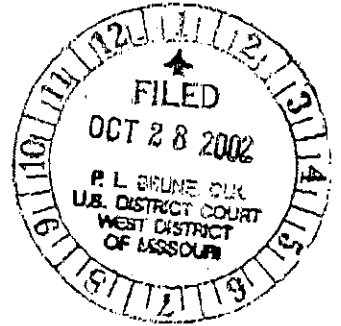


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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION



UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

No. 01-00190-01-CR-W-SOW)

ROBERT RICHARD KING,)

Defendant.)

ORDER

Before the Court are defendant King's Motion for New Trial (Doc. #103), the United States' Response, and defendant King's Reply. For the reasons stated herein, defendant's motion is denied.

I. Background

Defendant King's case went to trial on June 17, 2002. The evidence at trial demonstrated that defendant Robert Richard King, Stephen Kingsley ("Kingsley"), Albert Reitz ("Reitz"), Richard Halford ("Halford") and others were involved with an entity named OWL Securities Inc. ("OSI"). Using OSI, these individuals attempted to induce investors to provide money for a purported multi-million dollar development project in Costa Rica. At the conclusion of the trial, defendant King was found guilty by a jury of five counts, including conspiracy and violations of the Foreign Corrupt Practices Act ("FCPA") in connection with the purported development project in Costa Rica. Defendant King now moves the Court to set aside these convictions.

II. Standard

A court must grant a motion for a new trial if it would be a miscarriage of justice to let

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the verdict stand or if the verdict is against the weight of the evidence. *See United States v. Thomas*, 894 F.Supp. 58, 63 (N.D. N.Y. 1995).

III. Discussion

A. Sufficiency of the Evidence

Defendant King argues that the government's proof at trial failed to establish that defendant King conspired to violate the FCPA or committed the substantive FCPA violations alleged. In evaluating a claim regarding the sufficiency of the evidence introduced at trial, this Court is obligated to review the evidence in the light most favorable to the government and to resolve any factual disputes in favor of the jury's verdict. *See Glasser v. United States*, 315 U.S. 60, 80 (1942); *Klein v. United States*, 728 F.2d 1074, 1075 (8th Cir. 1984).

The evidence adduced at trial was sufficient to allow the jury to reasonably conclude that defendant King conspired with Kingsley, Halford, Reitz, and Barquero to pay a bribe to Costa Rican politicians and political parties and that King joined the conspiracy long before Kingsley began cooperating with the government. The government's evidence demonstrated that defendant King was an active and knowing participant in the conspiracy by October 24, 1999 when he met with Kingsley and discussed the future payment to the politicians, using the code word "kiss."

In addition, defendant had conversations with Halford regarding the use of various financial instruments to protect the bribe money until the concession was granted as well as the conditions under which the conspirators could safely pay the bribe without being held up by new requirements for more studies. During the summer of 2000, defendant King repeatedly directed Kingsley to obtain information from Barquero or to direct Barquero to obtain certain items from

the politicians. Defendant made other statements demonstrating his agreement with the other conspirators to pay the bribe.

The government's evidence showed that defendant King began conspiring with Kingsley long before Kingsley began cooperating with the government. The evidence demonstrated that defendant did more than just "talk." Defendant King sent out faxes and letters following his meetings with his co-conspirators seeking funds from his investors to pay the bribes to the politicians.

With respect to the FCPA offenses, defendant King argues that there was not sufficient evidence to establish that he took any act in furtherance of the bribe to foreign officials. To the contrary, the government introduced evidence that the bribe was offered to foreign officials. On August 9, 2000, Barquero told Kingsley that "three or four" high-ranking officials knew of the bribe and would be responsible for allocating it to various officials.

The government was not required to show that the bribe was offered to an official for the defendant to have violated the FCPA. The FCPA prohibits any person from taking an "act in furtherance" of an "offer or payment, or authorization of an offer or payment." 15 U.S.C. §78dd-2(a). Renumbered counts 2 through 5 included correspondence with investors to raise funds to pay the bribe, faxing a draft of a document that defendant had prepared for investors to Kingsley for comments, and participating in a meeting with Kingsley, Halford, and Reitz, during which they called Barquero in Costa Rica.

Defendant King's involvement went beyond "mere talk." The government's evidence demonstrated that King planned the bribe and engaged in detailed discussions of how to structure the payment to protect the conspirators' interests. Defendant King followed up on each meeting

of the conspirators by sending updates to his potential lenders and asking them to provide the necessary funds to pay the "closing costs." These letters constitute affirmative acts in furtherance of the bribe. Even though the bribe was never paid, this does not negate the corrupt intent underlying defendant King's efforts to raise the funds to pay such a bribe.

