

kept by anyone for the government's information. FSM v. Henly, 23 FSM R. 510, 513 (Pon. 2022).

Criminal Law and Procedure – Criminal Intent; Criminal Law and Procedure – Falsification; Criminal Law and Procedure – Tampering with Public Records

When the defendant, “with a smirk,” told the Captain the record was fake, which was corroborated by the Captain’s testimony, the defendant’s presentation of the fake record to the Captain was itself not a basis for a violation of either the falsification statute or the tampering statute as it was done without the purpose as required by those statutes. FSM v. Henly, 23 FSM R. 510, 513 (Pon. 2022).

Criminal Law and Procedure – Criminal Intent; Criminal Law and Procedure – Standard of Proof

The burden of proof is on the government to prove beyond a reasonable doubt each element of the crimes and this includes the element of purpose. FSM v. Henly, 23 FSM R. 510, 513 (Pon. 2022).

Criminal Law and Procedure – Standard of Proof

Unsubstantiated speculation does not raise a reasonable doubt. FSM v. Henly, 23 FSM R. 510, 513 (Pon. 2022).

Criminal Law and Procedure – Falsification; Criminal Law and Procedure – Standard of Proof; Criminal Law and Procedure – Tampering with Public Records

A defendant’s transparent intent, expressed to and corroborated by his supervisor that he wanted to prove a point to him, not to generate a false or forged record to be officially relied upon, means that reasonable doubt exists about whether the defendant violated either the falsification statute or the tampering statute. FSM v. Henly, 23 FSM R. 510, 513-14 (Pon. 2022).

Criminal Law and Procedure – Attempt; Criminal Law and Procedure – Criminal Intent

Attempt is a specific intent crime, and the act constituting the attempt must be done with the intent to commit the particular crime. FSM v. Henly, 23 FSM R. 510, 514 (Pon. 2022).

Criminal Law and Procedure

In a criminal proceeding, the court is not tasked with determining whether the defendant behaved appropriately in all respects, but only with making a determination of whether the defendant is guilty of the crimes charged. FSM v. Henly, 23 FSM R. 510, 514 (Pon. 2022).

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COURT’S OPINION

DENNIS L. BELCOURT, Associate Justice:

This matter came before the Court for a hearing on rendering of the verdict on March 30, 2022. FSM Assistant Attorney General Jesse Mihkel, Esq. appeared for Plaintiff, Federated States of Micronesia (“Government”). Acting Chief Public Defender Timoci Romanu, Esq. appeared for the Defendant. Defendant Molten Henly (“Henly”) was also present before the Court.

Defendant having made his plea of not guilty to all counts, trial in this matter began and concluded on February 17, 2022. At the conclusion of his case-in-chief, Defendant Molten Henly requested that written closing arguments be submitted to the Court. With no opposition from the Government but a preference for oral closing arguments and leaving it to the court’s discretion, Defendant Henly’s request was granted and the parties were ordered to make their written submissions no later than March 10, 2022. Both the Government and Defendant Henly submitted their written closing arguments on March 10, 2022. The Government filed its response to Defendant Henly’s closing arguments on March 21, 2022.

On March 30, 2022, the Court delivered its findings in open court as follows.

Pursuant to FSM Rules of Criminal Procedure 23 and 31, having conducted the trial herein on February 17, 2022, I make the following findings of this Court:

On August 10, 2021, the President of the Federated States of Micronesia issued a “Decree to implement mandatory vaccination pursuant to Congressional Resolution No. 22-33 adopted by the 22d FSM Congress on July 28, 2021” (“the Decree”). As requested by Plaintiff and consented to by Defendant, this Court took judicial notice of the Decree.

The Decree quoted from Congressional Resolution No. 22-33 stating, in pertinent part, that “[a]ll FSM citizens residing in the FSM, are required to undergo COVID-19 vaccination subject to the protocol of the Task Force. Any employee of the National Government and its offices or agencies who fails to comply with this requirement within thirty days, absent reasonable justification, shall be placed on leave without pay.” The Decree further provided in pertinent part that “[f]rom Monday August 30th, 2021, all individuals who work for the National Government in any capacity—as public servants, as political appointees, as elected officials, as consultants—must provide evidence of their COVID-19 vaccination to the FSM COVID-19 Task Force and Office of Personnel. If such documentation is not present, then all individuals not vaccinated shall be placed on Leave Without Pay until such a time that they become vaccinated.”

On a date at the beginning of September, 2021, Defendant Molten Henly (“Defendant”), then a Sergeant of the FSM National Police, approached his supervisor, Captain George Skilling. Captain Skilling was in charge of collecting vaccination records for the FSM Department of Justice. Captain Skilling testified he would make copies of employees’ original vaccination cards and return the originals to the employee. Captain Skilling testified that he kept the photocopies in a folder that he (usually) locked up in a cabinet near his desk.

Captain Skilling testified that, on that day in September, Defendant jokingly told him that he can produce a vaccination card without ever getting the shot. Captain Skilling testified Defendant then took an existing record and went outside of Captain Skilling’s view, subsequently returning (“with a smirk on his face”) to present Captain Skilling with a vaccination record with the name “Henly, Molten” on it.

Defendant’s testimony was substantially similar to Captain Skilling’s with regard to the creation of a fake card in Defendant’s name. Defendant stated that he saw vaccination records lying around on Captain Skilling’s table and told him to take good care of those things, because people could make their own records with them. Defendant said he took one of the papers, whited out the name and date of birth and placed his personal information on the card. He testified that his purpose in doing so was not to create a false record.

Defendant himself was not vaccinated at the time. He testified that at the time that he advised Captain Skilling to take care of the records because they could be used to make fakes, he was not aware that he would be sent home on leave without pay if he did not get the vaccine.

