UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

№ 13-CR-607 (JFB)

UNITED STATES OF AMERICA,

VERSUS

PHILLIP A. KENNER AND TOMMY C. CONSTANTINE,

Defendants.

MEMORANDUM AND ORDER
October 13, 2017

JOSEPH F. BIANCO, District Judge:

On July 9, 2015, following a nine-week trial, a jury convicted defendant Phillip Kenner ("Kenner") of one count of conspiring to commit wire fraud, in violation of 18 U.S.C. § 1349 (Count One of the superseding indictment); four counts of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2 (Counts Two, Three, Four, and Seven); and one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count Nine).[1] (ECF No. 324.) In addition, the jury convicted defendant Tommy C. Constantine ("Constantine," and together with Kenner, "defendants") of one count of conspiring to commit wire fraud (Count One); five counts of wire fraud (Counts Two through Six); and one count of conspiracy to commit money laundering (Count Nine). Now pending before the Court is (1) Constantine's motion for a judgment of acquittal as to all counts or, in the alternative, for a new trial (ECF No. 346); and (2) Kenner's motion for a new trial (ECF No. 416). For the reasons set forth below, the Court denies both motions.

First, with respect to his motion for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, Constantine argues that there was insufficient evidence to convict him of either conspiracy charge because the government did not prove, beyond a reasonable doubt, that Constantine was a participant in any of three conspiracy objects—namely, defrauding investors in (1) a Hawaii land development project ("the Hawaii Project"); (2) Eufora LLC ("Eufora"), a prepaid credit card company run by Constantine; and (3) a fund for litigation against developer Ken Jowdy ("Jowdy") (the "Global Settlement Fund" or "GSF"). In addition, Constantine contends that there was no evidence connecting him with the wire transfers charged in Counts

[1] The jury also acquitted Kenner of three wire fraud counts (Counts Five, Six, and Eight). (ECF No. 324.)

Two through Four of the superseding indictment, and he asserts that the Court should acquit him of the wire fraud charges in Counts Five and Six because the jury acquitted Kenner of those crimes and the evidence at trial showed that Constantine attempted to return the money at issue.

The Court finds all of these arguments unpersuasive. As set forth in greater detail below, the witness testimony and documentary evidence adduced at trial sufficiently established that Constantine agreed with Kenner to participate in all of the objectives of the conspiracy. In particular, bank records show that both defendants routinely diverted third-party funds intended to finance the Hawaii Project, Eufora, and the GSF to pay for undisclosed personal expenditures, such as—in Constantine's case—race cars, rent, and lawsuits unrelated to those investments. Although Constantine argues, with respect to the Hawaii Project and Eufora, that he did not directly solicit money from the victims of those schemes, a reasonable juror could find—after viewing the record in a light most favorable to the government and drawing all inferences in its favor—that Constantine's conversion of the proceeds from those endeavors, coupled with evidence that defendants attempted to conceal their fraud, proved beyond a reasonable doubt that Constantine knowingly participated in those objectives of the conspiracy.

As for the Global Settlement Fund, Constantine contends that the alleged victims authorized all of the contested payments and that a defense witness testified that he permitted Constantine to use his GSF contributions for Constantine's personal expenses. However, although there was evidence at trial that the Global Settlement Fund's purposive ambit was broad and encompassed goals beyond financing litigation against Jowdy, none of the government's witnesses testified that they approved using the GSF for defendants' individual gain. Moreover, financial statements show that Constantine's personal expenditures from the GSF exceeded the defense witness's investments.

With respect to the wire fraud convictions, Counts Two through Four of the superseding indictment involved money transfers between Kenner and third parties. However, although Constantine did not directly participate in those transactions, a rational juror could find that he was culpable as a co-conspirator based on evidence that (1) the funds came from Eufora investments, and (2) they were a reasonably foreseeable consequence of Constantine and Kenner's unlawful agreement to convert Eufora funds to their personal benefit.

