

Case No. 11-4151

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

TIM DECHRISTOPHER,

Defendant/Appellant.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Dee Benson, District Judge

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID B. BARLOW
United States Attorney
District of Utah

DAVE BACKMAN
Assistant United States Attorney
185 South State Street, Suite 300
Salt Lake City, Utah 84111-1506
Telephone (801) 524-5682
david.backman@usdoj.gov

Attorneys for Plaintiff/Appellee

ORAL ARGUMENT IS NOT REQUESTED

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STATEMENT OF PRIOR AND RELATED APPEALS

There are no prior or related appeals.

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BRIEF FOR THE UNITED STATES

STATEMENT OF THE ISSUES

I. Whether there was any error, much less plain error, regarding the multiple issues that DeChristopher did not preserve below.

II. Whether the district court properly excluded DeChristopher's proffered evidence concerning the government's purported circumvention of laws and regulations in preparing for the auction and the subsequent cancellation of many of the leases won at the auction where:

(a) the district court exercised its discretion in excluding the necessity defense based on DeChristopher's failure to establish there were no legal alternatives to violating the law or that the harm he sought to prevent was imminent;

(b) the proffered evidence had no relevance to the crimes charged;
and

(c) if the government's case opened the door at all to admission of the evidence, the limited probative value of the evidence was substantially outweighed by the factors in Rule 403 of the Federal Rules of Evidence.

III. Whether there was sufficient evidence that DeChristopher intended to bid in bad faith when he signed the bidder registration form where the evidence established that DeChristopher bypassed the demonstration to make more of an impact and to "take stronger action," represented himself as a bidder and not an observer, made multiple bids just to drive up the prices, and won fourteen auctions for \$1,797,852.25 with no intent to pay for the leases.

IV. Whether the district court properly held that 30 U.S.C. § 195(a)(1) does not require the government to prove that DeChristopher was aware of at least two specific provisions of law in Chapter 3A of Title 30 or its implementing regulations or that he acted with intent to circumvent or defeat those specific laws where the plain language of the statute does not include such a specific intent.

STATEMENT OF THE CASE

Tim DeChristopher was indicted on two federal charges arising from his intentional disruption of a government oil and gas lease auction resulting in the cancellation of the auction. Throughout the case, DeChristopher argued he was entitled to introduce proffered evidence involving the government's purported circumvention of laws and regulations relating to the parcels of public land at the auction and the subsequent cancellation of many of the leases won at the auction. Prior to trial, the district court found that DeChristopher did not carry his

demanding burden to qualify for the necessity defense, and at trial, when DeChristopher argued that testimony from one of the government's witnesses opened the door to his proffered evidence, the court excluded the evidence as irrelevant and, for whatever relevance it may have, as excludable under Rule 403 of the Federal Rules of Evidence. The court also denied DeChristopher's motion for discovery regarding selective prosecution and motion for judgment of acquittal and overruled some of DeChristopher's objections to the jury instructions. After the jury convicted DeChristopher of both charges, the district court sentenced DeChristopher to 24 months' imprisonment. DeChristopher filed a timely notice of appeal. Many of the issues he raises were not preserved below.

STATEMENT OF FACTS

Each United States Bureau of Land Management (BLM) state office is mandated by law to conduct a competitive oil and gas lease auction at least quarterly if the BLM receives nominations for public lands that are available for leasing. *See* 30 U.S.C. § 226(b)(1)(A); 43 C.F.R. § 3120.1-2. Such was the case in the final quarter of 2008, and the Utah BLM office scheduled an oil and gas lease auction for 131 parcels of public land on December 19, 2008, in Salt Lake City. (App. at 539, 634-36.)

Prior to an auction, any member of the public may file a protest against the parcels of land offered for auction. *See* 43 C.F.R. § 3120.1-3. By the date of the auction, protests had been filed against all 131 parcels. (App. at 514.)

Consequently, leases for the parcels would not be awarded to the winning bidders

until the protests were resolved, a process that usually takes at least one to two years. (*Id.* at 514-15.)

On December 17, 2008, two days prior to the auction, a motion for a temporary restraining order to enjoin the BLM from issuing the leases for seventy-seven of the parcels of land was also filed. *See Southern UT Wilderness Alliance v. Allred*, No. 08-2187, 2009 WL 765882 (D.D.C. Jan. 17, 2009). Almost a month after the auction, the motion was granted. *Id.* at *2.

None of these lawful challenges required cancellation of the auction, and the auction proceeded as scheduled on December 19, 2008, at the BLM office in downtown Salt Lake City. Approximately fifty people conducted a peaceful, lawful demonstration against the auction right in front of the building where the auction was held. (App. at 529.)

DeChristopher went to the BLM office intending to participate in the demonstration. (*Id.* at 801.) However, after briefly mingling with the demonstrators and realizing the demonstration would not have much of an impact, he decided to bypass the demonstration and go inside to “take stronger action.” (*Id.* at 802.) DeChristopher entered the building and walked to the registration table. A BLM official asked DeChristopher if he was a bidder, an observer, or a member of the media. DeChristopher said he was a bidder. (*Id.* at 499, 509.)

The official told DeChristopher to complete and sign a bidder registration form, which he did. (*Id.* at 499.) DeChristopher sat at the registration table for approximately two or three minutes. (*Id.* at 805.) By completing and signing the

form, DeChristopher “certif[ied] that any bid submitted by [him] . . . is a good faith intention . . . to acquire an oil and gas lease on the offered lands.” (*Id.* at 406.) The form notified DeChristopher: “It is a crime under 18 U.S.C. 1001 and 43 U.S.C. 1212 for any person to knowingly and willfully make any false, fictitious or fraudulent statements or representations as to any manner within its [sic] jurisdiction.” (*Id.*)

After DeChristopher completed and signed the bidder registration form, the BLM official gave DeChristopher a bidder paddle. (*Id.* at 499.) DeChristopher would not have received the bidder paddle and could not have participated in the auction if he had not filled out the bidder registration form. (*Id.* at 500-01, 651.)

Sometime into the auction, DeChristopher began bidding on parcels of land. (*Id.* at 555.) A BLM agent observed that DeChristopher would begin bidding when someone was about to win a parcel, but would drop out when the other bidder would demonstrate any hesitation. (*Id.* at 558.) The agent observed DeChristopher employ this tactic more than ten times. (*Id.* at 559.) Eventually, DeChristopher won one of the auctions for approximately \$500. (*Id.* at 561-62.) He continued to bid until he won another auction, this time for approximately \$25,000. (*Id.* at 562-64.) After winning this second auction, DeChristopher’s tactics changed. As the BLM agent testified, from this point on DeChristopher was “in it to win.” (*Id.* at 564.) DeChristopher consistently held up his bidder paddle until he won each and every one of the next twelve auctions. (*Id.* at 564-65, 644, 648.)

Based on DeChristopher's actions, BLM officials suspended the auction. (*Id.* at 569, 655.) The BLM agent who had been observing the auction approached DeChristopher and handed him the bidder registration form. DeChristopher verified that the form contained his handwriting and signature and that he had read the form. The agent asked DeChristopher if he had the ability to pay for the leases he had won. DeChristopher said he was not sure and asked how much trouble he was in. The agent showed DeChristopher the notice on the form about criminal conduct and asked DeChristopher if he had read the notice. DeChristopher said he had. (*Id.* at 571-72, 817.) DeChristopher admitted he read the form in its entirety and understood it, including that it was a crime to make fraudulent bids. (*Id.* at 576-77, 834-36, 855.) The agent asked DeChristopher again if he had the ability to pay for the leases. DeChristopher said he did not, asked how much trouble he was in, and said he was prepared to deal with the consequences. (*Id.* at 572.)

DeChristopher stated his initial tactic in bidding was to drive up the prices for the other bidders and that he believed his actions had inflated the prices by more than \$300,000 on as many as twenty parcels of land. (*Id.* at 578-79, 604, 840.) He said he knew his tactic was working because it caused legitimate bidders to leave the auction. (*Id.* at 579, 840.)

DeChristopher told the agent that once he had won his second parcel in the auction, he realized there was no way he could pay for that winning bid or any subsequent bid. He decided he would make a stand at that point. He knew he was already in trouble and figured he might as well keep going. (*Id.* at 577.) At trial,

DeChristopher admitted he knew there could be criminal consequences once he won an auction. (*Id.* at 840.)

DeChristopher's winning bids on the fourteen parcels of land totaled \$1,797,852.25.¹ (*Id.* at 644.) When the BLM agent notified DeChristopher of this amount, he laughed. DeChristopher said he was a student and that he had no ability to pay that amount.² (*Id.* at 582.) At trial, DeChristopher testified he could not afford the leases and had no intention of developing the leases in any way. (*Id.* at 841-42.)

