



The Federal Rules of Criminal Procedure provide that a sentence of imprisonment must be stayed if an appeal is taken and the defendant is released pending disposition of the appeal. *See* Fed. R. Crim. P. 38(b). The Federal Rules of Appellate Procedure provide that the decision regarding release must be made in accord with the applicable provisions of the Bail Reform Act. *See* Fed. R. App. P. 9(c). That Act provides, in pertinent part, that a defendant who has filed an appeal must be detained unless the court finds as follows:

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in –

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C.A. § 3143(b)(1) (West 2000).

While I am able to make the requisite finding contained in subsection (A) of section 3143(b) above, I cannot find that the appeal raises a substantial question of law or fact, as required in subsection (B). In this context, a “substantial question” is “a ‘close’ question or one that very well could be decided the other way.” *United States v. Steinhorn*, 927 F.2d 195, 196 (4th Cir. 1991) (quoting *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985)). Whether a question is substantial is decided on a case-by-case basis. *See id.*

The defendant asserts that two issues will be presented on his appeal. The first involves the selection of the jury. In accord with normal practice in this court, the jury was selected by the so-called “struck jury” method, by which the parties alternatively exercised peremptory challenges or “strikes” on a written list of qualified members of the venire following jury voir dire.<sup>1</sup> Because of challenges for cause and hardship excuses, there were insufficient members of the jury panel left to allow the parties the full number of peremptory challenges permitted by the rules. *See Fed. R. Crim. P. 24(b)(2)* (providing that in noncapital felony cases, the government has six peremptory challenges and the defendants jointly have ten

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<sup>1</sup> The manner in which peremptory challenges are to be used is a “a matter of local custom and traditionally has been left to the sound discretion of the district court.” *United States v. Mosely*, 810 F.2d 93, 96 (6th Cir. 1987).

peremptory challenges). Accordingly, the government agreed to waive three of its peremptory challenges, allowing the defendant to exercise his full allotment.

The defendant objected to proceeding without a sufficient number of jurors to allow the government its full six peremptory challenges, which motion the court overruled. The defendant now intends to assign that ruling as error on appeal, citing state authority, in particular *Fuller v. Commonwealth*, 416 S.E.2d 44 (Va. Ct. App. 1992). In *Fuller*, a defendant had been tried and acquitted by a jury and a week later brought to trial on separate charges. The jury pool for the second trial included persons who had been in the same pool for the first trial, and it was determined that there were only eighteen persons who had not served in the pool for the first case. A Virginia statute requires that “[t]welve persons from a panel of twenty shall constitute a jury in a felony case.” Va. Code Ann. § 19.2-262(B) (Michie 2000). The prosecution agreed to relinquish two of its four peremptory challenges. The defendant objected, but the trial judge overruled the objection. It was later determined that one of the eighteen persons had in fact been a member of the jury pool for the first trial. Although that person was struck by the prosecution using one of its remaining peremptory challenges, the Virginia Court of Appeals held that the defendant was prejudiced by not having another impartial juror on the panel and reversed the conviction. *See Fuller*, 416 S.E.2d at 46-47.

Unlike Virginia, there is no mandatory minimum size of a jury panel in a federal prosecution. Because the defendant received all of the peremptory challenges to which he was entitled and no juror sat on the case who should have been dismissed for cause, he has no valid claim of error under federal law. *See United States v. Martinez-Salazar*, 528 U.S. 304, 316-17 (2000) (holding that a defendant's right to peremptory challenges is not violated where he chooses to use such a challenge to remove a juror who should have been excused for cause, provided the jury panel ultimately selected is impartial).

The second claim of error by the defendant concerns an evidentiary ruling during the testimony of the defendant's wife, who testified on behalf of her husband that he had not possessed one of the guns.

The defendant's conviction of a misdemeanor crime of domestic violence in 1995 was the result of a complaint made by his wife.<sup>2</sup> During the government's case in chief, the government presented evidence of the prior convictions in the following manner:

THE COURT: Call your first witness.

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<sup>2</sup> The charges against the defendant required that the government prove that he had been convicted of a felony or a misdemeanor crime of domestic violence prior to his alleged possession of the firearms in question.

MR. MOUNTCASTLE [Prosecutor]: Your Honor, I would start off by offering to the court what I have previously marked as Government's Exhibits One, Two and Three, which I've shown to defense counsel. Exhibit Number One is the conviction and sentencing order in the Circuit Court of Dickenson County pertaining to the felonies for which the defendant was previously convicted. It's a certified copy. Exhibit Two is the paperwork, it's a certified copy of the record of his conviction for a misdemeanor crime of domestic violence. Exhibit Three is a stipulation fact entered into by the parties in which the parties agree that the defendant is the individual who is named in both of these documents. We would offer those in as Government's Exhibits One, Two, and Three.

THE COURT: Any objection?

