U.S. Department of Justice

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September 9, 2019

The Honorable William J. Martini
Senior United States District Judge
Martin Luther King Jr. Federal Building
and Courthouse
50 Walnut Street
Newark, NJ 07102

Re: *United States v. Francis Raia*
Crim. No. 18-657 (WJM)

Dear Judge Martini:

Please accept this letter brief in opposition to defendant Francis Raia's ("Raia") motion for a new trial pursuant to Fed. R. Crim. P. 33(a). Dkt. No. 56. Raia's motion should be denied because, contrary to his arguments, the weight of the evidence clearly supports the jury's guilty verdict and the Government's summation did not mischaracterize the evidence or improperly inflame the jury.

I. Background

On October 31, 2018, a grand jury returned an indictment charging Raia with conspiracy to use the United States mail to promote a voter bribery scheme, contrary to 18 U.S.C. § 1952(a)(3), in violation of 18 U.S.C. § 371. The charge stemmed from his orchestration of a scheme to bribe voters by paying them $50 to apply for and cast mail-in ballots for the 2013 municipal election in Hoboken.

Raia ran in 2013 for an at-large Hoboken City Council seat, as part of a slate of candidates (the "Slate"). He also served as the Chairperson of Let the People Decide, a political action committee that he formed in 2011 to advocate for various ballot referenda in Hoboken. In 2013, Let the People Decide—at Raia's direction—supported a ballot measure aimed at weakening Hoboken's existing rent control laws. The Indictment charged that Raia instructed campaign workers to offer voters $50 by check if they cast mail-in ballots in support of the Slate and/or the Referendum.

Trial commenced with jury selection on June 17, 2019. The Government began presenting evidence later that day and formally rested on June 20, 2019. After the Government rested, Raia moved for a judgment of acquittal and the Court denied that motion. The jury began its deliberations on June 25, 2019 and that same day returned a guilty verdict.

The Government called fourteen witnesses during the trial. Rather than recount all of the testimony, the Government will focus on the witnesses whose testimony bears most directly on the instant motion, including: (i) three of Raia's co-conspirators—Matthew Calicchio, Michael Holmes, and Freddie Frazier—who each admitted that Raia directed them and other campaign workers to bribe voters; (ii) five voters who admitted that the Raia campaign paid them $50 to cast mail-in ballots; and (iii) Jackie Matthews, a Staff Operations Specialist with the Federal Bureau of Investigation, who testified to her analysis of bank records and Hudson County's vote-by-mail report.

Calicchio, Holmes, and Frazier all testified that Raia instructed them and other campaign workers—including Dio Braxton, Lizaida Camis, and Ana Cintron—to offer voters $50 if they cast mail-in ballots in the 2013 election. Tr. 32:23-25; Tr. 33:1-6; Tr. 383:4-8; Tr. 385:20-24; Tr. 533:20-23; Tr. 534:1-7. Three of those voters—Patricia Tirado, Latasha Swinton, and Marquitha Allen—admitted that Camis had bribed them to cast mail-in ballots, while Gloria Diaz and Tracey Stepherson testified that Cintron and Frazier, respectively, had offered them bribes in exchange for submitting mail-in ballots. Tr. 224:6-11; Tr. 225:21-25; Tr. 239:23-25; Tr. 240:1-4; Tr. 429:20-22; Tr. 516:13-18; Tr. 502:25; Tr. 503:1-4.

Calicchio, Holmes, and Frazier all testified that Raia instructed the people working for his campaign to bring ballots back to his social club unsealed so that Raia could review the ballots before deciding whether the voters should get paid after the election. Tr. 52:13-18; Tr. 52:24-25; Tr. 53:1; Tr. 68:25; Tr. 69:1-2; Tr. 70:1-2; Tr. 380:10-18; Tr. 541:16-21. They also each testified that the Let the People Decide declarations that voters were required to sign stating that they worked for Raia's campaign were nothing more than a cover story that Raia himself conceived to conceal his voter bribery scheme. Tr. 97:16-18; Tr. 397:1-9; Tr. 535:18-21; Tr. 536:4-10. Tirado, Swinton, Allen, and Diaz also testified that the declarations that they signed were false in that they never actually worked for the Raia campaign.[1] Tr. 228:17-25; Tr. 229:1-25; Tr. 230:1-4; Tr. 243:16-18; Tr. 245:12-22; Tr. 435:2-12; Tr. 519:15-25. Indeed, Diaz—a Spanish-speaker—testified that she had no idea what the declaration actually

[1] Raia did not produce in discovery, and the Government was not otherwise able to locate, a declaration signed by Ms. Stepherson.

said because Cintron gave it to her and told her to sign without translating it. Tr. 519:15-22.