The agent asked DeChristopher why he had fraudulently bid on the parcels. DeChristopher said he is part of a larger environmental movement, that environmental issues had been largely ignored the last couple of years, and that there is little time to make changes to a liveable planet. (*Id.* at 859-60.) He stated there is no legal structure in place to effect change, that he has become frustrated, and that the only way to make a statement was through illegal means. (*Id.* at 856, 860.)

Based on this conduct, DeChristopher was charged in a two-count Indictment with Violation of the Federal Onshore Oil and Gas Leasing Reform

¹ This \$1,797,852.25 was approximately a quarter of the total bids in the entire auction. (*App.* at 646.)

² DeChristopher was required to pay \$81,238 of the \$1,797,852.25 by 4:30 p.m. that day. The remaining balance was due within ten business days. (*App.* at 645.) After the interview with the BLM agent, DeChristopher called a friend who said he would help DeChristopher pay for the leases. (*Id.* at 792-94, 821.) However, several months later, in March of 2009, the BLM was still attempting to collect even the initial \$81,238 from DeChristopher. (*Id.* at 734.)

Act in violation of 30 U.S.C. § 195(a)(1) (Count 1) and False Statement in violation of 18 U.S.C. § 1001 (Count 2). (*Id.* at 32-34.)

A. Pre-Trial Rulings

1. Necessity Defense

Prior to trial, the United States filed a motion in limine to bar DeChristopher from presenting a necessity defense. (*Id.* at 13.) In response, DeChristopher filed a written proffer and an attachment in support about widespread topics including BLM’s purported circumvention of various laws and regulations relating to the parcels of land at the auction, the outgoing Bush administration’s supposed “rush” to lease the parcels, the subsequent cancellation of many of the leases won at the auction, and environmental issues such as global warming, climate change, and harms to the planet, the ecosystem, and natural and cultural resources. (*Id.* at 41-282.) DeChristopher argued he should be allowed to testify and call expert witnesses about these topics that were the basis for his conduct. (*Id.* at 47.)

The district court granted the United States’ motion, finding that DeChristopher failed to satisfy any of the elements that are required for the necessity defense. (*Id.* at 18-21.) The court found that “the evidence is insufficient as a matter of law to support the necessity defense.” (*Id.* at 21.)

2. Discovery Regarding Selective Prosecution

Prior to trial, DeChristopher filed a motion for discovery regarding selective prosecution. (*Id.* at 22.) The only evidence DeChristopher ever provided in support related to successful bidders who defaulted on BLM oil and gas leases, as

shown in three tables. (*Id.* at 283-84.) The first table lists nine successful bidders who forfeited their initial payment by failing to pay the remaining balance within ten days. (*Id.* at 283.) The second table lists nine successful bidders who submitted checks that bounced. (*Id.* at 284.) The final table lists DeChristopher and a successful bidder in New Mexico, neither of whom ever submitted any money. (*Id.*)

At the hearing on the motion, the district court repeatedly asked if the United States had disclosed all of the default bidders at BLM oil and gas lease auctions. The United States said it had. (*Id.* at 455, 459-60.) The United States stated it had requested information from the Department of the Interior and the BLM to determine if there were any others who had intentionally interfered with a BLM auction and learned that no one else had, that “DeChristopher stands by himself.” (*Id.* at 463.)

The court denied the motion from the bench, finding that DeChristopher failed to make a credible showing of either discriminatory effect or discriminatory intent. (*Id.* at 469-70.) In distinguishing DeChristopher from the other default bidder who never made a payment, the court stated among other differences that DeChristopher was the only one who “publicized and has stated publicly his intent to sabotage the lease auction.” (*Id.* at 471.)

After the court pronounced its ruling, the court repeatedly asked the United States whether it had evidence of other default bidders with motives similar to DeChristopher’s. The United States stated it did not. (*Id.* at 475-77.) The United

States emphasized that “this prosecution was not based on any motivation by Mr. DeChristopher or others. It was based on the facts, and the facts are that he threw the auction in disarray which cost a lot of people a lot of money.” (*Id.* at 476.)

In a subsequent written order, the district court found that “[t]here has been no credible showing that for any bidder the sufficiency of the evidence linking the bidder to the offense, the nature of the offense, or the bidder’s public declaration of his/her actions was essentially the same as in DeChristopher’s case.” (*Id.* at 24.) Based on its holding that DeChristopher had not satisfied the discriminatory effect prong, the court did not rule on the discriminatory intent prong, but noted that “DeChristopher did not produce credible evidence of discriminatory intent.” (*Id.* at 25.)

B. Rulings at Trial

1. Proffered Evidence to Rebut Hoffman’s Testimony

The district court conducted the trial according to its ruling that DeChristopher could not present a necessity defense. During the testimony of Kent Hoffman, BLM Deputy State Director for Land and Minerals, the defense argued that Hoffman’s testimony opened the door to evidence concerning the government’s purported circumvention of laws and regulations in preparing for the auction and the subsequent cancellation of many of the leases won at the auction. (*Id.* at 657-58, 664-66.)

Specifically, the defense complained about Hoffman’s testimony regarding BLM’s role as steward over public lands, the public interest in energy and natural

resource development, the financial benefit to the state and federal government from oil and gas leases, the “meticulous records” the BLM keeps regarding the quarterly auctions, and BLM’s estimated direct costs of preparing for and conducting the auction which were just under \$140,000. (*Id.* at 632-36, 654.) The defense was especially concerned about the following exchange regarding the foundation for the estimate of BLM’s costs:

Q. How much work goes into preparing for a lease auction? Can you describe the type of work that goes into preparing for a lease auction at the B.L.M.?

A. Sure. A lease auction typically begins five or six months before the actual auction, where the industry nominates parcels and we receive the expression of interest, and then those expressions basically are geographic, they are acreages, and those are screened and prepared by my staff and then sent to the field office where there are environmental reviews and compliance with things like the National Historic Preservation Act, the Endangered Species Act, several other things are completed, and then prior to the auction the environmental documents are signed.

(*Id.* at 651-52.)

DeChristopher argued his evidence should be admitted to counter these portions of Hoffman’s testimony. (*Id.* at 658.) The court responded that it would “not allow this trial to get turned into a debate about whether the B.L.M. dotted all their I’s and crossed all their T’s before they held this auction. I would, if there was any good faith basis for the defense arguing that the auction was not a legal auction, but I have heard no basis for that.” (*Id.* at 661-62.) In fact,

DeChristopher never provided any evidence that the auction itself was invalid in any way.

The court stated it would not allow the case to be dragged into a debate about whether some of the government's preparations for the auction were flawed.

(*Id.* at 662-63.) The court emphasized:

it is against the law to intentionally tamper with or thwart or interfere with an auction. It may not have been a perfect auction in that everything was done perfectly before they got there, but it has not, from what I have heard from any facts, reached the point where it was not an auction. As I have said at sidebar, not all things are perfect. This trial is not perfect, no doubt, but it is still a trial.

(*Id.* at 663-64.)

The court excluded the evidence because it “would confuse the jury and it would be misleading. It would be in an area that is so lacking in relevance, if it is relevant, that it has the potential for being improper under Rule 403 of the Rules of Evidence.” (*Id.* at 662.)

During a recess, DeChristopher filed a written proffer along with attached documents that was similar to what he filed in support of the necessity defense. (*Id.* at 285-356.) At a hearing that afternoon, the court stated that the direct examination of Hoffman “opened up less than I thought when I first heard it.” (*Id.* at 684.) The court rejected the proffer as “it would turn this trial into something that would essentially be so far away from the criminal charges brought against Mr. DeChristopher that it could consume days if not weeks of study of who said what about who did what in connection with these 77 parcels.” (*Id.*)

The court explained it was:

still having . . . trouble about opening this case into a vast exploration of oil and gas lease policy by the United States government, the Department of the Interior, the B.L.M., a lawsuit in Washington, D.C., an internal review by the Inspector General Service, a study of comments by the National Park Service, allegations that these parcels were too close to national parks and monuments. Every one of the things I just mentioned could serve as a full day or two of testimony just to sort that out, let alone bringing it back to this trial and how it informs the question of Mr. DeChristopher's intent when he went into the auction and what he did there.

(*Id.* at 685.)

The court further found that the documents attached to the proffer:

are not relevant to this case, and I have not been provided with a sufficient proffer that they are relevant. The defense seems to want to talk in this case, in this trial, about whether the B.L.M., as you stated it, failed in its role as steward of our nation's public lands. There may be a trial where that is pertinent, and it may be a very important issue in hearings and trials and political debates and maybe the halls of Congress, but I don't see its relevance here. I think this case is focusing on what the defendant's state of mind was on that day and whether he intended to criminally interfere with this auction. It was an auction. However flawed it was, it was an auction.