Count 5 involves an August 17th telephone call to Pablo Barquero. Defendant King argues that this call was made at the FBI's direction and that he did not make the call or cause the call to be made. Defendant King had talked to Barquero in the past and had used Kingsley as a conduit to Barquero to obtain information and convey directions to Barquero in negotiating the terms of the bribe. There was nothing improper about the decision to arrange an opportunity for defendant King to discuss the matter directly with Barquero. During the telephone conversation, defendant King actively participated in the conversation and coached Barquero to call the future bribe a "closing cost" because it "sounds more legal" than "toll."

Contrary to defendant King's characterization, the government's evidence showed that defendant King intended to put money into escrow or to open a letter of credit to pay the bribe and then to go to Costa Rica to negotiate the terms of the concession. In sum, the government introduced sufficient evidence to allow a reasonable jury to find defendants King guilty on the counts submitted to the jury.

Finally, King contends that the four FCPA counts submitted to the jury actually alleged a single scheme and, therefore, suffer from "multiplicity." This argument was rejected by the Court prior to trial and is denied for the reasons stated in the pre-trial order.

B. Evidentiary and Trial Rulings

1. Failure to Suppress the Kingsley Tapes

Defendant King contends that the Court erred in allowing the government to introduce the tapes made by Stephen Kingsley. Defendant King argues that the introduction of these tapes violated his Confrontation Clause rights and Federal Rules of Evidence 106 and 403.

The Court gave defendant King's counsel wide latitude in cross-examining the government's witnesses, including the case agent, to show Kingsley's shortcomings. All of the facts that defendant claims he would have elicited from Kingsley on cross-examination were elicited from other witnesses. The jury was fully aware of the issues regarding Kingsley's integrity and character.

The tapes were introduced as admissions of the defendant under Rule 801(d)(2)(A). *See United States v. Stelten*, 867 F.2d 453, 453 n.2 (8th Cir. 1988). Kingsley's statements on the tapes were admissible as verbal acts that provided context for defendant King's responses. Therefore, they were admissible as non-hearsay under Rule 801(c). *See United States v. Roach*, 164 F.3d 403, 410 (8th Cir. 1998). In addition, defendant King adopted many of Kingsley's statements and these statements were admissible as adoptive admissions under Rule 801(d)(2)(B). *See Stelten*, 867 F.2d at 454.

Next, defendant King suggests that the tapes should have been excluded under Federal Rule of Evidence 106, the rule of completeness. The government offered the complete recordings of seven conversations between defendant King and Kingsley. Although the government only played excerpts to the jury, the complete recorded conversations were introduced and defendant King was permitted to play other portions of the recordings. The rule

of completeness does not authorize the admission of unrelated hearsay that does not fall within a recognized hearsay exception. See United States v. Woolbright, 831 F.2d 1390 (8th Cir. 1987). A statement which is “merely exculpatory” but is not necessary to place an admitted portion of a recording into context or to avoid misleading a jury remains inadmissible hearsay and may not be admitted under the rule of completeness. United States v. Edwards, 159 F.3d 1117, 1127 (8th Cir. 1998). There is no basis for concluding that the tapes introduced at trial misled the jury or provided an incomplete or distorted view of the relationship and communications between the defendant and Kingsley.

Defendant King suggests that the introduction of the tapes violated Rule 403 because their probative value was outweighed by the danger of unfair prejudice. Despite multiple opportunities to do so, defendant King failed to demonstrate that any of the tapes that were introduced were “partly incomplete.” As for Kingsley’s alleged motive to “contrive” the conversations that were taped, Kingsley’s motives were placed before the jury. The tapes that were introduced into evidence consisted of “proof specific to the offense charged.” They did not contain extraneous or prejudicial conversations that might have induced the jury to find defendant King guilty on a different ground.

In sum, the Court did not err in admitting the Kingsley tapes.

2. Failure to Admit the Remaining Kingsley Tapes

During the presentation of the defense case, defendant King’s attorney sought to introduce *all* of the Kingsley-King tapes, without playing them to the jury or identifying any portions that corrected or clarified the eight tapes played for the jury during the government’s case. The Court did not allow defendant King to introduce the additional tapes. Rule 106 does

not provide a back door to introduce exculpatory hearsay. See United States v. Edwards, 159 F.3d 1117, 1127 (8th Cir. 1998). In addition, the rule of completeness must be invoked at the time the allegedly misleading or incomplete portion is admitted, not after the recording's proponent has rested. See United States v. Larranaga, 787 F.2d 489 (10th Cir. 1986). There was no error in denying the defense request to introduce all of the tapes.

