UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	Criminal Action No. 13-10238-DPW
v.	)	
	)	
AZAMAT TAZHAYAKOV,	)	
	)	
Defendant	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

The United States opposes the defendant's motion to set aside the jury's verdict of guilty and enter judgment of acquittal under Fed. R. Crim. P. 29(c) or to grant a new trial under Fed. R. Crim. P. 33. In evaluating motions under Rules 29 and 33, the Court must resolve all questions of credibility and make all reasonable inferences in favor of the verdict. The trial evidence amply supported the jury's verdict in this case. Tazhayakov's motion asks the Court to re-assess the credibility of witnesses and re-weigh the evidence. The Court should deny the motion because the jury's carefully considered verdict was well supported by the evidence.

One of the defendant's sufficiency arguments implicates the question posed by the Court regarding whether knowledge by the defendant that the backpack contained a thumb drive is necessary to sustain the conviction. As defined by the Supreme Court in *Yates v. United States*, 135 S. Ct. 1074, 1088-89 (February 25, 2015), a "tangible object" under 18 U.S.C. § 1519 "is one used to record or preserve information." The rule announced in *Yates* should not disturb the verdict in this case for two reasons. First, the statute's knowledge requirement does not extend to the identity of the specific objects concealed or covered up; thus the defendant is guilty of concealing and covering up the thumb drive so long as he acted knowingly and with the requisite

obstructive intent, irrespective of his knowledge that the backpack contained a thumb drive. Second, under the *Yates* definition of tangible object, the backpack is itself a tangible object, because it is an object typically used to maintain and preserve books, documents, and the like.

I. FACTUAL BACKGROUND

A. General Background and Defendant's Post-Trial Claims

The jury found Tazhayakov guilty of both counts of the superseding indictment, which charged him with (1) conspiracy to obstruct justice, in violation of 18 U.S.C. § 371; and (2) obstruction of justice, in violation of 18 U.S.C. § 1519, both in connection with the altering, destroying, concealing, or covering up of tangible objects, to wit, a backpack containing fireworks, a jar of Vaseline, and a thumb drive, which had been in Dzhokhar Tsarnaev's dorm room in the early days of the Boston Marathon bombing investigation. Verdict Form at 1-2. The jury found the defendant not guilty of conspiracy or obstruction of justice in connection with the removal of a laptop computer from Tsarnaev's dorm room. *Id.*

In his motion the defendant makes the following five sufficiency of the evidence challenges:

(1) sufficiency of evidence to support the jury's finding that Tazhayakov "willfully" entered into an "agreement" in contravention of 18 U.S.C. § 371;

(2) sufficiency of evidence to support the jury's finding that Tazhayakov "willfully" obstructed justice in contravention of 18 U.S.C. § 1519;

(3) sufficiency of evidence to support the jury's finding that Tazhayakov knew the backpack contained a thumb drive;

(4) sufficiency of evidence to support the jury's guilty verdicts against Tazhayakov because the testimony of three government agents was incredible; and

(5) sufficiency of evidence of statements made by Tazhayakov's co-conspirator, based on a claim that the statements were elicited in violation of *Crawford v. Washington*, 541 U.S. 36, 68 (2004).[1]

Def. Mem. at 2.

The defendant's assertion that the evidence does not support a finding that he knew the backpack contained a thumb drive implicates the instructions by this Court in anticipation of the Supreme Court's decision in *Yates v. United States*, 135 S. Ct. 1074 (2015). *See* Procedural Order, Docket Entry No. 410. The Court instructed the government to address the following question:

> Given the potential that the Supreme Court may adopt the contention . . . that the term 'tangible object' in 18 U.S.C. § 1519 is limited to "a thing used to preserve information, such as a server, computer, or similar storage device", . . . is proof of knowledge that the backpack disposed of contained a thumb drive necessary in this case to support a conviction under § 1519 as the object of a conspiracy (Count One), or substantively (Count Two)? *See generally United States v. X–Citement Video, Inc.*, 513 U.S. 64 (1994).