(*Id.* at 710.) The court excluded the evidence, "finding that it is either entirely irrelevant, which I think it mostly is, but if there is probative value, it is outweighed by the danger of misleading this jury and confusing the jury and taking this trial in a direction that takes it away from the focus." (*Id.*)

The court emphasized that the defense could cross examine Hoffman about relevant areas of his direct testimony and that DeChristopher could present a

defense about “what was in his head on that day that informs his mens rea.” (*Id.* at 710-12.) The court allowed the defense to cross examine Hoffman about the “meticulous records” that BLM keeps, Hoffman’s activities on the day of the auction, the failure of two bidders other than DeChristopher to pay for their leases, and other portions of Hoffman’s testimony. (*Id.* at 668-79, 721-50, 754-58.)

The court also permitted DeChristopher to testify about the following:

- his intentions and actions at the auction (*id.* at 801-821);
 - that he has “always been fairly concerned about environmental issues,” that his university studies involved environmental issues, and that he had taken a final exam for a current economic problems class just before he went to the auction (*id.* at 799, 801);
 - that he “was aware that there were quite a few legitimate concerns about whether or not the government was following their own procedures in holding this auction” (*id.* at 800);
 - that “this auction deserved more than just holding a sign, so I wanted to go inside and take stronger action to really waive [sic] that red flag and see what was going on there” (*id.* at 802);
 - that his “intent of being in there was to kind of waive [sic] a red flag about what was going on and hopefully bring enough attention that the government could reconsider their actions” (*id.* at 808-09, 819);
- and

- that he called his friend who said he would help raise money or provide the money himself for the amount DeChristopher owed (*id.* at 815-16, 820-21).

2. Motion for Judgment of Acquittal

At the close of the government's case, DeChristopher made a motion for judgment of acquittal. (*Id.* at 768-71.) He argued that Count 1 requires proof that he intended to violate the specific laws under the Federal Oil and Gas Leasing Reform Act and that the United States failed to produce such evidence. (*Id.* at 769.) DeChristopher renewed the motion at the close of the evidence. (*Id.* at 867-68.) The court denied the motion, finding "very sufficient evidence that would support taking this case to the jury." (*Id.* at 771.)

3. DeChristopher's Arguments to the Jury

In his opening statement, counsel for DeChristopher asserted the government's evidence showed that when DeChristopher signed the bidder registration form, "[h]e still hadn't made up his mind about what he was going to do to exercise what he believed were reflections of the beliefs that he had at that time." (*Id.* at 784.) Counsel also stated that "we will also present evidence that at no time did [DeChristopher] knowingly and willfully make a false and fraudulent material representation . . . when he initially signed that form because he hadn't formed any intent to do anything willfully in that regard at that time." (*Id.* at 787.)

Throughout his closing argument, counsel argued that the government failed to prove DeChristopher's criminal intent at the time he allegedly committed the

crimes. (Supp. App. at 1-14.) Counsel agreed that “the conduct of Mr. DeChristopher is virtually without question, but his intention . . . is far from clear or easy to discern.” (*Id.* at 2.)

With respect to the False Statement count, the defense emphasized that at issue was DeChristopher’s “intent at the time that this occurred when he wrote his name” on the bidder registration form. (*Id.*) Counsel argued that “Mr. DeChristopher did tell you . . . that he never had any intention, any desire to bid when he went to that auction.” (*Id.* at 4.) Counsel further argued that the government:

directed [DeChristopher] to the point where he picked up the bidder card, and not that he intended to do it, that he put the bidder card in his pack and that he got up there on that basis.

Are those the actions of a person who went there to disrupt this auction by placing phony bids that were not in good faith? I suggest to you that they were not.

(*Id.* at 5.)

Counsel argued that, in fact, DeChristopher told the BLM agent “that [he] didn’t know what [he] was going to do” when he went into the auction (*id.* at 7), and that the government’s evidence showed that DeChristopher “was going to go down there and walk in the protest” (*id.* at 8). Counsel argued that DeChristopher “was there to make a statement. That is all that he intended to do.” (*Id.* at 9.) He emphasized that DeChristopher testified that “[o]n the spur of the moment, I began to bid,” and argued, “That was his intent. It was not his intent to violate the law as the Court has instructed you.” (*Id.* at 10.)

Counsel summarized why the timing of DeChristopher's intent was critical to the False Statement count:

[T]hey have got to prove that he had that mental element at the time that he signed the form, not some later time, that at the time he signed the form that he intended to lie about that. I caution you when you think about . . . the manner in which that form was filled out, and the manner in which he went about it, that that is critical and to measure that against proof beyond a reasonable doubt and the burden that the government bears.

(*Id.* at 11.)

The jury rejected these arguments and convicted DeChristopher of both counts of the Indictment. (App. at 26.)

4. Jury Instructions

At the jury instruction conference, DeChristopher raised only one objection to the elements instructions regarding the two counts. That objection was to the lack of "specific intent to defeat the provision of Chapter 30(A) of Title 30 of the United States Code Federal Gas and Oil Leasing Reform Act or its implementing regulations." (*Id.* at 872-73.) The court held it would retain the instruction, stating: "I find it adequately lists the elements as charged in the indictment by the government and is sufficient to explain to the jury what they need to find to find a violation of the Federal Onshore Oil and Gas Leasing Reform Act." (*Id.* at 874-75.)

5. Statements Related to Sentencing

Prior to sentencing, DeChristopher filed a sentencing memorandum wherein he argued he should receive credit for acceptance of responsibility. One of the

arguments in support was: “In his public statements, DeChristopher has consistently admitted to and accepted responsibility for his actions, despite his recognition that this might well land him in prison.” (Supp. App. at 23.) In its sentencing memorandum, the United States similarly relied on some of DeChristopher’s public statements as they relate to sentencing factors under 18 U.S.C. § 3553(a). (*Id.* at 31-35.) In its objection to the presentence report, the United States also cited several of DeChristopher’s public statements in support of its argument that DeChristopher was not entitled to credit for acceptance of responsibility. (*Id.* at 40-42.) In response, DeChristopher noted that the United States was complaining about his exercise of his First Amendment rights, but he did not raise any objection, cite any law, or argue in any way that the reference to his public statements was evidence of selective prosecution or an improper consideration in imposing sentence. (*Id.* at 50-52.)

At sentencing, DeChristopher and his counsel characterized DeChristopher’s crimes as acts of civil disobedience and focused much of their arguments on civil disobedience. For example, DeChristopher stated in his allocution that he had “openly and explicitly called for nonviolent civil disobedience in response to mountaintop coal mining in West Virginia.” (App. at 917.) He further stated: “The truth is that my intention, both at the time and now, was to expose and embarrass and to hold accountable the oil industry to the degree to which it starts to cut into their \$100 billion in profits that they make every year through exploitation.” (*Id.* at 931.) He even went so far as to boldly assert:

I will continue to confront the system that threatens our future. Given the destruction of our demographic institutions that once gave citizens access to power, there is the possibility that my future will involve civil disobedience at some point. Nothing that happens here today will change that. . . .

(Id. at 934.)

DeChristopher noted that “[m]uch of the government’s memorandum focuses on the political statements that I have made in public.” *(Id.* at 922.) He proudly asserted he was okay with that, stating that the prosecutors:

want to take my message from the public square and make it a central part of these federal criminal proceedings. Now, I have no problem with that. I am just as willing to have those views on display as I have ever been.

(Id.)

DeChristopher’s counsel then continued with the theme of civil disobedience, describing the actions of Rosa Parks, Jesus Christ, Brigham Young, Ghandi, and others. *(Id.* at 942-49.) He argued that a sentence of imprisonment does not effectively address acts of civil disobedience. *(Id.* at 941, 949-50.)

The court, in the context of articulating its complete disagreement with the characterization of DeChristopher’s crimes as acts of civil disobedience (*id.* at 957-58), stated: “We have an act of willful disobedience, and I can tell you with complete candor that if this had played out differently, Mr. DeChristopher may very well not have been prosecuted, from everything I know about the prosecution of this case.” *(Id.* at 962.) The court further expounded on DeChristopher’s public statements that he could:

take the law and disregard it and violate one of the most important legal precepts of all, and that is not to lie or to cheat or to steal. That is what he did. The defense says he can do that with impunity because it is honoring some time-honored tradition in this country of civil disobedience. Well, that is countered by a time-honored system of legal obedience.

(*Id.* at 963.) Immediately after making these statements, the court emphasized that DeChristopher had the right to make his public comments. (*Id.* at 963-64.)

Then, in explaining why a sentence of imprisonment was required, the court stated:

If this hadn't been a continuing trail of statements by Mr. DeChristopher about his advocacy, as he calls it civil disobedience, and that he will continue to fight, and I am prepared to go to prison, then others are going to have to be prepared to go with me, that causes me to feel under the sentencing laws before me that a term of imprisonment is required.

(*Id.* at 964.) The court sentenced DeChristopher to 24 months' imprisonment. (*Id.* at 966.)