Specialist Matthews compared checks drawn on the bank accounts of Let the People Decide and Bluewater Operations with a report from the Hudson County Clerk's Office that showed who voted by mail in the 2013 election. Her analysis, which was reflected in a chart introduced into evidence, showed that 378 out of the 395 people who received $50 checks from Let the People Decide and Bluewater Operations also voted by mail during the 2013 election. Tr. 482:25; Tr. 483:1-13; GX 900.

II. Legal Argument

Fed. R. Crim. P. 33(a) provides that the district court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). When evaluating a Rule 33 motion, the district court "does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." *United States v. Johnson*, 302 F.3d 139, 150 (3d Cir. 2002). The authority to grant a new trial pursuant to Rule 33, however, is limited to those instances where the Court "believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted." *Id.* (quotation omitted).

Here, Raia argues that he is entitled to a new trial for two independent reasons. First, he claims that the jury's verdict was against the weight of evidence because Calicchio, Holmes, and Frazier "cannot be believed." Br. at 7, 10, 13. Second, Raia contends that, in its summation, the "prosecution mischaracterized the evidence in a way that created a substantial possibility that the verdict was tainted." Br. at 13. Both of these arguments fall well short of establishing that Raia is entitled to a new trial.

a. The Weight of the Evidence Clearly Supports the Jury's Verdict

"[M]otions for a new trial based on the weight of the evidence are not favored" and should be "granted sparingly and only in exceptional cases." *United States v. Salahuddin*, 765 F.3d 329, 346 (3d Cir. 2014) (quotation omitted). Indeed, the type of manifest injustice contemplated by Rule 33 cannot be found simply on the basis of the trial judge's determination that certain testimony is incredible, unless the judge, after evaluating the totality of the case, is prepared to answer "no" to the following question: "Am I satisfied that competent, satisfactory and sufficient evidence in this record supports the jury's finding that this defendant is guilty beyond a reasonable doubt?" *United States v. Bell*, 584 F.3d 478, 483 (2d Cir. 2009) (per curiam) (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)).

Thus, while the Court may assess the credibility of witnesses in evaluating a defendant's Rule 33 motion, given that the new trial remedy is a sparing one, its application on witness credibility grounds must be limited to truly "exceptional" circumstances, *Salahuddin*, 765 F.3d at 346, such as where testimony is "patently incredible or defies physical realities." *Sanchez*, 969 F.2d at 1414; *United States v. McCourty*, 562 F.2d 458, 475-76 (2d Cir. 2009). Moreover, a jury's apparent decision to credit testimony despite impeachment efforts is an important consideration supporting the denial of a Rule 33 motion, like this one, that is based on a challenge to witness credibility. *United States v. Friedland*, 660 F.2d 919, 931-32 (3d Cir. 1981).

Here, Calicchio, Holmes, and Frazier were not impeached on any significant details, and their testimony could not possibly be characterized as "patently incredible." *Sanchez*, 969 F.2d at 1414; *see also United States v. Vas*, 497 App'x 203, 206 (3d Cir. 2012) (unpublished) (affirming district court's denial of Rule 33 motion despite minor inconsistencies in Government witnesses' testimony). Most importantly, Raia did not cast doubt on testimony that went to the heart of the case, *i.e.*, whether he instructed his campaign workers to bribe voters to cast mail-in ballots on behalf of the Slate and the Referendum. Nor was Raia able to effectively impeach his co-conspirators *or* the voters when they testified that the declarations were a cover story designed to conceal that they actually were being paid for their votes. That was, in part, because Raia's co-conspirators' corroborated one another on these key points and were further corroborated by the voters themselves and the statistical evidence introduced through Specialist Matthews.