Procedural Order at 1-2. As the Court is aware, in *Yates*, the Supreme Court stated that § 1519 is not "a coverall spoliation of evidence statute" and held that a "tangible object" within the meaning of § 1519 is something "used to record or preserve information" or that falls within the category of "filekeeping." 135 S. Ct. at 1088-89 (plurality opinion), 1090 (concurring opinion).[2] As discussed below, in the government's view, the answer to the Court's question is no. The

[1] The defendant further asserts that the government "improperly" highlighted this evidence in its closing argument, but fails to explain this argument. The government will not address this argument further because the defendant's cursory treatment of the issue constitutes waiver. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990).

[2] Thus, in *Yates*, the Court did not narrow the definition of "tangible object" to the full extent posited by this Court in its Order anticipating *Yates*. That is, the Supreme Court did not limit the meaning of "tangible object" to "a thing used to preserve information, such as a server, computer, or similar storage device." As discussed below, this distinction is significant because a student's backpack is in essence a briefcase worn on the back and is commonly used, as it was in this case, to carry and maintain records, both electronically and in hard copy.

government will address this issue first, after setting forth a summary of the evidence adduced at trial.

B. Summary of key facts established at trial

The Boston Marathon bombings occurred on Boylston Street in Boston, Massachusetts, on April 15, 2013. Tr. 5:61, 66. These explosions killed three people and injured more than two hundred people. Tr. 5:66. The FBI led the JTTF investigation of the bombings, which eventually identified Tsarnaev and his brother, Tamerlan, as suspects. Tr. 5:63, 70, 82. The FBI investigation following the bombing led them to a New Bedford apartment shared by Tazhayakov and Kadyrbayev. Tr. 5:73, 75. The two roommates were good friends with each other and were also close to Tsarnaev. Tr. 5:98; 6:10-13, 18; Govt. Exs. 11, 30, 31; *see generally* Testimony of Bayan Kumiskali. Subsequent investigation revealed the following:

Approximately one month before the bombing, Tsarnaev confided in both Tazhayakov and Kadyrbayev that he believed it was good to die as a Shaheed or martyr as you would die with a smile on your face and go straight to heaven. Tr. 9:49. Further, during this same conversation, Tsarnaev told Tazhayakov and Kadyrbayev that he knew how to make a bomb and identified the specific ingredients that could be used to make a bomb. Those ingredients included "gunpowder." Tr. 9:49-50.

Shortly after the FBI released video footage and photographs of the suspected bombers at a press conference and solicited the public's assistance in identifying the bombers on April 18, 2013, both Kadyrbayev and Tazhayakov had seen the images and suspected that their close friend, Tsarnaev, was one of the two suspects. Tr. 6:26-27. At approximately 9:00 p.m. on April 18, 2013, Tazhayakov and Kadyrbayev agreed to go to Tsarnaev's dormitory room on the campus of the University of Massachusetts at Dartmouth. Tr. 6:14, 26, 65; Govt. Ex. 47. The

two men then went to Tsarnaev's dorm room, where Tsarnaev's roommate let them into the room. Tr. 6:27. Moments before the defendant entered Tsarnaev's dormitory room, at 9:35 p.m. on April 18, 2013, he viewed an article entitled "FBI: Help us ID Boston bomb suspects" on CNN's website. Govt. Ex. 49. Before entering Tsarnaev's room, Kadyrbayev showed the defendant a text message from Tsarnaev that read: "I'm leaving. If you want anything from my room, take it." Tr. 6:26-27; Govt. Ex. 47.