SUMMARY OF THE ARGUMENT

I. DeChristopher did not preserve many of the multiple issues he now presents on appeal. DeChristopher cannot establish any error, much less plain error, regarding the unpreserved issues.

II. The district court properly excluded DeChristopher's proffered evidence regarding the government's purported shortcomings in preparing for the auction and the subsequent cancellation of many of the leases won at the auction as irrelevant to the case. While the evidence was relevant to the necessity defense,

the district court acted within its discretion in excluding that defense at trial. DeChristopher did not carry his demanding burden of showing there were no legal alternatives to violating the law or that the harm he sought to prevent was imminent. Absent the necessity defense, the evidence had no relevance to the case itself because it did not concern any of the elements of the crimes charged. The only possible relevance of the evidence would be to rebut the government's evidence at trial. The district court properly held the evidence was mostly irrelevant to rebut the government's case, and whatever relevance it had was substantially outweighed by the danger of confusion of the issues, misleading the jury, undue delay, and wasting time. The district court wisely kept the trial focused on the crimes charged instead of allowing several lengthy mini-trials concerning entirely collateral issues.

III. The evidence was sufficient to prove DeChristopher's intent to bid in bad faith when he signed the bidder registration form. The evidence established that DeChristopher bypassed the demonstration to make more of an impact and to "take stronger action," represented himself as a bidder and not an observer, made multiple bids just to drive up the prices, and won fourteen auctions for \$1,797,852.25 with no intent to pay for the leases. The jury could reasonably infer from this evidence that DeChristopher intended to bid in bad faith when he signed the form at the outset.

IV. The district court also properly held that 30 U.S.C. § 195(a)(1) does not require the government to prove that DeChristopher was aware of at least two

specific provisions of law in Chapter 3A of Title 30 or its implementing regulations or that he acted with intent to circumvent or defeat those specific laws. The plain language of the statute simply does not include such a specific intent.

ARGUMENT

I. There Was No Error, Much Less Plain Error, Regarding the Multiple Issues That DeChristopher Did Not Preserve Below.

Standard of Review: DeChristopher did not preserve many of the multiple issues he now presents on appeal. Nevertheless, DeChristopher's only treatment of plain error review is a one-page summary argument at the end of his brief. (Aplt. Br. at 63.) As the following establishes, DeChristopher's failure to afford the district court an opportunity to address the majority of the issues strictly circumscribes this Court's review of those issues and places a far more substantial burden on DeChristopher than a terse summary argument.

"If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue." *Puckett v. United States*, 556 U.S. 129, 129 S. Ct. 1423, 1428 (2009). "If an error is not properly preserved, appellate-court authority to remedy the error . . . is strictly circumscribed. There is good reason for this; anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Id.* (quotation omitted).

There are other sound reasons for a demanding plain error standard of review regarding unpreserved issues:

This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the outcome. And of course the contemporaneous-objection rule prevents a litigant from “sandbagging” the court - remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.

Id. (quotation omitted); *see also United States v. Uscanga-Mora*, 562 F.3d 1289, 1294 (10th Cir. 2009) (stating a district court alerted to potential errors is “in a position to remedy them easily and quickly,” that “[s]ometimes as little as an additional sentence or paragraph of explanation, or a response to a question, will suffice to dispel any need for an appeal,” and that “without a contemporaneous objection requirement, many cases will needlessly ping-pong back and forth between the district court and court of appeals, with the parties expending substantial resources fighting over a problem that could have been readily identified and cured up front”).

Because DeChristopher stood silent regarding a majority of the issues that he now raises, he has the burden of establishing plain error as to those issues. *See United States v. Hall*, 625 F.3d 673, 684 (10th Cir. 2010). “The plain error standard presents a heavy burden for an appellant, one which is not often satisfied.” *United States v. Romero*, 491 F.3d 1173, 1178 (10th Cir. 2007). To carry this demanding burden, DeChristopher must demonstrate as to each unpreserved issue that “(1) the District Court committed error, (2) that the error

was plain, and (3) that the plain error affected [his] substantial rights.” *United States v. LaVallee*, 439 F.3d 670, 703 (10th Cir. 2006). If DeChristopher satisfies all three criteria, this Court may exercise its discretion to correct the error only if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

As the following shows, DeChristopher cannot establish any error, much less plain error, regarding any of the following issues that he did not preserve below.

A. Group, Not Individual, Activity

DeChristopher raises two unpreserved issues based on his argument that 30 U.S.C. § 195(a)(1) applies only to group, not individual, activity: (1) that the evidence was legally insufficient; and (2) that the jury instruction regarding the elements of Count 1 was legally incorrect. (Aplt. Br. at 15-20, 22-23.)

DeChristopher cannot establish that the district court committed plain error because there is no well-settled law concerning the elements of § 195(a)(1).

“An error is plain if it is clear or obvious under current, well-settled law.” *United States v. Thornburgh*, 645 F.3d 1197, 1208 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 214 (2011) (quotations omitted). “In general, for an error to be contrary to well-settled law, either the Supreme Court or this court must have addressed the issue.” *United States v. Ruiz-Gea*, 340 F.3d 1181, 1187 (10th Cir. 2003).

DeChristopher notes: “It does not appear that the statute [§ 195(a)(1)] has ever been prosecuted before.” (Aplt. Br. at 16, n.8.) The United States similarly

has found no case law on point. Because neither the Supreme Court nor this Court has addressed the elements of § 195(a)(1), the district court did not plainly err by failing to, sua sponte, require proof of group activity. *See Ruiz-Gea*, 340 F.3d at 1187.

B. Portions of Indictment Not in Jury Instructions

DeChristopher contends the district court constructively amended the Indictment by failing to instruct the jury regarding all of the language in the Indictment. He cites how the instructions required only that DeChristopher “knowingly organized or participated in a scheme or plan” even though Count 1 charged that DeChristopher “did organize and participate in a scheme, arrangement, plan, and agreement” (Aplt. Br. at 22-23; App. at 33, 371 (emphasis added)), and how the instructions required only that the statement was false even though Count 2 charged that DeChristopher made “a false and fraudulent statement.” (Aplt. Br. at 28-29; App. at 34, 372 (emphasis added)). He also complains that the instructions did not include the language in Count 1 that “DeChristopher attended the auction, represented himself to be a *bona fide* bidder when he was not, completed a bidder registration form certifying his good faith intention to acquire an oil and gas lease on the lands, and bid on and purchased oil and gas leases for which he could not and did not intend to pay.” (Aplt. Br. at 22-23; App. at 33, 371.) DeChristopher did not raise any of these issues below.

“The prohibition on constructive amendments is derived from (1) the Fifth Amendment which limits a defendant’s jeopardy to offenses charged by a grand

jury, and (2) the Sixth Amendment which guarantees the defendant notice of the charges against him.” *United States v. Hien Van Tieu*, 279 F.3d 917, 921 (10th Cir. 2002). “To constitute a constructive amendment, the district court proceedings must modify an essential element of the offense or raise the possibility the defendant was convicted of an offense other than that charged in the indictment.” *Id.*

“[W]here a crime denounced disjunctively in the statute is charged in the conjunctive, proof of any one of the allegation[s] will sustain a conviction.” *United States v. Pauldino*, 443 F.2d 1108, 1112 (10th Cir. 1971). In evaluating a statute similar to 18 U.S.C. § 1001 that “provides for liability in the event of a ‘false, fictitious, *or* fraudulent’ claim,” this Court has held that “[b]y the use of the disjunctive ‘or’ Congress made it clear that any one of the three wrongful types of claim would subject the claimant to liability and that the claim need not be ‘fraudulent’ so long as it is ‘false.’” *Fleming v. United States*, 336 F.2d 475, 479 (10th Cir. 1964).

Contrary to DeChristopher’s assertions, the district court did not constructively amend the Indictment by not including all of the language that DeChristopher identifies. The statutes at issue denounce the crimes disjunctively. Count 1 is based on 30 U.S.C. § 195(a)(1), which states that “[i]t shall be unlawful for any person: (1) to organize or participate in any scheme, arrangement, plan, or agreement to circumvent or defeat the provisions of this chapter or its implementing regulations.” Count 2 is based on 18 U.S.C. § 1001(a)(2), which

states that “whoever, in any matter within the jurisdiction of the . . . United States, knowingly and willfully— (2) makes any materially false, fictitious, or fraudulent statement or representation” is guilty of the offense. Even though the Indictment charged the crimes conjunctively (App. at 33-34), proof of any one of the allegations was sufficient to sustain DeChristopher’s convictions. The jury was required to find that DeChristopher organized *or* participated in a scheme, arrangement, plan, *or* agreement and that he made a false, fictitious, *or* fraudulent statement, not that he committed each and very one of these allegations. *See Pauldino*, 443 F.2d at 1112. Accordingly, by not including “arrangement,” “agreement,” and “fraudulent” in the jury instructions, the district court did not “modify an essential element of the offense or raise the possibility the defendant was convicted of an offense other than that charged in the indictment.” *See Hien Van Tieu*, 279 F.3d at 921.