Counts Five and Six also pertain to a Eufora investment, and insofar as Constantine argues that he is entitled to a judgment of acquittal based on the jury's determination that Kenner was not guilty on those charges, an inconsistent verdict for two co-defendants does not provide grounds for Rule 29 relief. Further, a rational juror could conclude that Constantine had the requisite intent to defraud based on evidence that (1) he subsequently used the underlying funds for an undisclosed personal expenditure, and (2) the investor who wired that money never received the Eufora equity that Constantine had promised him. Constantine's contention that he subsequently attempted to return that investment is not a basis for Rule 29 relief because it is well-established Second Circuit case law that, for federal wire fraud charges, scienter is measured at the time of the transaction, and the crime is complete once the fraudulent communication has been sent. Although a juror can consider later actions to determine intent at the time of the transaction, a rational juror could certainly have concluded that Constantine had the intent to defraud at the time of the investment at issue and only offered to return the money once the fraud was disclosed.

Accordingly, the Court denies Constantine's Rule 29 motion in its entirety because the government proved his guilt beyond a reasonable doubt as to all charges.

Second, Constantine also moves, in the alternative, for a new trial pursuant to Federal Rule of Criminal Procedure 33 on the grounds of jury confusion and newly-discovered evidence.[2]

Constantine argues that the Court should have provided the jury with a special verdict form that would have required them to specify which of the three conspiracy objects provided the basis for Constantine's conviction. However, Constantine waived this argument at trial because he affirmatively withdrew his request for special interrogatories. In addition, assuming *arguendo* that he had not forfeited that claim, there was no error—much less plain error—by the Court because Supreme Court and Second Circuit precedent make clear that a special verdict form is not required in a multi-object conspiracy prosecution. Moreover, the newly-discovered evidence proffered by Constantine does not warrant Rule 33 relief because it existed prior to the trial, and Constantine could have discovered it with due diligence. In any event, it is highly improbable that use of those materials at trial would have affected the jury's verdict. Thus, Constantine's Rule 33 motion is also denied.

Third, Kenner separately moves for a new trial under Rule 33, asserting that (1) the government withheld exculpatory evidence; (2) there is newly-discovered evidence; and (3) the government committed prosecutorial misconduct. All of these arguments lack merit.

There was no violation of Kenner's due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), because all of the materials at issue were disclosed to Kenner, are cumulative of impeachment evidence that was introduced at trial, or were not in the government's possession prior to trial. Further, there is no likelihood that any of those records would have altered the jury's findings of guilt.

In addition, the newly-discovered evidence encompasses financial documents that Kenner obtained via subpoena during the trial and that he introduced as evidence during his own testimony. Thus, they were fully available to the jury. The remaining documents were either in Kenner's possession or could have been discovered with due diligence before trial, and to the extent he did not have those records, introducing them as evidence would not have led to acquittal given the government's substantial proof of guilt.

Kenner also alleges that the government made inappropriate statements during its cross-examination of him and during its rebuttal summation, and he asserts that the government suborned perjury from several of its witnesses. However, the contested remarks were not so egregious as to deprive Kenner of a fair trial, the Court minimized any prejudice by sustaining contemporaneous objections and properly instructing the jury that questions and summations by counsel do not constitute evidence, and it is unlikely that the verdict

[2] Constantine has also filed a supplemental brief raising an additional ground for relief based on ineffective assistance of trial counsel. (ECF No. 483.) Because that argument is not yet fully submitted, the Court does not consider it here.

would have been different absent those remarks. Further, Kenner's perjury claims merely reiterate the same credibility issues that his counsel vigorously explored at trial on cross-examination of the government's witnesses and during his opening statement and summation. Kenner also testified in great detail as to these issues during the defense case. Therefore, any purported perjury was fully considered by the jury, which—after nine weeks of testimony and the introduction of more than 1,000 exhibits—had ample opportunity to fully evaluate the veracity of each witness in this case, including Kenner.

Finally, with respect to both Constantine's and Kenner's Rule 33 motions, the Court concludes, in its discretion, that a new trial is not warranted because there is no real possibility that an innocent person has been convicted.

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Thus, for these reasons and those that follow, and after careful consideration of the parties' submissions, contentions at oral argument, and the extensive trial record, the Court denies defendants' motions in their entirety.

I. Background

A. The Trial Evidence

As noted, the trial in this action lasted approximately nine weeks, and the evidence consisted of testimony from over 40 witnesses and more than 1,000 exhibits. In light of this voluminous record, the Court will limit its factual summary to the evidence that is relevant to the instant motions.