Inside Tsarnaev's room, Kadyrbayev located a backpack that contained emptied-out cardboard tubes that Tazhayakov described as fireworks. *See* Tr. 6:32-33. Initially, Tazhayakov claimed he did not know whether fireworks were removed from Tsarnaev's dormitory room, Tr. 6:29-30, but he eventually admitted that the backpack contained "the stuff you use on New Year's" and used hand gestures and sound effects to describe fireworks, Tr. 6:32. Tazhayakov explained that he was scared when Kadyrbayev showed him the fireworks in the backpack because they were missing the "gunpowder." Tr. 6:33-34. Kadyrbayev also found a jar of Vaseline which he showed to the defendant while indicating that Tsarnaev might have used it to make a bomb. Tr. 8:122. While inside Tsarnaev's room and as Kadyrbayev was finding evidence of bomb making materials, Tazhayakov viewed a video about the manhunt for the bombers on his phone. *See* Ex. 49. Tazhayakov told law enforcement that, after finding the fireworks and jar of Vaseline, he and Kadyrbayev removed the backpack, along with a black laptop computer, a brown ashtray, and a pair of headphones, from Tsarnaev's dormitory room. Tr. 6:27-34; Tr. 9:50-52.

Tazhayakov and Kadyrbayev then brought the items to the Carriage Drive apartment. Tr. 6:29. Back at their apartment, the two men then removed the items from the backpack. Tr. 6:29, 34. Tazhayakov indicated that both he and Kadyrbayev again saw the fireworks while in their

apartment that evening. *See* Tr. 6:34, 71. After returning to their apartment, the defendant and Kadyrbayev monitored the manhunt of Dzhokhar and Tamerlan Tsarnaev on the internet and television news. At 2:28 a.m. on April 19, 2013, Tazhayakov sent Kadyrbayev at text, which read, "I think they caught his brother." This coincided with the news reports of the Watertown shootout. *See* Govt. Exs. 46, 58, 59.

During the morning of April 19, 2013, the defendant and Kadyrbayev discussed disposing of Tsarnaev's backpack. Tr. 6:34. In response to Kadyrbayev saying, "We should throw out the backpack with fireworks," the defendant stated, "I agree." *Id*. The defendant later adopted a statement in a form prepared by a federal agent indicating that he and Kadyrbayev "removed these items because they suspected Tsarnaev was one of the Boston Marathon bombers and they came up with a plan to dispose of the items." Tr. 7:46-50; Govt. Ex. 45. The defendant told the agent that he and Kadyrbayev "collectively just agreed to remove the items," including the backpack, from Tsarnaev's dorm room and that they "agreed to get rid or throw away the items." Tr. 7:49-50. After this discussion, the defendant accepted that the word "plan" was an accurate characterization. Tr. 7:49-51.

Kadyrbayev disposed of the backpack, together with the fireworks, thumb drive, Vaseline, and academic papers, in a dumpster near the Carriage Drive apartment. Tr. 10:28-29, 64. The defendant knew that the backpack had been thrown into a garbage dumpster and that the dumpster had been emptied by a garbage truck on Friday, April 19, 2013. Tr. 10:28-29. After Kadyrbayev returned from disposing of the backpack, Tazhayakov told Kadyrbayev that he needed to remember exactly where he threw the bag away. Tr. 6:29-30.

The FBI removed several items from the defendant's Carriage Drive apartment, including a Sony Vaio laptop computer. Tr. 5:77. The FBI located the Sony Vaio laptop underneath a red

and blue baseball cap. Tr. 5:80; Govt. Ex. 13. The Sony Vaio laptop belonged to Tsarnaev. Tr. 5:82, 83. After learning that Tazhayakov and Kadyrbayev had also brought the backpack belonging to Tsarnaev to the apartment—and later disposed of it in a dumpster—the FBI recovered the backpack from the Crapo Landfill on April 26, 2013. *See* Govt. Exs. 130-131; Tr. 9:116, 117. Tsarnaev's backpack contained fireworks (Govt. Exs. 116-118), a jar of Vaseline (Govt. Ex. 128), a spiral UMass/Dartmouth academic planner (Govt. Ex. 122), and a homework assignment from an ethics class in which Tsarnaev was enrolled (Govt. Ex. 124; Tr. 9:138). The backpack also contained a thumb drive. Govt. Exs. 120, 126. The parties stipulated that the thumb drive belonged to Tsarnaev. Govt. Ex. 111; Tr. 9:123.