The remaining language from Count 1 that DeChristopher identifies went “beyond alleging the elements of the offense” and was “mere surplusage” that “need not be proved.” *United States v. Harper*, 579 F.2d 1235, 1239 (10th Cir. 1978). The district court did not commit any error, let alone plain error, in not including all of the language from the Indictment in its jury instructions.

C. *Prosecuted for Public Comments*

In support of his motion for discovery regarding selective prosecution, DeChristopher never argued or presented any evidence that he was selectively prosecuted for his public comments about the case. Now on appeal, it is the only

argument he makes. He does not challenge the court's ruling based on the arguments and evidence that he presented below. In fact, he does not contest the court's holding that he did not carry his demanding burden of establishing discriminatory effect. For this reason alone, the district court's decision should be upheld. It should also be affirmed because DeChristopher cannot show the district court plainly erred in finding no evidence of discriminatory intent because the evidence DeChristopher invokes for the first time on appeal is still insufficient to establish discriminatory intent.³

³ DeChristopher claims he did raise the issue that he was prosecuted for what he said, that "[h]e contended that he had been singled out for prosecution because of statements he made after the alleged offense." (Aplt. Br. at 57.) He cites counsel's statement at the hearing regarding the motion:

[I]f the motive happens to be that the other people that made this decision in the B.L.M. or in the Justice Department offices have made that decision because of political motives, that is stuff that we are entitled to because that means that they are singling him out not as a protected class, but simply for what he said at the time he was arrested.

(App. at 469.)

This last statement, "simply for what he said at the time he was arrested," is ambiguous. It logically relates to the statements DeChristopher made to the BLM agent right after the auction. If so, such statements do not implicate the First Amendment at all. If the phrase was intended to mean DeChristopher's public statements, that should have been made very clear as the phrase is the only pre-trial reference even suggesting DeChristopher was prosecuted for his public statements. A single, ambiguous reference is not sufficient to raise the issue. *See United States v. Winder*, 557 F.3d 1129, 1136 (10th Cir. 2009) ("Our precedent is clear that an objection must be definite enough to indicate to the district court the precise ground for a party's complaint.") (quotation omitted).

“Caution is required when evaluating selective-prosecution claims. The defendant is asking the judiciary to exercise power over a special province of the executive branch, a province in which, for good reason, the executive possesses broad discretion. The decision to prosecute is particularly ill-suited to judicial review.” *United States v. Deberry*, 430 F.3d 1294, 1299 (10th Cir. 2005) (quotations omitted). “[J]udicial review of prosecutorial decisions can chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy. Accordingly, the presumption of regularity supports ... prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.” *Id.* (quotations omitted) (alterations in original).

The standard for proving a selective-prosecution claim is a demanding one. *See id.* To be entitled to discovery regarding selective prosecution, a defendant “must make a credible showing of both discriminatory effect and discriminatory intent.” *Id.* (quotation omitted). To establish discriminatory intent, a defendant must make a credible showing that “the prosecution was invidiously based on

Even if the issue was preserved, the result would be the same. When properly raised below, this Court “review[s] de novo the district court’s grant or denial of a defendant’s selective-prosecution discovery motion.” *United States v. Deberry*, 430 F.3d 1294, 1298 (10th Cir. 2005). Even under de novo review, DeChristopher is still unable to satisfy his demanding burden to be entitled to discovery regarding selective prosecution.

racial, religious, or other impermissible considerations.” *United States v. Bohrer*, 807 F.2d 159, 161 (10th Cir. 1986).

The district court did not plainly err in finding there was no evidence of discriminatory intent. In fact, the only evidence regarding the intent of the prosecutors in charging DeChristopher was that the decision was based on the facts of the case, not any impermissible factor. The prosecutor told the court that the United States had requested information from the Department of the Interior and the BLM to determine if there were any others who had intentionally interfered with a BLM auction and learned that no one else had, that “DeChristopher stands by himself.” (App. at 463.) The prosecutor also emphasized that “this prosecution was not based on any motivation by Mr. DeChristopher or others. It was based on the facts, and the facts are that he threw the auction in disarray which cost a lot of people a lot of money.” (*Id.* at 476.) DeChristopher presented no evidence to refute these statements.

The only evidence DeChristopher invokes in response are statements made by the district court in ruling on the issue of selective prosecution and by the court and the United States relating to sentencing. DeChristopher never objected below to the statements or made any arguments that the government’s own statements or the government’s failure to correct the court’s statements amounted to evidence of discriminatory intent. The court should not have been expected to assume, *sua sponte*, that statements relating to issues in the case amounted to evidence of discriminatory intent in prosecuting DeChristopher in the first place.

In any event, the court's statements relating to the selective prosecution motion were made in the context of distinguishing DeChristopher from other bidders and finding DeChristopher had not established discriminatory effect. (App. at 24, 469-71.) The statements were not made to suggest DeChristopher was prosecuted for his exercising his First Amendment rights.

The statements relating to sentencing also do not constitute a credible showing of discriminatory intent. The statements by the United States about DeChristopher's public comments all related to sentencing factors and did not concern any reasons for prosecuting DeChristopher. The court's statement, "We have an act of willful disobedience, and I can tell you with complete candor that if this had played out differently, Mr. DeChristopher may very well not have been prosecuted, from everything I know about the prosecution of this case," does not establish DeChristopher was prosecuted for exercising his free speech rights. (*Id.* at 962.) The court's statement, "that if this had played out differently," could have a wide range of meanings. DeChristopher could have asked the court to clarify what it meant, but he did not. His speculation that the court meant that he was prosecuted for exercising his First Amendment rights is certainly insufficient to carry his demanding burden.

Because DeChristopher does not challenge the district court's finding that he failed to establish discriminatory effect and the "evidence" DeChristopher now presents is still insufficient to establish discriminatory intent, the court did not plainly err in denying the motion for discovery regarding selective prosecution.

D. Sentenced Based on Public Comments

DeChristopher raises another unpreserved issue, arguing that the district court improperly considered his public comments about this case in imposing sentenced. However, DeChristopher cannot establish any error, much less plain error.

“[T]he Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.” *Dawson v. Delaware*, 503 U.S. 159, 165 (1992). “A sentencing court may consider such evidence so long as it is relevant to the issues involved in the sentencing proceeding.” *United States v. Kane*, 452 F.3d 140, 142 (2d Cir. 2006) (quotation omitted); *see also United States v. Simkanin*, 420 F.3d 397, 418 (5th Cir. 2005) (finding court properly considered defendant’s belief that the tax laws are invalid in sentencing him for income tax evasion); *Kapadia v. Tally*, 229 F.3d 641, 644-48 (7th Cir. 2000) (finding court properly considered defendant’s anti-Semitic beliefs in sentencing him for attack on a Jewish community center). “In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society.” *Dawson*, 503 U.S. at 164.

Here, the district court’s consideration of DeChristopher’s public statements was proper because the statements were relevant to DeChristopher’s likelihood of recidivism, lack of respect for the law, and failure to accept responsibility and to

deter others from following DeChristopher's example. In fact, DeChristopher put his public comments squarely into play.

In his sentencing memorandum, DeChristopher argued that "[i]n his public statements, [he] has consistently admitted to and accepted responsibility for his actions, despite his recognition that this might well land him in prison." (Supp. App. at 23.) During his allocution, DeChristopher clarified he had "no problem with" taking his "message from the public square and mak[ing] it a central part of these federal criminal proceedings. . . . I am just as willing to have those views on display as I have ever been." (App. at 922.)

Then at sentencing, DeChristopher and his counsel focused most of their arguments on the good that can come from civil disobedience. During his allocution, DeChristopher even boldly asserted:

I will continue to confront the system that threatens our future. Given the destruction of our demographic institutions that once gave citizens access to power, there is the possibility that my future will involve civil disobedience at some point. Nothing that happens here today will change that.

(App. at 934.)

It was only after DeChristopher interjected his public comments into the sentencing that the court referred to some of the public comments. Certainly, by then, DeChristopher's public comments were at issue and relevant to show he was likely to recidivate, that he lacked respect for the law, and that he had not accepted responsibility for his crimes. DeChristopher's public comments which publicly glorified his actions and called on others to follow his example also increased the

need for deterrence. The court did not plainly err by considering DeChristopher's public statements in imposing sentence.

II. The District Court Properly Excluded DeChristopher's Proffered Evidence Concerning the Government's Purported Circumvention of Laws and Regulations in Preparing for the Auction and the Subsequent Cancellation of Many of the Leases Won at the Auction Where: (a) the District Court Exercised its Discretion in Excluding the Necessity Defense Based on DeChristopher's Failure to Establish There Were No Legal Alternatives to Violating the Law or That the Harm He Sought to Prevent Was Imminent; (b) the Proffered Evidence Had No Relevance to the Crimes Charged; and (c) If the Government's Case Opened the Door at All to Admission of The Evidence, the Limited Probative Value of the Evidence Was Substantially Outweighed by the Factors in Rule 403 of the Federal Rules of Evidence.

