... is not sufficient to constitute an attempt"); *United States v. Polk*, 118 F.3d 286, 291 (5th Cir. 1997) ("crime of attempt requires... a 'substantial step,' beyond mere preparation..."); *United States v. Oviedo*, 525 F.2d 881, 884-85 (5th Cir. 1976) ("whether certain conduct constitutes mere preparation which is not punishable, or an attempt which is...").

Likewise, in *Mandujano*, the Fifth Circuit twice recited similar language to that which Aldawsari contests. *See* 499 F.2d at 375 (quoting Holmes, J.: "Preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree."); *see also* 499 F.2d at 377 (citing *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950) ("... some preparation may amount to an attempt. It is a question of degree")). Finally, the Court correctly emphasized that an attempt requires both a willful intent to commit the crime and a substantial step toward committing the crime. Thus, if we read the contested charge in light of the entire instruction, the Court finds no merit to Aldawsari's objection.

The Court's Reading of the Jury Instructions.

Aldawsari's final basis for a new trial is this Court's alleged mistake in reading the jury charge. The defense notes that "[a] significant aspect of the defense's case was that Aldawsari could not have attempted to 'use' a weapon of mass destruction, because there was no weapon of mass destruction in this case."[15] The defense argued that it elicited testimony from the Government's explosives expert that Aldawsari did not have the parts from which a destructive device could be "readily assembled," because he was missing phenol.[16] Accordingly, the defense emphasized this point in closing argument by reading the expected jury instruction: "In this case the Judge is going to tell us ... a definition of a weapon of mass destruction [includes] ... any combination of parts intended for use into any destructive device, and from which a destructive device may be readily assembled."[17] This definition was number six, of six possible definitions of a weapon of mass destruction. Aldawsari claims that this was the only applicable definition in

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[15] Doc. #206, p. 14 (citing Doc. #206-1, p. 29) ("You cannot attempt to use that which does not exist.").

[16] *Id.*

[17] *Id.* (citing Doc. #206-1, pp. 25-26).

his case. However, immediately after reading this section of the jury charge, the Court stated: "That really has no application, No. 6, here."[18] Aldawsari contends that, although the Court corrected its statement, the error could not be cured.

When a court is faced with allegations of judicial misconduct, the question is "whether the judge's behavior was so prejudicial that it denied the defendant a fair, as opposed to a perfect, trial." *United States v. Bermea*, 30 F.3d 1539, 1569 (5th Cir. 1994) (citing *United States v. Williams*, 809 F.2d 1072, 1086 (5th Cir. 1987)). Here, the broad instruction defining a weapon of mass destruction included six possible definitions. The Court simply narrowed the jurors' focus by identifying, and eliminating, an inapplicable section of that broad definition. Moreover, upon objection by the defense, the Court immediately cured any potential error by asking the jurors to turn back to the relevant portion of the instructions and re-reading the sixth, optional definition of a weapon of mass destruction. In addition to this curative step, the Court's final instructions included this admonishment: "Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case."[19] In reviewing the record as a whole, it is clear that Aldawsari received a fair trial. Therefore, upon due consideration, Defendant Aldawsari's Motion [Doc. #206] is hereby **DENIED.**

THUS DONE AND SIGNED in Shreveport, Louisiana, on this 15th day of August, 2012.

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

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[18] Doc. #206, p. 15 (citing Doc. #206-1, p. 62).

[19] Doc. #206-1, p. 57.