During questioning by FBI agents, the defendant initially left out details about his activities on the night of April 18, 2013, and was "shaking" whenever that topic came up. Tr. 6:24-26. After continued questioning, he relented and shared details of his involvement, admitting that he left out details at first because he was "trying to defend [Tsarnaev]." Tr. 6:25-26.

II. ARGUMENT

A. *Yates* does not require a finding that there was insufficient evidence to support the jury's verdict. (*See* Def. Mem. Argument C)

1. The knowledge requirement is satisfied by the jury's findings that the defendant knowingly conspired to and did in fact conceal, cover up, *etc*. a backpack containing fireworks, a jar of Vaseline and a thumb drive.

As stated above, proof that the defendant knew that Tsarnaev's backpack contained a thumb drive is not necessary to support a conviction, notwithstanding *Yates*'s narrowing of the definition of "tangible object." Courts interpreting the knowledge requirement of § 1519 have observed that "the most natural reading of § 1519 . . . is to interpret 'knowingly' as modifying its surrounding verbs only: 'alters, destroys, mutilates, conceals, covers up, falsifies, or makes a

false entry." *United States v. Moyer*, 674 F.3d 192, 208 (3d Cir. 2012) (citing *United States v. Yielding*, 657 F.3d 688, 714 (8th Cir. 2011)).[3] Those courts have also explained that exceptions to applying the grammatically natural reading are easily distinguished from the language of § 1519. As the court in *Yielding* explained,

> The Supreme Court sometimes has applied "knowingly" more broadly (and unnaturally) in a criminal statute to avoid anomalies and constitutional problems, or where scienter is not otherwise expressed. *See, e.g.*, *United States v. X–Citement Video, Inc*., 513 U.S. 64, 69–70 . . . (1994). Those concerns are not present here. The statute requires proof that an accused *knowingly* falsified a document, with *intent* to impede, obstruct, or interfere with the investigation or proper administration of a matter.

Yielding, 657 F.3d at 714 (emphasis in original); *accord Moyer*, 674 F.3d at 208.

In *X–Citement Video*, the Court addressed the use of the term "knowingly" in 18 U.S.C. § 2252, a statute that contains no express scienter requirement. *See* 513 U.S. at 68-69. Section 2252 prohibits, among other things, "knowingly . . . ship[ping] in interstate . . . commerce . . . any visual depiction, if . . . the producing of such visual depiction involves the use of a minor . . . ." *Id*. at 68. The Court set out to determine whether the term "knowingly" modifies the phrase "use of a minor" and noted that "[t]he most natural grammatical reading . . . suggests that the term 'knowingly' modifies only the surrounding verbs: transports, ships, [etc. and] . . . would not modify the elements of the minority of the performers, or the sexually explicit nature of the material . . . ." *Id*. The Court departed from the plain grammatical reading of the statute, however, in order to avoid criminalizing purely innocent conduct. *See id.* at 69 ("If we were to conclude that 'knowingly' only modifies the relevant verbs in § 2252, we would sweep within

[3] The government recognizes that in those cases the appellants argued that "knowingly" required knowledge that the "matter" was within the FBI's jurisdiction. *See Moyer*, 674 F.3d at 208; *Yielding* 657 F.3d at 714. The reasoning in those decisions nonetheless applies in this context.

the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material.").

The Supreme Court explained that the "reluctance to simply follow the most grammatical reading of the statute is heightened by our cases interpreting criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *Id*. at 70. The Court further explained that its precedents interpreting obscenity laws "suggest that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts," requiring the Court "to read the statute to eliminate those doubts . . . ." *Id*. at 78. The *X–Citement Video* Court discussed several instances of the Court eschewing the most grammatical reading of a statute in order to avoid an interpretation that omitted a scienter requirement. *See Morissette v. United States*, 342 U.S. 246, 271 (1952) (relying on common-law presumption of evil intent to read "knowingly" in the federal embezzlement statute to require the defendant know that the converted property belonged to the United States); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (interpreting "knowingly" in a manner that imposed a scienter requirement because "to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct"); *Staples v. United States*, 511 U.S. 600, 610 (1994) (construing statute criminalizing possession of an automatic weapon and lacking an express *mens rea* requirement to include a scienter requirement because to do otherwise "would criminalize behavior that a defendant believed fell within 'a long tradition of widespread lawful gun ownership by private individuals,'" *X–Citement Video*, 514 U.S. at 71 (quoting *Staples*, 511 U.S. at 610)) . Thus, the Court in *X–Citement Video* concluded, "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter

requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *Id*. at 72.