3. Admission of the Kingsley-Barquero Tapes

Defendant King contends that the Court should not have admitted four tape recordings of conversations between Kingsley and Barquero or have allowed Special Agent Herndon to testify concerning other recorded conversations because neither Kingsley nor Barquero were available to testify and the government had not established that the statements bore "sufficient indicia of reliability." Defendant King's argument ignores the Supreme Court's decision in Bourjaily v. United States, 483 U.S. 171 (1987) and the Eighth Circuit's ruling in United States v. Beckman, 222 F.3d 512, 523 n.7 (8th Cir. 2000) rejecting the "indicia of reliability" test. The Supreme Court held that "the requirements for admissibility under 801(d)(2)(E) are identical to the requirements of the Confrontation Clause" and, therefore, "statements admissible under the rule are also admissible under the Confrontation Clause." Bourjaily, 483 U.S. at 182. The availability of the co-conspirator declarant is irrelevant to either the Rule 801(d)(2)(E) or the Confrontation Clause analysis. See United States v. Chindwongse, 771 F.2d 840 (4th Cir. 1985); United States v. Singleton, 125 F.3d 1097, 1106-07 (7th Cir. 1997).

Barquero's statements to Kingsley were properly admitted pursuant to Rule 801(d)(2)(E) and their admission did not violate the Confrontation Clause. The government laid a sufficient foundation to establish that a conspiracy existed, that Barquero, the declarant, and the defendant

were both members of the conspiracy, and that the statements were made in furtherance of the conspiracy. *See United States v. Alcantar*, 271 F.3d 731, 739 (8th Cir. 2001).

4. Alleged Massiah Violation

Next, defendant King suggests that the Court erred in permitting the case agent to testify about statements that the defendant made to his attorney in the agent's presence. King claims that the agent "eavesdropped," "spied on him," and "invaded the defense camp" in violation of his Sixth Amendment right to counsel.

Special Agent Herndon testified that defendant King's attorneys notified him in late 2001 that defendant King wanted to review the evidence at the FBI's office. After consulting with a prosecuting attorney, Herndon informed defendant King's attorneys that defendant King was welcome to do so, provided the agent was present when they reviewed original evidence obtained through search warrants. The defense agreed to this condition. Then, defendant King and his attorney reviewed the evidence in Special Agent Herndon's presence.

The common law rule pertaining to the attorney-client privilege "extends only to *confidential* communications from a client to his or her attorney. Confidential communications encompass that information communicated on the understanding that it would not be revealed to others, and to matters constituting protected attorney work product." *In re Grand Jury Proceedings*, 791 F.2d 663, 665 (8th Cir. 1986)(citations omitted; emphasis in original). "A voluntary disclosure of information which is inconsistent with the confidential nature of the attorney-client relationship waives the privilege." *Gray v. Bicknell*, 86 F.3d 1472, 1482 (8th Cir. 1996); *United States v. Workman*, 138 F.2d 1261, 1263 (8th Cir. 1998).

Here, defendant King did not take steps to protect the confidentiality of his comments to

his attorney. As a result, he waived any privilege pertaining to them. Defendant King made comments to his attorney while reviewing the evidence. He made these comments in a normal voice, audible to the agent sitting at the table, knowing that the agent was sitting there. There was no error in allowing the agent to testify concerning defendant King's comments.

C. Alleged Errors in the Jury Instructions

1. FCPA Instructions

Defendant King claims that the FCPA instructions did not include the government's burden of proof and was too long. Instruction Number 22 instructed the jury that it must find that the government met its burden of proof before it could return a guilty verdict. "When a single jury instruction is challenged, . . . that instruction must be reviewed in the context of the charge as a whole, not in artificial isolation." United States v. West, 28 F.3d 748, 751 (8th Cir. 1994). The burden of proof statement in Instruction Number 22 simply reinforced the Court's earlier instructions explaining the burden of proof. A defendant is not entitled to a specifically worded instruction on the burden of proof. It is only necessary that the instructions as a whole convey the concept of reasonable doubt. *See* United States v. Rogers, 91 F.3d 53, 56 (8th Cir. 1996).

In addition, defendant King suggests that the FCPA instructions covered issues that were not contested, specifically pointing to the definitions of "domestic concern" and "interstate commerce." Defendant King did not challenge these instructions on these bases at trial. These were essential elements of the offense. It would have been erroneous for the Court not to instruct the jury on all essential elements of the offense charged. *See* Neder v. United States, 527 U.S. 1, 7-9 (1999).

There was no error in giving the FCPA instructions as they were submitted to the jury in

this case.

