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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN E. REAGAN,

Defendant - Appellant.

No. 08-10068

D.C. No. CR-01-01104-EHC

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PATRICK T. BUCKNER,

Defendant - Appellant.

No. 08-10069

D.C. No. CR-01-01104-EHC

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Argued and Submitted April 13, 2009
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Before: D.W. NELSON, BERZON and CLIFTON, Circuit Judges.

John Reagan and Patrick Buckner appeal their criminal convictions. They challenge numerous trial evidentiary rulings, the jury instructions, the form of verdict, and the denial of their motion for a new trial. We affirm.

1. The district court did not abuse its discretion by admitting the series of charts referred to as “the Burnison report.” *See* Fed. R. Ev. 1006. First, Boeing employee testimony laid a proper foundation for the sales invoices and pricing information from which the report was synthesized, so the underlying data would have been admissible as business records. *See* Fed. R. Ev. 803(6); *United States v. Miller*, 771 F.2d 1219, 1237 (9th Cir. 1985); *City of Phoenix v. Com/Sys., Inc.*, 706 F.2d 1033, 1037-38 (9th Cir. 1983). Second, the Government made the records available to Defendants for inspection prior to trial. *See Amarel v. Connell*, 102 F.3d 1494, 1516-17 (9th Cir. 1997); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 515 n.9 (9th Cir. 1985). Finally, any possible inaccuracies or manipulation of the underlying data went to the weight of the report, not its admissibility, *see, e.g., United States v. Catabran*, 836 F.2d 453, 458 (9th Cir. 1988), and Defendants had the opportunity through cross-examination to “alert the jury to any alleged discrepancies” between the report and the underlying data, *United States v. Meyers*, 847 F.2d 1408, 1412 (9th Cir. 1988).

2. The district court did not abuse its discretion in admitting copies of various checks issued to Defendants by Boeing service centers, as these checks constituted substantive evidence of wire fraud and overt acts in furtherance of the conspiracy, *United States v. Baker*, 10 F.3d 1374, 1413-14 (9th Cir. 1993), *overruled on other grounds by United States v. Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000). As such, the checks “fall[] outside the ambit” of Federal Rule of Evidence 404(b). *See United States v. King*, 200 F.3d 1207, 1214 (9th Cir. 1999). The district court also did not abuse its discretion in admitting copies of Defendants’ tax returns under Rule 404(b). *See United States v. Fuchs*, 218 F.3d 957, 964-65 (9th Cir. 2000). The tax returns, which were contemporaneous with the conspiracy and the kickback checks, arguably demonstrated an attempt to conceal the overall scheme and were thus relevant, circumstantial evidence of Defendants’ fraudulent intent, a material element of the charged offenses. *See United States v. Curtin*, 489 F.3d 935, 945 (9th Cir. 2007) (en banc) (quoting *Huddleston v. United States*, 485 U.S. 681, 685 (1988)); *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013-14 & 1014 n.5 (9th Cir. 1995); *United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1325-26 (9th Cir. 1992); *United States v. Cloud*, 872 F.2d 846, 852 n.6 (9th Cir. 1989).

3. The district court did not err in refusing to compel the Government to grant transactional immunity to two potential defense witnesses. Defendants did not submit an offer of proof regarding the anticipated content of Dave MacFarlane's proposed testimony and therefore failed to meet their threshold burden of establishing its relevance. *See United States v. Straub*, 538 F.3d 1147, 1162 (9th Cir. 2008). Bill Jones's proffered testimony also did not satisfy the narrow test for compelled immunity. *See id.* The district court found that the Government's pretrial letter to Jones, an alleged co-conspirator identified by the Government as a potential target for future prosecution, did not amount to wrongful intimidation for the purpose of discouraging him from testifying, and this finding was not clearly erroneous. *See id.* at 1156; *Williams v. Woodford*, 384 F.3d 567, 602 (9th Cir. 2004); *United States v. Croft*, 124 F.3d 1109, 1116-17 (9th Cir. 1997). Defendants have also failed to demonstrate that Jones's proffered testimony would have directly contradicted an immunized Government witness's testimony.