Throughout the case, DeChristopher argued he should be allowed to present his proffered evidence concerning the government's purported circumvention of laws and regulations in preparing for the auction and the subsequent cancellation of many of the leases won at the auction. As the following establishes, the district court properly held the evidence was irrelevant, and that if it did have any relevance, it must be excluded under Rule 403 of the Federal Rules of Evidence.

A. Necessity Defense

Standard of Review: This Court "respects the trial judge's role as gatekeeper" by reviewing decisions regarding the necessity defense "for an abuse of discretion." *United States v. Al-Rekabi*, 454 F.3d 1113, 1123 (10th Cir. 2006).

Discussion: "[A] defendant is entitled to have a jury consider any defense which is supported by the law and has sufficient foundation in the evidence to create a genuine issue of fact." *United States v. Ortiz*, 804 F.2d 1161, 1163 (10th

Cir. 1986). At the same time, however, “[w]hen the evidence presents no genuine dispute, there is no factual issue for the jury, and the district court has a duty to rule on the defense as a matter of law.” *Id.*

“The necessity defense may excuse an otherwise unlawful act if the defendant shows that (1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant’s action and the avoidance of harm.” *United States v. Unser*, 165 F.3d 755, 764 (10th Cir. 1999) (quotation omitted); *see also Al-Rekabi*, 454 F.3d 1113, 1121 (stating this same standard); *United States v. Patton*, 451 F.3d 615, 638 (10th Cir. 2006) (same).

“A defendant must carry his burden on each of the elements; if the evidence is insufficient on even one element, the trial court and jury need not be burdened with testimony supporting other elements of the defense.” *United States v. Portillo-Vega*, 478 F.3d 1194, 1197 (10th Cir. 2007) (quotation omitted). “The necessity exception should be strictly and parsimoniously applied.” *Al-Rekabi*, 454 F.3d at 1122.

As the following shows, DeChristopher did not carry his burden on the first and second elements. Accordingly, the district court did not abuse its discretion in rejecting the necessity defense.

1. No Legal Alternative to Violating the Law

As the district court correctly held, there were several legal alternatives available to DeChristopher. He could have participated in the lawful

demonstration that was conducted right outside of the auction, as he initially intended, filed a protest against any or all of the 131 parcels of land involved in the auction, or brought a lawsuit. These lawful measures proved to be quite effective. The protests filed against the parcels of land meant that leases could not issue for any of the parcels until the protests had been resolved, a process which takes one to two years.⁴ And the motion for temporary restraining order was granted, which enjoined the BLM from issuing leases for seventy-seven of the parcels of land. DeChristopher was well aware of at least one legal alternative as his initial intent was to participate in the demonstration against the auction. However, he bypassed the demonstration and purposely broke the law to disrupt the auction.

This case is similar to *United States v. Seward*, 687 F.2d 1270 (10th Cir. 1982). In *Seward*, a large group of demonstrators was arrested for trespassing at a nuclear plant site. *Id.* at 1271. Those arrested had been provided a large area right outside the outer boundary of the plant to conduct their demonstration. *Id.* at 1271-72. The first day of the demonstration was peaceful, however, on the second day, sixty of the demonstrators were arrested after they walked onto the nuclear plant site, sat or laid down across the road, and ignored warnings to leave. *Id.* at

⁴ DeChristopher contends that “leases are to issue within sixty days of payment by the lessees, regardless of the existence of any protest.” (Aplt. Br. at 43.) That is not the case. In fact, “[t]he authorized officer may suspend the offering of a specified parcel while considering a protest or appeal against its inclusion in a Notice of Competitive Lease Sale.” 43 C.F.R. § 3120.1-3. The only record evidence is that the leases would not issue until the protests were resolved, a process that usually takes one to two years. (App. at 514-15.)

1272. After charges were brought for trespassing, the government filed a motion in limine to preclude the necessity defense. In response, defense counsel filed written proffers that they intended to introduce evidence about “the effects of radiation, risks of accidental leakage, soil contamination in the land surrounding [the nuclear plant site], and lack of viable political alternatives.” *Id.* at 1273. The trial court granted the government’s motion and precluded the necessity defense. *Id.* at 1273-74.

This Court affirmed, holding:

The defense of necessity does not arise from a “choice” of several courses of action, it is instead based on a real emergency. It can be asserted only by a defendant who was confronted with such a crisis as a personal danger, a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts. It is obviously not a defense to charges arising from a typical protest.

Id. at 1276; *see also United States v. Turner*, 44 F.3d 900, 900-03 (10th Cir. 1995) (affirming preclusion of necessity defense based on numerous legal alternatives to defendant’s scaling fence and entering abortion clinic to prevent the claimed greater evil of abortion).

Similar to *Seward*, the auction of public lands in this case did not involve a crisis which prevented DeChristopher from selecting from available legal alternatives. Rather, DeChristopher chose to exhibit his opposition to the auction by committing crimes. This choice he made was not out of necessity. It was his way to, in his words, “take stronger action” and to “cause a disturbance.” (App. at 578, 580, 601, 802, 829.) Because DeChristopher could not establish that no legal

alternatives were available to avoid the perceived harm, the court properly excluded the necessity defense.

2. Imminent Harm

To establish the second element of the necessity defense, the imminent harm element, “the harm to be avoided must be so imminent that, absent the defendant’s criminal acts, the harm is certain to occur.” *United States v. Kabat*, 797 F.2d 580, 591 (7th Cir. 1986); *see also Seward*, 687 F.2d at 1276 (stating the necessity defense must be “based on a real emergency”). DeChristopher failed to establish the leases were certain to issue absent his criminal acts. In fact, there was no imminence whatsoever. Based on the protests against all of the offered parcels and the temporary restraining order, the leases could not issue.⁵

DeChristopher argues the imminent harm element may be satisfied when there is “a present threat of harm, which may come to fruition in the future.” (Aplt. Br. at 47.) In support, he relies on civil cases that have no relevance to the necessity defense in a criminal case. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (defining “may present an imminent and substantial endangerment to health or the environment,” one of the elements under the Resource Conservation and Recovery Act); *Burlington Northern and Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007) (same and emphasizing the operative word is “may”). Because DeChristopher provides no authority that a

⁵ DeChristopher reasserts that “leases are to issue within sixty days of payment by the lessees, regardless of the existence of any protest.” (Aplt. Br. at 48.) As explained in footnote 3, that is not the case.

present threat of harm is sufficient, he has not carried his burden of establishing the second element of the necessity defense.

DeChristopher failed to carry his burden as to the first two elements and failure to establish even one element precludes the necessity defense. Accordingly, the district court did not abuse its discretion in rejecting the necessity defense.

B. Irrelevant to Crimes Charged

Standard of Review: Because the exclusion of the proffered evidence relates to DeChristopher's constitutional rights, this Court "review[s] the District Court's decision de novo." *Markey*, 393 F.3d at 1135.

Discussion: "A defendant's right to testify, present witnesses in his own defense, and to cross-examine witnesses against him-often collectively referred to as the right to present a defense-is rooted in the Sixth Amendment's confrontation and compulsory process clauses and the Fifth Amendment's guarantee of due process and privilege against self-incrimination." *United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004) (citation omitted). "The right to present a defense, however, is not without limits. At a minimum, a defendant is limited to presenting relevant evidence, which is evidence having 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* (quoting Fed. R. Evid. 401) (citation omitted).

This Court has held that the right to defend oneself:

while fundamental, is not absolute, and surely a defendant cannot present testimony willy nilly that has nothing to do with the crime. Accordingly, we have held that the district court enjoys substantial discretion in deciding whether to receive or exclude evidence at trial. And when it comes to assessing whether the constitutionally protected right to call witnesses and produce evidence has been trenched upon, we have indicated that we will reverse a district court's decision excluding evidence if, but only if, the proffered evidence is both relevant and material (that is, of such an exculpatory nature that its exclusion can be said to affect a trial's outcome).

United States v. Hernandez-Hernandez, 519 F.3d 1236, 1238-39 (10th Cir. 2008) (quotation and citations omitted). “To determine what evidence is relevant, [this Court] first turn[s] to the elements of the offense.” *Markey*, 393 F.3d at 1135.