2. Government Misconduct Instruction

Next, defendant King contends that the Court erred in refusing to instruct the jury on government misconduct. Defendant's counsel repeatedly indicated that they were not suggesting that defendant King had been entrapped. Rather, defendant's proposed instruction focused on the government agent's conduct, stating that the jury could acquit the defendant if he was the victim of government misconduct by the FBI and its informant Stephen Kingsley. The Eighth Circuit has held that outrageous government misconduct is a legal issue for the court to decide and it is not error to refuse to submit the issue to a jury; United States v. Dougherty, 810 F.2d 763, 770 (8th Cir. 1987); United States v. Drefke, 707 F.2d 978, 982 (8th Cir. 1983). *See also* Eighth Circuit Model Jury Instructions, 9.01 Committee Comments. There was no error in refusing defendant King's proposed instruction.

3. Deliberate Ignorance Instruction

Finally, defendant King argues that it was error for the Court to have instructed the jury on deliberate ignorance and that by doing so, the Court suggested to the jury that it could return a guilty verdict based on a finding of negligence. Defendant's position throughout the trial was that he had a good faith belief that OSI's \$1.5 million payment in Costa Rica was not a bribe, but was some form of legal payment to the political parties.

In contrast, the government's evidence demonstrated that defendant King had been presented with co-conspirator's statements, as well as Kingsley's unambiguous statements, that put defendant King on notice that "criminal activity [was] probably afoot." United States v. Barnhart, 979 F.2d 647, 652 (8th Cir. 1992). The evidence suggested that defendant King glossed

over those statements by calling the payments political donations, “thereby deliberately declining to verify or discover the criminal activity.” *Id.*

Since the defendant repeatedly emphasized his good faith belief that the payment was a legitimate one in the face of strong evidence to the contrary, the government was entitled to a deliberate ignorance instruction. See United States v. Massa, 740 F.2d 629, 643 (8th Cir. 1984). In addition, other instructions clarified that the jury had to find that defendant acted “voluntarily and intentionally” and not out of negligence or mistake. Instruction Number 27 specifically informed the jury that a “showing of negligence, mistake, or carelessness is not sufficient to support a finding of knowledge.” There was no error in giving the deliberate ignorance instruction in this case. See Massa, 740 F.2d at 643; United States v. Graham, 739 F.2d 351, 352-53 (8th Cir. 1984).

D. Governmental Misconduct

Defendant King contends that the government improperly commented on his alleged invocation of his rights under the Fifth Amendment when it noted during closing argument that defendant King had not called the FBI when Kingsley began openly equating the “closing costs” with bribery. King argues that the Court erred in denying his motion for a mistrial.

Defendant King’s argument fails because he never invoked his Fifth Amendment right to silence, except insofar as he chose not to testify at trial. Prior to December of 2000, defendant voluntarily met with the FBI on several occasions and spontaneously called Special Agent Herndon on other occasions. During one of these conversations in November of 1999, defendant told Herndon that he understood that certain payments would be made to a Costa Rican political party as “closing costs,” but King insisted that these were legal contributions that were tied to

some work the party had done. During his own closing argument, defendant King's counsel argued that the evidence showed that King did not have the requisite criminal intent because King believed, based on Kingsley's statements and as reflected in King's own statements to the FBI, that these were legal payments. The government responded to this argument by noting that the defendant, who had professed his desire to cooperate with the FBI and had insisted on the legality of the closing costs, had never contacted the FBI to say that Kingsley was now talking about bribes.

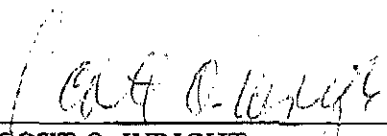
The government's argument was not calculated to call attention to defendant's failure to testify. Whether he testified or not was irrelevant to whether he had contacted the FBI to correct his voluntary statements. The prosecutor was simply calling attention to the defendant's failure to contact the FBI prior to being indicted and after having assured the FBI of his cooperation. There was no error in the prosecutor's argument. See United States v. York, 830 F.2d 885 (8th Cir. 1987).

Defendant King also reasserts his pretrial motion to dismiss based upon alleged governmental misconduct in "targeting" defendant. This motion was extensively briefed prior to trial and was the subject of an evidentiary hearing conducted by Chief Magistrate Judge Maughmer. Judge Maughmer's Report and Recommendation to deny the defendant's motion was accepted by Chief Judge Whipple. No new evidence was introduced at trial to suggest that the Court's prior decision was erroneous. As a result, this claim is denied for the reasons stated in the previous orders.

IV. Conclusion

For all of the reasons stated above, it is hereby

ORDERED that defendant King's Motion for New Trial (Doc. #103) is denied.



SCOTT O. WRIGHT
Senior United States District Judge

Dated: OCT 28 2002