In closing argument, which was by written submissions, the Government pointed to Defendant’s testimony about the mandate, that he did not know about it, as clearly showing that the Defendant is “a dishonest and untrustworthy person,” since “[a]ll national government employees were aware of the vaccination mandate, and most especially national police officers were aware because they are the ones who have the responsibility to enforce the mandate.” FSM’s Resp. to Def.’s Closing Arguments at 2-3.

No evidence was offered at trial to refute Defendant’s testimony claiming lack of knowledge that he faced leave without pay if he didn’t get the vaccine, and this Court is prohibited from considering closing argument as evidence. Livaie v. Weilbacher, 13 FSM R. 139, 144 (App. 2005).

However, based on Defendant’s own testimony that he created the fake record to show Captain Skilling that he should be careful with the records because people can make their own, this Court may and does infer that Defendant was aware of a requirement of employees to submit vaccine records.

Captain Skilling testified that he told Defendant to “trash” the fake record. Defendant testified he did not hear Captain Skilling say that. Defendant testified that he left the fake record at Captain Skilling’s desk. Captain Skilling did not see Defendant leave it there, but was less than certain, when pressed, whether Defendant took the record with him.

A few days later, Department of Justice administrative specialist Lenecia “Kristy” Nakanaga obtained the folder of vaccination records from on top of Captain Skilling’s desk to go through them and to cross-check with the Health Department as to their vaccination records. When she was sorting through the folder, Captain Cynthia Ludrick, who was with her, happened to see the paper with Defendant’s name. Captain Ludrick testified that, having worked for many years with Defendant, she recognized his handwriting. She was aware that the cards were filled out by health personnel, not the persons receiving the vaccination. She also knew that Defendant was not vaccinated.

No direct evidence was produced in this case as to how the faked record made its way into the folder picked up by Ms. Nakanaga from Captain Skilling’s desk. Captain Skilling testified that the folder was not locked away but was left on top of his desk for a period of time, a potential inference being that if Defendant did not leave the fake record on the desk as he says, but rather carried it away with him, he may have inserted the fake record in the folder when it was on Captain Skilling’s desk.

Defendant is charged with unsworn falsification, 11 F.S.M.C. 524. That statute would have been violated if Defendant, “with purpose to mislead a public servant in his or her official function . . . submit[ted] or invite[d] reliance” on the fake record, a forged document. Defendant is also charged with tampering, 11 F.S.M.C. 529, which would have been violated if Defendant made, presented, or used the fake vaccination record, a false document, “knowing it to be false, and with the purpose that it be taken as a genuine part of information or records . . . received or kept by a public servant, or belonging to the Government of the Federated States of Micronesia to be kept by anyone for information of the Government.”

Defendant claims that he did not create the record for any other purpose than to show Captain Skilling that a fake record could be made, and, thus, he lacked the requisite purpose under § 524 or § 529.

As Defendant, “with a smirk,” effectively told Captain Skilling the record was fake, which was corroborated by Captain Skilling’s testimony, the Court finds that Defendant’s presentation of the fake record to Captain Skilling is itself not a basis for a violation of either § 524 or § 529, as it was done without the purpose as required by those statutes.

A possible issue is whether Defendant, after his discussion with Captain Skilling, rather than simply leaving the fake record on Captain Skilling’s desk, actually took it with him and inserted it in the folder at a later date in the hope that it would escape Captain Skilling’s attention and be relied upon by others. Defendant testified he left it on the desk. Captain Skilling, while testifying that he did not see Defendant put the fake record in the file, when asked on cross-examination whether Defendant might have left the record on the desk, said he did not know.

Moreover, the theory that Defendant retained the fake record waiting for an opportunity to put it back in the folder when Captain Skilling wasn’t looking is a less likely scenario for explaining the presence of the fake record in the folder when Ms. Nakanaga later picked it up than the possibility that the fake record had previously been inadvertently picked up by Captain Skilling and placed in the file after Defendant had left it on the desk.

The burden of proof is on the Government to prove beyond a reasonable doubt each element of the crimes as set forth in § 524 or § 529, each of which, as detailed above, includes an element of purpose.

Unsubstantiated speculation does not raise a reasonable doubt. *Alaphonso v. FSM*, 1 FSM R. 209, 225-27 (App. 1982). I find that there is a reasonable doubt as to whether Defendant snuck the fake

document into the file without Captain Skilling knowing it, as opposed to Captain Skilling inadvertently putting it there himself.

Given the foregoing, especially Defendant's transparent intent, expressed to and corroborated by his supervisor Captain Skilling, that he wanted to prove a point to him, not to generate a false or forged record to be officially relied upon, I find that there is a reasonable doubt as to whether Defendant violated § 524 or § 529 and find him not guilty of Counts I and II.

With regard to the counts alleging attempted violations of § 524 or § 529, Counts III and IV, an attempt is a specific intent crime, and the act constituting the attempt must be done with the intent to commit the particular crime. FSM v. Mumma, 21 FSM R. 387, 400-01 (Kos. 2017). Insofar, as with violations of § 524 and § 529, the requisite intent includes a purpose, the proof of such purpose is also required to show an attempt of such crimes. As there is no proof of such purpose, I find Defendant not guilty as well of Counts III and IV.

This Court is not tasked with determining in this criminal proceeding whether Defendant behaved appropriately in all respects as a sworn officer of the FSM National Police. This Court, in this proceeding, other than making a determination of whether or not the Defendant is guilty of the crimes charged, makes no comment as to the appropriateness of Defendant's conduct in any other respect.

For the reasons above, it is adjudged that Defendant Henly is not guilty of Counts I, II, III and IV, and he is therefore acquitted.

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