DeChristopher was charged in a two-count Indictment with Violation of the Federal Onshore Oil and Gas Leasing Reform Act in violation of 30 U.S.C. § 195(a)(1) and False Statement in violation of 18 U.S.C. § 1001. The elements of Count 1 are: (1) the defendant knowingly organized or participated in a scheme or plan; and (2) the scheme or plan was intended to circumvent or defeat the competitive bidding process of the sale of federal oil and gas leases. (App. at 371.) The elements of Count 2 are: (1) the defendant made a false statement or representation to the government when he completed and signed a “Bidder Registration Form,” and certified he had a good faith intention to acquire an oil and gas lease on lands offered for auction by the United States; (2) the defendant made the statement knowing it was false; (3) the defendant made the statement

willfully, that is deliberately, voluntarily and intentionally; (4) the statement was made in a matter within the jurisdiction of the executive branch of the United States government; and (5) the statement was material to the government. (*Id.* at 372.)

The elements do not concern the government's preparations for the auction in any regard. The district court properly emphasized that the statute requires only that a valid auction occurred, not that the preparations for the auction were perfect. The court aptly stated:

it is against the law to intentionally tamper with or thwart or interfere with an auction. It may not have been a perfect auction in that everything was done perfectly before they got there, but it has not, from what I have heard from any facts, reached the point where it was not an auction. As I have said at sidebar, not all things are perfect. This trial is not perfect, no doubt, but it is still a trial.

(App. at 663-64.)

DeChristopher never proffered any evidence that the auction itself was invalid. In fact, as the record shows, the auction was indeed valid. BLM acted within its authority to hold the auction, *see* 30 U.S.C. § 226(b)(1)(A); 43 C.F.R. § 3120.1-2, and no court or other authority enjoined the auction.

Because DeChristopher's proffered evidence has no bearing on the elements of the crime, the district court properly excluded the evidence as irrelevant.

C. *Rebuttal Evidence*

Standard of Review: Because the exclusion of the proffered evidence relates to DeChristopher's constitutional rights, this Court "review[s] the District Court's decision de novo." *Markey*, 393 F.3d at 1135.

Discussion: DeChristopher argues the "excluded evidence was relevant and essential to the jurors' assessment of the credibility of the Government's witnesses' testimony as to the BLM's careful and law-abiding preparation of the auction" and to rebut the claimed misimpression that "DeChristopher was the cause of millions of dollars of loss to the local and national taxpayers . . . as they never learned that the legal deficiencies in the auction led to its nullification by the government." (Aplt. Br. at 37.) The district court properly held that the government's case did not open the door much, if at all, to rebuttal evidence, and to whatever extent it did, DeChristopher's proffered evidence was too likely to mislead the jury, confuse the issues, and lead to undue delay and waste of time that it must be excluded.

"The 'open the door' or 'invited error' doctrine provides that where a proponent introduces inadmissible evidence, a court may permit the opponent to introduce similarly inadmissible evidence in rebuttal or engage in otherwise-improper cross-examination." *United States v. Martinez*, 988 F.2d 685, 702 (7th Cir. 1993). The doctrine "is limited to the prevention of prejudice and used only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence." *United States v. Morales-Quinones*, 812 F.2d

604, 610 (10th Cir. 1987) (quotation omitted). “It is a doctrine dangerously prone to overuse.” *Id.* (quotation omitted).

“Where the rebuttal evidence does not directly contradict the evidence previously received, or goes beyond the necessity of removing prejudice in the interest of fairness, it is within the district court’s discretion to deny its admittance.” *Martinez*, 988 F.2d at 702. “Indeed, the ‘open door’ doctrine’s soundness depends on the specific situation in which it is used and thus calls for an exercise of judicial discretion.” *United States v. Villegas*, 655 F.3d 662, 671 (7th Cir. 2011).

For it makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by ‘opening the door’ so wide that rebutting collateral, inflammatory and highly prejudicial evidence may enter the minds of the jurors. In short, a small advantage improperly obtained does not compel the exaction of a gross disadvantage in penalty, particularly where a tarnished verdict is the inevitable result.

United States v. Beno, 324 F.2d 582, 588-89 (2d Cir. 1963).

Indeed, under Rule 403, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. To constitute a danger of unfair prejudice, “the evidence must have ‘an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.’” *United States v. Martinez*, 938 F.2d 1078, 1082

(10th Cir. 1991) (quoting Fed. R. Evid. 403 advisory committee’s note). “A district court has broad discretion in balancing the probative value of evidence against its potential prejudicial effect” *United States v. Nickl*, 427 F.3d 1286, 1300 (10th Cir. 2005).

In support of his argument that the government’s case opened the door to his proffered evidence, DeChristopher makes it appear that the focus of the government’s case was on the propriety of its actions in analyzing and offering the 131 parcels of land at the auction and the damage that DeChristopher caused this country’s citizens and taxpayers. (*Id.* at 31-33.) For example, DeChristopher asserts the jury was:

given to believe that, consistent with the BLM’s charge as steward of the public lands and resources, and the multiple uses thereof (DA 633), and in compliance with its meticulous record keeping, auction screening, and quality assurance practices (DA 495, 513, 637), BLM workers spent six months, approximately \$140,000 of their tax-payer funded time, to comply with the environmental, endangered species, historic preservation and other protective laws in preparing for the December auction (DA 513, 652).”

(Aplt. Br. at 31.) DeChristopher’s characterization of the government’s case is exaggerated.

Most of the testimony cited in support of this broad assertion was provided as general background regarding the witness’ duties and responsibilities and BLM’s administration of its responsibilities or to prove an element of the crime such as that DeChristopher’s false statements were material. No one ever testified that the BLM spent six months complying with all of the laws and regulations in

preparing for this specific auction. While Hoffman did agree with the prosecutor's question that the BLM keeps "meticulous records" regarding the auctions and made mention of "environmental reviews and compliance with things like the National Historic Preservation Act, the Endangered Species Act" and the signing of "environmental documents," these portions of his testimony were brief and were collateral to the issues in the case. (App. at 637, 652.) The record shows the government's case was focused on whether DeChristopher intentionally disrupted the auction, not whether the BLM complied with all the laws and regulations in offering the 131 parcels of land for auction. Accordingly, the probative value of rebutting Hoffman's testimony through DeChristopher's proffered evidence was minimal.

This minimal probative value was substantially outweighed by "a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, [and] wasting time." Fed. R. Evid. 403. The danger of unfair prejudice was that the evidence would have "an undue tendency to suggest decision on an improper basis." *Martinez*, 938 F.2d at 1082 (quoting Fed. R. Evid. 403 advisory committee's note). DeChristopher's proffered evidence would have been admissible only for the limited purpose of rebutting Hoffman's testimony. However, it would have been nearly impossible to ensure the jury understood that essential concept. The issues would have been confused and the jury likely misled into improperly considering DeChristopher's proffered evidence in determining whether DeChristopher was justified in committing the crimes. Admission of the

evidence would have opened the door “so wide that rebutting collateral, inflammatory and highly prejudicial evidence” would have entered “the minds of the jurors.” *Beno*, 324 F.2d at 588.

DeChristopher’s proffered evidence also had a danger of undue delay and wasting time. As the district court aptly stated, each portion of DeChristopher’s proffer “could serve as a full day or two of testimony just to sort that out, let alone bringing it back to this trial and how it informs the question of Mr. DeChristopher’s intent when he went into the auction and what he did there.” (App. at 685.)

DeChristopher argues the presentation of the proffered evidence could have been streamlined “through cross-examination of the government witnesses, DeChristopher’s testimony, the court’s taking judicial notice of some or all of the government reports, and/or through the testimony of a reasonable number of expert witnesses in a reasonable amount of time.” (Aplt. Br. at 41.) Presenting the evidence even in this suggested manner would have taken far longer than the trial regarding the charged crimes itself, and DeChristopher fails to mention that the evidence would result in several mini-trials that could take “days if not weeks.” (App. at 684-85.) The court properly found that the minimal probative value of the evidence was substantially outweighed by these significant risks.

DeChristopher’s proffered evidence was simply not relevant to this case. By excluding the evidence, the district court ensured that the jury properly focused on DeChristopher’s intentional disruption of the valid auction, not on an entirely

collateral case regarding the government's preparations for the auction. That collateral case was appropriately handled through protests against all the parcels of land, a successful lawsuit, and a demonstration that DeChristopher chose to bypass and instead commit the crimes for which he was convicted.

III. There Was Sufficient Evidence That DeChristopher Intended to Bid in Bad Faith When He Signed the Bidder Registration Form Where the Evidence Established That DeChristopher Bypassed the Demonstration to Make More of an Impact and to "Take Stronger Action," Represented Himself as a Bidder and Not an Observer, Made Multiple Bids Just to Drive up the Prices, and Won Fourteen Auctions for \$1,797,852.25 with No Intent to Pay for the Leases.

Standard of Review: "This court reviews a denial of a motion for judgment of acquittal *de novo*, viewing the evidence in the light most favorable to the government in determining if there is substantial evidence from which a jury could find the defendant guilty beyond a reasonable doubt." *United States v. Austin*, 231 F.3d 1278, 1283 (10th Cir. 2000).