Viewed in light of § 1519's explicit requirement that a defendant act not only knowingly, but also with specific "intent to impede, obstruct, or influence" a federal investigation, *Morissette*, *Staples*, *X–Citement Video*, and other cases in which the Supreme Court has identified a need to vary from the natural reading of a statute in order to articulate a scienter requirement, are inapposite. Section 1519 contains a scienter requirement: the intent to impede, obstruct, or influence a federal investigation. Thus, it simply does not cover inadvertent conduct or even intentional conduct without obstructive intent; it covers only intentionally obstructive conduct. Reading "knowingly" as it has been interpreted by courts analyzing the specific statute at issue here, *see Yielding*, 657 F.3d at 714; *Moyer*, 674 F.3d at 208, is appropriate and raises none of the concerns expressed in *X–Citement Video*. As the Supreme Court has instructed, "[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *X–Citement Video*, 513 U.S. at 72). Where, as here, a defendant has knowingly concealed evidence with intent to impede an investigation, the government need not prove that he knew precisely what evidence he concealed.

2. Unlike the fish in *Yates*, the backpack the jury found the defendant concealed was used to "preserve information" and is thus a tangible object as *Yates* defined that term.

The rule announced in *Yates* does not limit the definition of "tangible object" to things used to preserve information electronically, such as a server, computer, or similar storage device. On the contrary, the Court's definition of "tangible object" as something "used to record or preserve information" or falling within the category of "filekeeping" is most naturally read to

include objects traditionally used to preserve paper records, such as briefcases, banker's boxes, and file cabinets. *See Yates*, 135 S. Ct. at 1085 ("The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information."); and *see id.* at 1090 (concurring opinion expanding tangible object to include "nouns" within the "category [of] filekeeping."). The backpack at issue in this case was in essence a briefcase that could be worn on the back. Indeed, Tsarnaev's backpack contained paper records evidencing Tsarnaev's ownership of the backpack and enrollment as a student at the University of Massachusetts at Dartmouth, thus connecting Tsarnaev to the backpack's other contents. *See* Tr. 9:116, 124, 138 (backpack contained a homework assignment the jury could infer belonged to Tsarnaev and a notebook bearing the title "Corsairs Dartmouth, academic 2012-2013 planner"). It is certainly within common understanding, and the jury could reasonably infer, that the primary use to which a student typically puts such a backpack is to keep books and documents safe and portable. Tsarnaev's backpack was used to "preserve" the documents and records it contained, both in hard copy and in electronic format. *See* "Preserve," Merriam-Webster Online Dictionary (defining "preserve" as "to keep safe from injury, harm, or destruction; protect; to keep alive, intact, or free from decay; maintain").

B. The Defendant's Sufficiency Claims

1. Standards Under Rules 29 and 33

It is well established that review under Rule 29 proceeds in two phases. First, the Court views all the evidence in the light most favorable to the verdict, drawing all reasonable inferences and resolving all credibility disputes in the verdict's favor. *United States v. Fermin*, 771 F.3d 71, 78 (1st Cir. 2014) (citing *United States v. Cruz-Rodríguez*, 541 F.3d 19, 26 (1st Cir.

2008)). Next, the Court determines whether such a rendition of the record would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Id.* (citing *United States v. Lizardo*, 445 F.3d 73, 81 (1st Cir. 2006)).

