

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12024

D.C. Docket No. 1:16-cr-00243-ODE-JFK-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

NATHAN VAN BUREN,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(October 10, 2019)

Before MARTIN, ROSENBAUM, and BOGGS,* Circuit Judges.

ROSENBAUM, Circuit Judge:

Perhaps Dudley Field Malone said it best when he opined, “One good analogy is worth three hours’ discussion.”¹ Or in this case, 15 pages of discussion. *See infra* at pp. 9–23.

Take, for example, this case.

“[A] lawsuit before a court” is a pretty big deal to most people. But a generic “question” or “matter,” in common usage, maybe not so much.

That impression may change, though, if we clarify what we mean by “question” or “matter” in a specific context by analogizing to something else. So if we say that, for our purposes, to qualify as a “question” or a “matter,” the question or matter must be of the same significance or scope as “a lawsuit before a court,” a person would understand that we are not talking about just any old question or

* Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

¹ Richard Nordquist, *The Value of Analogies in Writing and Speech*, ThoughtCo., <https://www.thoughtco.com/what-is-an-analogy-1691878> (last visited Oct. 8, 2019). Along with Clarence Darrow, Dudley Field Malone defended John Scopes in the 1925 “Scopes Trial,” formally known as *State v. Scopes. Scopes Trial*, Encyclopaedia Britannica, <https://www.britannica.com/event/Scopes-Trial> (last visited Oct. 8, 2019) (“Scopes Trial”); *Malone’s Trial Speech (Full Text)*, Historical Thinking Matters, <http://historicalthinkingmatters.org/scopestrial/1/sources/44/fulltext/> (last visited Oct. 8, 2019) (“Malone’s Trial Speech”). In that case, Tennessee, led by William Jennings Bryan, prosecuted Scopes for allegedly teaching evolution at a Tennessee high school. *Scopes Trial*. Scopes was convicted and fined \$100. *Scopes v. State*, 289 S.W. 363, 367 (Tenn. 1927). The Tennessee Supreme Court then vacated the judgment since Tennessee law required a jury—not a judge—to assess any fine of more than \$50.00, but in Scopes’s case, the trial judge had done so. *Id.* The Tennessee law Scopes was accused of violating was ultimately repealed in 1967. *Scopes Trial*.

matter; we are referring to only questions or matters on the same scale as “a lawsuit before a court.” To use a metaphor, the analogy here is a bridge to understanding.

In this case, though, that bridge was never built. The government charged Nathan Van Buren with honest-services fraud (through bribery) for undertaking an “official act” in his capacity as a police officer, in exchange for money. At the close of the evidence, the district court instructed the jury that an “official act” is a decision or action on a “question” or “matter.” But it did not inform the jury that the “question” or “matter” in this context must be comparable in scope to a lawsuit, hearing, or administrative determination. The jury convicted Van Buren.

Since the jury was not instructed with the crucial analogy limiting the definition of “question” or “matter,” and because the government itself did not otherwise provide the missing bridge, we cannot be sure beyond a reasonable doubt that the jury convicted Van Buren of the offense that Congress criminalized when it enacted the honest-services-fraud and bribery statutes. For this reason, we must vacate Van Buren’s honest-services-fraud conviction and remand for a new trial on that count. Van Buren was also charged with and convicted of computer fraud, and we affirm that conviction.

I.

Nathan Van Buren was a sergeant with the Cumming, Georgia, Police Department. In his capacity as a police officer, Van Buren came to know a man named Andrew Albo. Albo was a recent widower in his early sixties, who allegedly fancied younger women, including minors and prostitutes. He allegedly paid prostitutes to spend time with him and then often accused the women of stealing the money he gave them. At least one woman also alleged Albo surreptitiously recorded and harassed her. The Deputy Chief of Police in the Cumming Police Department believed that Albo “had a mental health condition” and considered Albo to be “very volatile,” so he warned his officers to “be careful” with Albo.

Van Buren did not heed the Deputy Chief’s caveat. Instead, he fostered a relationship with Albo. Van Buren, who first met Albo when he helped arrest Albo for providing alcohol to a minor, often handled the disputes between Albo and various women. At the time, Van Buren was grappling with financial difficulties, and Van Buren saw in Albo a chance to improve his situation. So Van Buren decided to ask Albo for a loan. To justify his request, Van Buren falsely claimed he needed \$15,368 to settle his son’s medical bills. He explained to Albo that he could not obtain a loan from a bank because he had shoddy credit.

Unbeknownst to Van Buren, however, Albo recorded their conversations. Albo presented the recording of Van Buren’s loan solicitation to a detective in the

Forsyth County Sheriff's Office. He told the detective that Van Buren was "shak[ing] him down for his money." Albo's complaint drew the suspicion of the FBI, which created a sting operation to test how far Van Buren was willing to go for money. Under the plan, Albo was to give Van Buren some cash, and in exchange, Albo was to ask Van Buren to tell him whether Carson, a woman he supposedly met at a strip club, was an undercover police officer.

Over a series of meetings and communications monitored and recorded by the FBI, Albo put the plan into action. At lunch with Van Buren on August 21, 2015, Albo handed Van Buren an envelope with \$5,000, telling him that this was "not the whole thing." Van Buren offered to pay Albo back, but Albo waved that off, saying money was "not the issue." Instead, Albo told Van Buren he had met a woman he liked at a strip club, but he needed to know if she was an undercover officer before he would pursue her further. Van Buren agreed to help.

On August 31, Albo followed up on a previous discussion the pair had had about searching the woman's license plate in the police database. During that conversation, Albo asked Van Buren whether he had had a chance to conduct the search yet. Van Buren replied, "As far as running the plates, I don't—I don't think I got the right plate numbers from you." Van Buren then told Albo to just text him the plate number, so Albo texted Van Buren "Pkp" and "1568," a fake license plate number created by the FBI. Van Buren responded that he would look into the

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