Discussion: DeChristopher contends the evidence was insufficient to sustain Count 2, False Statement, in violation of 18 U.S.C. § 1001. Count 2 charged that DeChristopher completed and signed a bidder registration form that certified he "had a good faith intention to acquire an oil and gas lease on lands offered for auction by the United States, when in fact [he] had no intention of acquiring such a lease." (App. at 34.) DeChristopher argues the evidence was legally insufficient because the form "does not certify that any bidder has any intention of bidding, it just says that if a bid is submitted, it will be a good faith bid, and that if it is the high bid, it will obligate the bidder to pay for the lease."

(Aplt. Br. at 25-26.) He also argues the evidence did not establish that he had any intent to acquire an oil or gas lease when he signed the bidder registration form.

(Aplt. Br. at 27-28.) DeChristopher preserved only the second of these two issues.

“[U]nder section 1001, a promise may amount to a ‘false, fictitious, or fraudulent’ statement if it is made without any present intention of performance and under circumstances such that it plainly, albeit implicitly, represents the present existence of an intent to perform.” *United States v. Shah*, 44 F.3d 285, 294 (5th Cir. 1995); *see also United States v. Stewart*, 590 F.3d 93, 119-20 (2d Cir. 2009) (relying on *Shah* in finding lawyer’s signed promises to the government that she would abide by measures restricting her convicted client’s ability to communicate with others to prevent his continued direction of terrorist organizations constituted false statements because the evidence sufficiently showed that at the time she made the promises, she had no intent to honor them).

By signing the bidder registration form, DeChristopher certified that “any bid submitted by” him would be “a good faith intention . . . to acquire an oil and gas lease on the offered lands.” (App. at 406.) This promise DeChristopher made could constitute a false statement as long as the government proved that at the time he signed the form, he intended to bid in bad faith. Accordingly, there was no error, much less plain error, regarding the legal sufficiency of the evidence.

The evidence viewed in the light most favorable to the government was as follows. DeChristopher bypassed the demonstration when he realized it would not have much of an impact and decided to go inside to “take stronger action.” (*Id.* at

802.) When DeChristopher approached a BLM official, she asked if he was a bidder, an observer, or a member of the media. DeChristopher said he was a bidder. (*Id.* at 499, 509.) DeChristopher would not have received a bidder paddle and could not have participated in the auction if he had not filled out the bidder registration form. (*Id.* at 500-01, 651.) Sometime into the auction, DeChristopher began to bid on parcels of land with no intention to acquire the leases. He eventually won fourteen auctions for \$1,797,852.25 with no intent to pay for or develop the leases. (*Id.* at 555, 558-59, 561-65, 572, 577-79, 585, 604, 644, 648, 840-42.)

At trial, counsel for DeChristopher repeatedly argued to the jury the evidence did not establish that, when DeChristopher signed the bidder registration form, he intended to bid in bad faith. The jury rejected the arguments and convicted DeChristopher of making a false statement.

The jury's finding that DeChristopher had the requisite intent when he signed the form is supported by the evidence. The jury could reasonably infer from DeChristopher's motive to make more of an impact and to "take stronger action," his representing himself as a bidder and not an observer, his multiple bids just to drive up the prices, and his winning of the fourteen auctions with no intent to pay that his intent all along was to bid in bad faith. Accordingly, the evidence was sufficient to support the conviction on Count 2.

IV. The District Court Properly Held That 30 U.S.C. § 195(a)(1) Does Not Require the Government to Prove That DeChristopher Was Aware of at Least Two Specific Provisions of Law in Chapter 3A of Title 30 or its Implementing Regulations or That He Acted with Intent to Circumvent or Defeat Those Specific Laws Where the Plain Language of the Statute Does Not Include Such a Specific Intent.

Standard of Review: “This court reviews a denial of a judgment of a motion for judgment of acquittal *de novo*, viewing the evidence in the light most favorable to the government in determining if there is substantial evidence from which a jury could find the defendant guilty beyond a reasonable doubt.” *Austin*, 231 F.3d at 1283. This Court “review[s] a district court’s decision whether to give a particular [jury] instruction for an abuse of discretion” and “conduct[s] a *de novo* review to determine whether, as a whole, the instructions correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards.” *Brown v. Gray*, 227 F.3d 1278, 1291 (10th Cir. 2000).

Discussion: Count 1 charged DeChristopher with Violation of the Federal Onshore Oil and Gas Leasing Reform Act pursuant to 30 U.S.C. § 195(a)(1), which makes it a crime for someone “to organize or participate in any scheme, arrangement, plan, or agreement to circumvent or defeat the provisions of this chapter or its implementing regulations.” DeChristopher argues the district court erred in denying his motion for judgment of acquittal and refusing to amend the jury instruction by failing to require that he was aware of at least two specific provisions of law in Chapter 3A of Title 30 or its implementing regulations and that he acted with intent to circumvent or defeat those specific laws. (Aplt. Br. at

20-24.) As the following establishes, the district court did not commit any error because the plain language of the statute does not require an intent to circumvent or defeat a specific law.

“When interpreting the language of a statute, the starting point is always with the language of the statute itself.” *United States v. Quarrell*, 310 F.3d 664, 669 (10th Cir. 2002). The words are to be given their ordinary meaning. *See United States v. Plotts*, 347 F.3d 873, 876 (10th Cir. 2003).

The plain language of 30 U.S.C. § 195(a)(1) requires an intent “to circumvent or defeat the *provisions* of this chapter or its implementing regulations.” 30 U.S.C. § 195(a)(1) (emphasis added). It does not require an intent to circumvent or defeat a specific law.

This language that is “clear and unambiguous . . . must be followed” because it would not “lead to an absurd result contrary to clear legislative intent.” *Markey*, 393 F.3d at 1136 (quotation omitted). In fact, the legislative history is consistent with the plain language of the statute as it refers only to circumventing or defeating the *provisions* of the statute and its implementing regulations and never states there must be an intent to violate a specific law. *See, e.g.*, S. Rep. No. 99-412, at 10 (1986); H.R. Rep. No. 100-378, at 15 (1987); S. Rep. No. 100-188, at 7 (1987).

The “provisions” of Chapter 3A of Title 30 and its implementing regulations include the laws covering the competitive bidding process for acquiring oil and gas leases of public land. *See* 30 U.S.C. § 226(b)(1)(A); 43

C.F.R. §§ 3120.1-1, 3120.1-2. DeChristopher's intentional disruption of the auction clearly satisfied the requisite intent "to circumvent or defeat the *provisions* of this chapter or its implementing regulations." 30 U.S.C. § 195(a)(1) (emphasis added). Accordingly, the district court properly denied DeChristopher's motion for judgment of acquittal and objection to the jury instruction.

CONCLUSION

For the foregoing reasons, this Court should affirm the jury's verdict and DeChristopher's sentence.

RESPECTFULLY SUBMITTED this 26th day of January, 2012.

DAVID B. BARLOW
United States Attorney

/s/ Dave Backman

DAVE BACKMAN
Assistant United States Attorney
s/Dave Backman
Utah Bar No. 8044
185 South State Street, Suite 300
Salt Lake City, Utah 84111
(801) 325-3315
david.backman@usdoj.gov

CERTIFICATE OF COMPLIANCE

My brief was prepared in a proportionally spaced typeface and contains 13855 words. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DAVID B. BARLOW
United States Attorney

/s/ Dave Backman

DAVE BACKMAN
Assistant United States Attorney
s/Dave Backman
Utah Bar No. 8044
185 South State Street, Suite 300
Salt Lake City, Utah 84111
(801) 325-3315
david.backman@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that a copy of the foregoing BRIEF FOR THE UNITED STATES was filed via ECF and two written copies were mailed, postage prepaid to all parties named below, this 26th day of January, 2012.

Elizabeth Hunt LLC
569 Browning Avenue
Salt Lake City, UT 84105
elizabeth.hunt@comcast.net

Patrick A. Shea, PC
252 South 1300 East, Suite A
Salt Lake City, UT 84102
pas@patrickashea.com

Ronald James Yengich
Yengich, Rich & Xaiz
175 East 400 South, Suite 400
Salt Lake City, UT 84111
ronaldy333@aol.com

/s/Christine Allred
CHRISTINE ALLRED
Legal Assistant
s/Christine Allred
185 South State Street, Suite 300
Salt Lake City, Utah 84111
(801) 325-3231
chris.allred@usdoj.gov

CERTIFICATION OF DIGITAL SUBMISSIONS

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and that

- (1) All required privacy redactions have been made; and
- (2) The ECF submission has been scanned for viruses with the most recent version of "Trend Micro OfficeScan," version number 6.5, last updated January 26, 2012, and according to the program, are free of viruses.

/s/Christine Allred
CHRISTINE ALLRED
Legal Assistant
s/Christine Allred
185 South State Street, Suite 300
Salt Lake City, Utah 84111
(801) 325-3231
chris.allred@usdoj.gov