Thus, when deciding whether there is sufficient evidence to sustain a conviction, the Court will reverse only if all of the evidence, viewed in the light most favorable to the government, "could not have persuaded any trier of fact of the defendant's guilt beyond a reasonable doubt." *United States v. Tavares*, 705 F.3d 4, 17-18 (1st Cir. 2013). The Court's review canvasses "the totality of the evidence, both direct and circumstantial," *United States v. Czubinski*, 106 F.3d 1069, 1073 (1st Cir. 1997) (internal citations and quotation marks omitted), but the Court "do[es] not weigh evidence or assess credibility." *Tavares*, 705 F.3d at 18.

Alternatively, the defendant seeks a new trial under Fed. R. Crim. P. 33, arguing that the verdict constitutes "manifest injustice." Def. Mem. at 39. Rule 33 "authorizes the grant of a new trial if required in the interests of justice and where the evidence preponderates heavily against the verdict." *United States v. Villarman-Oviedo*, 325 F.3d 1, 15 (1st Cir. 2003) (quoting *United States v. Andrade*, 94 F.3d 9, 14 (1st Cir. 1996); *see also United States v. Merlino*, 592 F.3d 22, 33 n.5 (1st Cir. 2010) (noting that a district court considering a Rule 33 motion "should interfere with the jury verdict only if the jury has reached a seriously erroneous result").

While the Court "has greater latitude in considering a motion for a new trial than it does in considering a motion for acquittal," *Merlino*, 592 F.3d at 33, the First Circuit has imposed "definite limits upon a district court's right to upset a jury verdict." *United States v. Rivera Rangel*, 396 F.3d 476, 486 (1st Cir. 2005) (quoting *United States v. Rothrock* 806 F.2d 318, 322 (1st Cir. 1986)). In order to "protect the fragile power given to the jury," the remedy of a new trial must be "sparingly used." *Rothrock*, 806 F.2d at 322 (citation and internal quotation marks

omitted). The district court must refrain from interfering with the jury's verdict "unless it is quite clear that the jury has reached a seriously erroneous result." *Id.* (quoting *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 887 (1st Cir. 1978)); *see also Merlino*, 592 F.3d at 33 n.5.

2. Ample evidence supported the jury's finding that Tazhayakov "willfully" entered into an "agreement" to dispose of the backpack. (Def. Mem. Argument A)

The defendant's argument that there is insufficient evidence to support the jury's finding that Tazhayakov "willfully" entered into an "agreement" to dispose of the backpack is without merit. A conspiracy pursuant to 18 U.S.C. § 371 exists "[i]f two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy." 18 U.S.C. § 371. To prove a conspiracy, the government must show that (1) a conspiracy existed, (2) the defendant had knowledge of the conspiracy, and (3) the defendant voluntarily participated in the conspiracy. *United States v. Cortes-Caban*, 691 F.3d 1, 13-14 (1st Cir. 2012) (internal citation and quotation marks omitted). The third element, voluntary participation, "requires a showing of intent to agree to the conspiracy and intent to effectuate the object of the conspiracy." *United States v. Lizardo*, 445 F.3d 73, 81 (1st Cir. 2006) (internal citation and quotation marks omitted). Direct or circumstantial evidence will suffice to establish each of these elements, and a conspirator's agreement to participate in a conspiracy need not be express. *Cortes-Caban*, 691 F.3d at 13-14 (internal citation and quotation marks omitted); *Lizardo*, 445 F.3d at 81. When addressing a sufficiency challenge, the Court "must reject [the defendant's] claim as long as a plausible reading of the record supports the jury's implied finding that [the defendant] knowingly participated in the charged conspiracy." *United States v. Perez-Ruiz*, 353 F.3d 1, 7 (1st Cir. 2003).

The trial record requires the Court to accept the jury's finding that Tazhayakov voluntarily entered into a conspiracy with Kadyrbayev to obstruct justice. The defendant explicitly admitted that he and Kadyrbayev "collectively just agreed to remove the items." Tr. 7:50. This testimony alone unequivocally refutes the defendant's contention that the government "presented no evidence that [Tazhayakov] and [Kadyrbayev] had a discussion, plan, or agreement about removing *items* from the dorm room." Def. Mem. at 19 (emphasis in original). Moreover, when Kadyrbayev said, "We should throw out the backpack with fireworks," the defendant responded, "I agree." *Id*.; and *see* Govt. Ex. 23. Such evidence, supplemented by ample circumstantial evidence, such as the close relationship between the defendant and Kadyrbayev, the communication about the purpose of the Vaseline, the defendant's delaying tactics while being interviewed by the FBI, and his admission that he delayed because he was trying to defend Tsarnaev, is plainly sufficient to support the jury's verdict.