Nor do Defendants explain why they could not have obtained evidence from other sources to demonstrate or at least bolster much of the exonerating information they wished to extract from Jones. For example, the proffer suggested that Jones's company paid Buckner over \$100,000 in consulting fees for his

assistance in facilitating a contract to sell weapons systems to the South Korean military. Even though this deal ultimately fell through, Defendants could presumably have gathered documentary evidence or requested the court to subpoena a representative from one of the other parties involved, such as the weapons system manufacturer, to verify defendant Buckner's substantial participation in the transaction.

4. The district court did not abuse its discretion or infringe on Defendants' constitutional right to present a defense when it reasonably limited their cross-examination of Frank Palminteri during the Government's case-in-chief regarding the collateral matter of design defects in Boeing-manufactured helicopter main rotor blades. *See United States v. Whitworth*, 856 F.2d 1268, 1283-84 (9th Cir. 1988); *see also United States v. Weiner*, 578 F.2d 757, 766 (9th Cir. 1978). It was Defendants' sale of a Boeing competitor's tail rotor blades, not main rotor blades, which in part formed the basis of the charges of honest services mail and wire fraud, and Defendants had adequate opportunities to introduce evidence regarding flaws in Boeing tail rotor blades. In particular, Defendants relinquished the opportunity to call Palminteri back to the stand for direct examination on this subject during their case-in-chief and do not offer a satisfactory explanation as to why an attempt to do so would have been futile.

5. The district court did not abuse its discretion in precluding the defense from introducing evidence to impeach Larry Shiembob for bias under Federal Rule of Evidence 403. *See United States v. Ray*, 731 F.2d 1361, 1364 (9th Cir. 1984). Even assuming evidence of a sexual relationship six years prior to trial between Shiembob and Tina Cannon, whose testimony he corroborated, would support an inference of bias, the proffered impeachment of a non-crucial witness on a tangential issue risked misleading the jury. *See Fed. R. Ev. 403; Ray*, 731 F.2d at 1363-64. The subject of Shiembob's and Cannon's testimonies formed but one small piece in a large puzzle connecting Defendants to stolen helicopter parts and was further corroborated by two additional Government witnesses. *Cf. Silva v. Brown*, 416 F.3d 980, 987 (9th Cir. 2005). Therefore, any error in precluding the defense from impeaching Shiembob was harmless. *See, e.g., United States v. Johnson*, 297 F.3d 845, 862 (9th Cir. 2002).

6. The district court did not abuse its discretion in declining to use Defendants' proffered special verdict form. Such forms are neither required nor "favored" in this circuit. *See United States v. Ramirez*, 537 F.3d 1075, 1083 (9th Cir. 2008); *United States v. Shelton*, 588 F.2d 1242, 1251 (9th Cir. 1978). The court provided a specific unanimity instruction for each of the offense elements for which a guilty verdict might possibly have rested on alternative grounds, and the

jury is presumed to have followed these instructions, *Mejia v. Garcia*, 534 F.3d 1036, 1043 n.3 (9th Cir. 2008).

7. The district court did not abuse its discretion in declining to insert Defendants' supplemental language into the jury instructions defining honest services fraud. *See Ramirez*, 537 F.3d at 1081. The given instructions properly conveyed the Government's evidentiary burden to establish (1) breach of duty and (2) foreseeable economic harm. *See* 18 U.S.C. § 1346 (2004); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 939, 941 & n.14 (9th Cir. 2009); *United States v. Williams*, 441 F.3d 716, 723 (9th Cir. 2006). Defendants' proposed addition, which merely emphasized the insufficiency of breach standing alone, would have been redundant. *See United States v. Tarallo*, 380 F.3d 1174, 1190 (9th Cir. 2004).

8. Finally, the district court did not abuse its discretion in denying Defendants' motion for a new trial in light of newly discovered evidence. *See United States v. Endicott*, 869 F.2d 452, 454 (9th Cir. 1989). Evidentiary hearing testimony supported the district court's findings that (1) Defendants could have discovered this evidence before trial had they exercised due diligence and (2) Joe Childs did not contradict evidence produced at trial regarding the alleged scheme with which Defendants were charged, so these findings were not clearly erroneous.

See id. Accordingly, the district court did not abuse its discretion in concluding that this new evidence would not lead to an acquittal. *See id.*

AFFIRMED.