In brief, the government advanced three theories of fraud at trial pertaining to the Hawaii Project, Eufora, and the Global Settlement Fund. With respect to the Hawaii Project, the government introduced evidence demonstrating that Kenner defrauded several professional hockey players who were clients of his. Those witnesses testified that they contributed money to that endeavor based on Kenner's representations that their investments would finance a real estate development in Hawaii; however, Kenner subsequently diverted his clients' money—without their authorization—to another property development in Mexico that involved Jowdy. In addition, witnesses testified that Kenner used several lines of credit in their name to divert money in an unauthorized manner, and when Kenner failed to make interest payments, those accounts were closed, and his clients lost the collateral used to secure those lines of credit. Further, and unbeknownst to Kenner's clients, bank records introduced at trial showed that Constantine received money intended for the Hawaii Project. The government also adduced evidence of forged consulting agreements that purportedly justified those payments, as well as an audio recording of a conversation between Kenner and Constantine indicating that they colluded to conceal their fraud.

Similarly, with respect to Eufora objective, the government demonstrated at trial that Kenner solicited funds from several investors who believed that their money would be used to finance that company. However, bank records and testimony indicated that Constantine converted those investments to cover his personal expenses, such as legal fees, without the investors' authorization. Specifically, the government showed at trial that the transactions underlying the wire fraud charges in Counts Two through Six of the superseding indictment were derived from Eufora investments, and that Kenner and Constantine used that money for unapproved expenditures. Contemporaneous text messages between Kenner and Constantine from the relevant period also evinced an agreement by defendants to use Eufora money for their personal benefit.

Finally, several government witnesses testified at trial that Kenner and Constantine convinced them to invest in the Global Settlement Fund because they believed that their contributions would principally finance litigation against Jowdy. However, bank records and testimony again demonstrated that both defendants used GSF funds for personal expenses. In particular, the evidence showed that Constantine paid his rent, various legal expenses, and for automotive work with money from the GSF.[3]

1. Defendants' Background

Kenner was a financial advisor to several investors, including professional hockey players. (*See, e.g.*, Tr.[4] at 130, 2913-14.) He attended Rensselaer Polytechnic Institute ("RPI") for college, where he roomed and played hockey with government witness Joe Juneau ("Juneau"). (*Id.* at 124-26.)

Constantine was the founder and Chief Executive Officer of Eufora, a prepaid credit card company. (*See, e.g.*, Government Exhibit ("GX")-8021-R.) Constantine was also a professional race car driver. (*See, e.g.*, *id.*; Tr. at 3667.) He and Kenner were longtime business partners, since at least 2002, when they both held positions as officers of Eufora. (Defs.' Exh. C-265.)

2. Relevant Witness Testimony and Other Evidence

a. The Government's Case

i. Joe Juneau

1. Direct Testimony

On direct examination, Juneau testified that, after graduating from RPI, he joined the National Hockey League ("NHL") in 1992. (Tr. at 124, 127.) Juneau introduced Kenner to Derek Sanderson, an NHL connection of his who worked at Boston Capital, a financial firm, and Kenner was hired to work at Boston Capital. (*Id.* at 128-29.) Juneau testified that Kenner then went on to work at other financial investment companies and eventually started his own company, Standard Advisors, in 2002. (*Id.* at 132-33.)

Kenner served as Juneau's financial adviser from 1994 through 2007 or 2008. (*Id.* at 130.) Juneau testified that, during this period, Kenner often sent him faxes of investment-related documents to sign that only contained the signature page. (*Id.* at 141-42.) Juneau also said that Kenner did not send him regular summaries of the status of Juneau's various investments. (*Id.* at 142-43.) In or around 2002 or 2003, Kenner spoke with Juneau about investing in the Hawaii Project. (*Id.* at 137-38). A May 2005 exchange between Kenner and Juneau indicated that Juneau had invested $100,000 in that enterprise. (*Id.* at 145-46; GX-728.) In or around 2006, Kenner informed Juneau of the need to renew a line of credit with Northern Trust Bank ("Northern Trust").

[3] Although Kenner has not moved for an acquittal and did not specifically focus on Count Seven of the superseding indictment in his motion for a new trial, the Court notes that the government also demonstrated with overwhelming evidence on that charge, through testimony and documents such as bank records, that Kenner defrauded investors by diverting their investment funds to a real estate transaction in Sag Harbor, New York.

[4] "Tr." refers to the transcript of the trial in this action, which began on May 4, 2015 and concluded with the jury's verdict on July 9, 2015.

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