The defendant's suggestion that the Court consider alternative interpretations of the evidence—*e.g.*, suggesting that he used the word "we" to describe his joint conduct with Kadyrbayev solely to indicate his presence—is merely an invitation to the Court to second-guess evidence-based conclusions by the jury, the trier of fact. *See* Def. Mem. at 19. Similarly unpersuasive is the defendant's reliance on cases involving "preliminary" conspiratorial discussions that come to naught. *Id*. at 21-22. The jury also convicted the defendant of substantively violating § 1519; there was nothing "preliminary" about the co-conspirators discussions.

3. Ample evidence supported the jury's finding that that Tazhayakov obstructed justice, in violation of 18 U.S.C. § 1519. (Def. Mem. Argument B)

The government proved Tazhayakov obstructed justice both as an aider or abettor and under *Pinkerton*.[4] The defendant's claim that insufficient evidence supports the jury's finding that he substantively violated § 1519 is based on unsupported assertions similar to those he makes in arguing evidentiary insufficiency to support the conspiracy conviction. *See, e.g.*, Def. Mem. at 26 ("The Government presented absolutely no evidence that Azamat . . . concealed or covered up a backpack.") . He supports such bold statements with undisputed assertions, such as Kadyrbayev's role in carrying the backpack out of the dorm room and ultimately throwing it in a dumpster. The defendant then asks the Court to interpret his various admissions— *e.g.*, that he told Kadyrbayev that he agreed that "we should throw out the backpack with fireworks,"—by again suggesting that "the use of the pronoun 'we' was merely figurative to connote Azamat's presence." *Id.* The Court should reject this argument, because it cannot be said that a rational jury could not have found that the defendant's admissions proved he was an aider and abettor. This is especially true given other circumstantial evidence of guilt, as described above. *Supra* at 14.

Nor is there merit to the argument that insufficient evidence supports a finding of guilt for the substantive offense on a *Pinkerton* theory—especially where, as here, the substantive offense charged was the very object of the conspiracy. The First Circuit has not departed from this core principle. *See, e.g., United States v. Vazquez-Castro*, 640 F.3d 19, 24 (1st Cir. 2011)

[4]The defendant's argument that insufficient evidence to convict on all theories means the jury could not have convicted him on any theory is contrary to the law in the First Circuit: "The law is crystalline that, when the government has advanced several alternate theories of guilt and the trial court has submitted the case to the jury on that basis, an ensuing conviction may stand as long as the evidence suffices to support any one of the submitted theories." *United States v. Gobbi*, 471 F.3d 302, 309 (1st Cir. 2006).

("[U]nder the *Pinkerton* theory of liability, the jury must find that the defendant was a member of a conspiracy and the [overt act] was 'reasonably foreseeable' in furtherance of the conspiracy."). Once the defendant entered into the conspiracy to remove and dispose of the objects in Tsarnaev's room, *i.e.*, to obstruct justice, he became liable for the subsequent, foreseeable acts of his coconspirators taken in furtherance of that conspiracy.

Finally, the defendant's claim that a guilty finding under *Pinkerton* lacks due process protections for co-conspirators ignores the First Circuit's teaching that "[t]he foreseeability concept underlying *Pinkerton* is also the main concern underlying a possible due process violation." *United States v. Collazo-Aponte*, 216 F.3d 163, 196 (1st Cir. 2000) (citation omitted). As the court explained in *Collazo-Aponte,* the relevant inquiry is whether it was reasonably foreseeable to the defendant that the substantive offense would be committed. *Id.* Here, the evidence that supports a finding of aider and abettor liability is also sufficient to support a finding of guilty under *Pinkerton.*