Simply put, there was no manifest injustice here, as the weight of the evidence amply supported the jury's guilty verdict.

b. The Government's Summation Did Not Mischaracterize the Evidence or Improperly Inflame the Jury

"A prosecutor's comments during summation or rebuttal are improper if the statements mischaracterize certain evidence or are based upon evidence not in the record." *United States v. Brown,* 765 F.3d 278, 296 (3d Cir. 2014). The Supreme Court has held, however, that "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's statements standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11 (1985).

Where, as here, the defendant failed to object during trial to the allegedly improper statements, courts evaluate the supposedly offending comments under a deferential plain error review. *United States v. Onque*, 169 F. Supp. 3d 555, 571-72 (D.N.J. 2015) (citing *United States v. Wright*, 845 F. Supp. 1041, 1065

(D.N.J. 1994)). "When reviewing claims of prosecutorial misconduct under the plain error standard, the question is whether the prosecutor's comments caused 'substantial prejudice' to the defendant 'by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.'" *Onque*, 169 F. Supp. 3d at 572 (quoting *Brown*, 765 F.3d at 296 (internal quotation marks and citations omitted)). Here, Raia purports to identify two improper lines of argument that the Government made during summation, neither of which he objected to at the time.

First, Raia claims that it was improper for the Government to argue that, through the voter bribery scheme, he effectively "voted hundreds of times for himself and for [the Referendum]," Tr. 761:3-5, because there was "no evidence in the record to support such a claim . . . ." Br. at 15. He contends, in other words, that the Government inflamed the jury "by making the alleged scheme seem larger," Br. at 16, than what the evidence actually showed by arguing that the 378 people who voted by mail *and* received checks from either Let the People Decide or Bluewater Operations were all paid for their votes.

The Government introduced evidence, through Specialist Matthews, that 378 out of the 395 people who received $50 checks from Let the People Decide and Bluewater Operations also voted by mail during the 2013 election. During its summation, the Government asked the jury to consider this staggering number (95%) alongside the testimony from Raia's co-conspirators and the voters and draw the inference that indeed Raia *was* paying voters to cast mail-in ballots. This is not a mischaracterization of the evidence. To the contrary, it is a textbook example of asking jurors to draw an inference based on the evidence introduced at trial -- statistical evidence from Specialist Matthews and testimonial evidence from Raia's co-conspirators. That is, of course, entirely appropriate, and unsurprisingly did not draw a contemporaneous objection from Raia. *See United States v. Werme*, 939 F.2d 108, 117 (3d Cir. 1991) (explaining that, in summation, a prosecutor "is entitled to considerable latitude . . . to argue the evidence and any reasonable inferences that can be drawn from that evidence.").

Second, Raia argues that it was improper for the Government to reference evidence that he instructed his campaign workers to bring completed mail-in ballots back to his social club unsealed so that he could review them because it did not bear on an element of the offense and "only serve[d] to make the actual alleged criminal conduct appear more egregious and inflame the passions of the jury." Br. at 16. This evidence, however, was highly probative of whether Raia was aware of, and intentionally involved in, the charged scheme, as well as his motive for causing voters to be paid. For good reason, it, too, did not draw an objection at the time.

Calicchio, Holmes, and Frazier all testified that Raia wanted to review unsealed ballots to see if voters had voted for the Slate and or the Referendum before deciding whether the voters would get paid. Far from being an ancillary point elicited to inflame the jury, this testimony was direct and compelling evidence that Raia was knowingly and intentionally operating the charged voter bribery scheme because it showed that Raia checked to ensure that he got what he was paying for — votes. The Government's emphasis on this evidence was proper and certainly did not "infect the trial with unfairness," *Brown*, 765 F.3d at 296 (quoting *Shareef,* 190 F.3d at 78), that would justify the extraordinary step of ordering a new trial. Accordingly, Raia's motion for a new trial should be denied.

III. Conclusion

Raia's challenge to the credibility of his co-conspirators' testimony falls well short of establishing that the verdict was against the weight of the evidence. In addition, he has failed to show that the Government's arguments during summation mischaracterized evidence or improperly inflamed the jury. Accordingly, Raia's motion for a new trial should be denied.

Respectfully submitted,

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