MR. KALLEN [Defense Counsel]: Your Honor, I don't believe so. The only question I have is on domestic violence. I just want to make sure that is just the record from that. We don't object to the record of the conviction. There is a criminal complaint that goes in detail on the allegations on the domestic violence. We would object to that.

THE COURT: Would you remove that --

MR. MOUNTCASTLE: Yes, Your Honor, I can remove that.

THE COURT: I understand the defendant has no objection, and the exhibits will be admitted.

Later in the trial, during the defense case, the defendant's wife was cross examined by the prosecutor after she gave exculpatory evidence for her husband:

Q Are you afraid of him?

A No.

Q And you're smiling, but I mean, you've had reason to be afraid of him in the past, haven't you?

A We've had our arguments before, yes.

Q You were so afraid you took out a criminal complaint at one time?

A Seven, eight, nine year ago I believe it was.

Q There was some violence involved?

A Some pushing around. Nothing, I don't think, was real violent.

Q When you say pushing around, he pushed you up against the wall?

MR. KALLEN: I'm going to object to this, Your Honor. I think under Rule 403 this is the very thing the court --

THE COURT: I'll overrule the objection.

BY MR. MOUNTCASTLE:

Q One of the things was he pushed you up against the wall?

A Uh-huh.

Q You're saying uh-huh --

A Yes.

Q That was the wall of the kitchen of the house you were living in?

A I don't recall. It was like seven or eight years.

Q He started choking you?

A May have been. Like I said, I don't recall that.

Q You took out a criminal complaint, though?

A Yes.

Q Let me just show you a document and see if it helps you remember.

MR. MOUNTCASTLE: Your Honor, if I may approach the witness?

THE COURT: You may.

BY MR. MOUNTCASTLE:

Q Is that your handwriting there?

A Yes.

Q That's the complaint you swore out back in 1995?

A Uh-huh.

Q You're shaking your head --

A Yes.

Q Do you see here, back then you say he started choking you?

A Right.

Q And there was also some clothes that were torn during that incident, right?

A Uh-huh.

Q Can you - -

A Yes, yes.

Q And you were slapped?

A Right off hand, I don't remember.

Q Is that right?

A Yes.

Q That caused you to be in fear; is that right?

A Maybe at the time.

Q Now, at the time you were – were you living in the same household with him back when this was taken out? You had a child together, I guess, your eight year old?

A Yeah.

Q Now, I guess my question for you, are you coming here today because you're scared of him and telling us whatever it takes to get him off of these charges?

A No.

MR. MOUNTCASTLE: I have nothing further Your Honor.

THE COURT: Any further questions of the witness?

MR. KALLEN: No, Your Honor.

In the charge to the jury, the court instructed as follows:

The defendant is not on trial for any act or crime not contained in the indictment.

....

You have received evidence that the defendant has been previously convicted of crime, because that is a necessary element of the offenses charged in the case. In addition, you may consider the defendant's prior conviction of a felony in determining his credibility as a witness, because the testimony of a witness may be discredited or impeached by evidence showing that the witness has been convicted of a felony. However, you should not conclude that because the defendant may have committed a crime in the past, that he is more likely to have committed the offenses with which he is currently charged. Nor should you conclude that any prior conviction shows general bad character or a likelihood that the defendant would commit future crimes.

As I have instructed, the defendant is presumed innocent until proven guilty of the current charges.

(Instructions 5, 8.)

Under Federal Rule of Evidence 403, otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . .” The defendant contends that the court erred in allowing the prosecutor to elicit the details of the domestic violence crime during the cross examination of the defendant's wife.

The trial court is given broad discretion in the balancing required under Rule 403. *See United States v. Myers*, 280 F.3d 407, 413-14 (4th Cir.), *cert. denied*, 537 U.S. 852 (2002) (allowing “gruesome details” of victim's shooting and death). While

the trial court's explicit findings on a Rule 403 ruling may be helpful, they are not indispensable. *See United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988).

The ruling here was well within the court's discretion. The government was entitled to show the witness' possible fear of her husband as impeachment of her exculpatory testimony, even though the violence toward her occurred several years ago.<sup>3</sup> Moreover, there was no unfair prejudice, as the jury was already aware of his prior convictions and was instructed that they were not to consider them as evidence of propensity or bad character. Cautionary instructions are presumed to be effective in dispelling any unwarranted jury conclusions in these situations. *See United States v. Van Metre*, 150 F.3d 339, 351-52 (4th Cir. 1998).

For these reasons, I do not find that the appeal raises a substantial question that may result in a new trial for the defendant, and it is **ORDERED** that the defendant's Motion [Doc. No. 20] is denied.

ENTER: September 15, 2003

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United States District Judge

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<sup>3</sup> This case is unlike *United States v. Hands*, 184 F.3d 1322 (11th Cir. 1999), cited by the defendant at oral argument, where the evidence of the defendant's assault of his wife was not proper impeachment because although the wife testified, her testimony did not exculpate the defendant. *See id.* at 1327.