4. The jury was entitled to credit—and evidently did credit—the testimony of the federal agents. (Def. Mem. Argument D)

As the defendant concedes, credibility determinations are "solely within the jury's province." *United States v. Serunjogi*, 767 F.3d 132, 139 (1st Cir. 2014) (citation omitted). Thus, the defendant's assertion that the Court should supplant the jury as the finder of fact is without merit. This is especially so because the defendant's argument appears to be based on isolated instances of alleged inconsistencies in the testimony of various government agents. "Minor inconsistencies are common, unavoidable, and virtually always grist for the factfinder's mill. It [is] ultimately the province of the jury to assess the significance of any contradictions . . . ." *United States v. Gobbi*, 471 F.3d 302, 311 (1st Cir. 2006); *see also United States v. Guerrero-Guerrero*, 776 F.2d 1071, 1075 (1st Cir. 1985) ("[E]vidence need not

preclude every reasonable hypothesis inconsistent with guilt; and . . . the jury is free to choose among varying interpretations of the evidence, as long as the interpretation they choose is reasonable."); *United States v. Olbres*, 61 F.3d 967, 970 (1st Cir. 1995) (noting that, faced with sufficiency challenge, "the trial judge must resolve all evidentiary conflicts and credibility questions in the prosecution's favor; and, moreover, as among competing inferences, two or more of which are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt"); *United States v. Passos-Paternina*, 918 F.2d 979, 985 (1st Cir. 1990) ("[w]e defer, within reason, to inferences formulated by the jury in the light of its collective understanding of human behavior in the circumstances revealed by the evidence").

5. The defendant's *Crawford* claim is devoid of merit. (Def. Mem. Argument E)

The defendant complains that Special Agent Assad testified that it was only after Kadyrbayev told him about the removal of a backpack from Tsarnaev's dorm room that he confronted the defendant with the suggestion that the defendant was withholding information. *See* Def. Mem at 37 and Tr. 8:108-109. The defendant argues this was a Sixth Amendment violation under *Crawford v. Washington*, 541 U.S. 36, 68 (2004). This argument is without merit and warrants short shrift. First, the defendant did not object to the testimony of which he now complains, and consequently it is subject only to plain error review by this court. *See United States v. Brandao*, 448 F. Supp. 2d 311, 318 (D. Mass. 2006) (Saris, C.J.) *aff'd*, 539 F.3d 44 (1st Cir. 2008); *see also United States v. Acevedo-Maldonado*, 696 F.3d 150, 155-56 (1st Cir. 2012) (applying plain error review to *Crawford* objection raised for first time in post-trial motion). Thus, the defendant can only prevail on this argument if (1) there was error, (2) that error was "plain," (3) that error affected the defendant's substantial rights, and (4) failure to

correct the error would seriously "affect[] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993).

This argument fails the first prong of that standard because there was no error. The statement was not hearsay because it was not offered for the truth of the matter asserted. *See United States v. Earle*, 488 F.3d 537, 542 (1st Cir. 2007) (no *Crawford* violation unless statement at issue was hearsay). Rather, the statement served only to describe the progress of the investigation and demonstrate that, contrary to assertions the defendant made in his opening statement, Tazhayakov's response to the FBI's inquiries was not altogether forthcoming. Finally, contrary to the defendant's characterization of the prosecution's treatment of this issue in its closing argument as improper (Def. Mem. at 37), the prosecution merely accurately relayed the unchallenged testimony by Assad that "Kadyrbayev said, 'We took backpack with fireworks.'" Tr. 12:28.

III. CONCLUSION

For the foregoing reasons, the Court should deny the defendant's motion for judgment of acquittal or alternatively a new trial.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: /s/ John A. Capin
JOHN A. CAPIN
B. STEPHANIE SIEGMANN
Assistant U.S. Attorneys

Certificate of Service

I do hereby certify that a copy of foregoing opposition was served upon the counsel of record for the defendant by filing it electronically via the CM/ECF system on this 18th day of March, 2015.

/s/ John A. Capin