

NONPRECEDENTIAL

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.)
)
 HASHIM M. BAZAR, and)
 NAYEF YOUSEF a.k.a.)
 NAYEF YOUSEF ASAD,)
)
 Defendants)
 _____)

CRIMINAL NO. 2000/0080

APPEARANCES:

Andrew L. Capdeville
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MEMORANDUM OPINION

Finch, C. J.

This matter comes before the Court on the posttrial motions of Defendants Hashim Bazar and Nayef Yousef for acquittal, new trial, or arrest of judgment on Counts 1, 2 and 3 of the Indictment. For the reasons stated herein, Defendants' motions will be denied.

I. Procedural Background

Defendants Bazar and Yousef move for judgment of acquittal, new trial, or arrest of judgment following their convictions, at a joint trial, on three counts of wire fraud in violation of 18 U.S.C. § 1343.¹ At the same trial Defendant Bazar was convicted on one count of arson in violation of 18 U.S.C. 844(i).² The Court previously heard and resolved Defendant Bazar's posttrial motions with respect to his arson conviction under Count 5 of the Indictment. The Court now considers Defendants' challenges to the wire fraud convictions under Counts 1, 2 and 3.

Although the bulk of Defendant Bazar's posttrial arguments pertained to his arson conviction, Bazar makes the following arguments in support of his motion for acquittal or new

¹ 18 U.S.C. § 1343 provides:

§ 1343. Fraud by wire, radio, or television.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

² 18 U.S.C. 844(i) provides:

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

trial as to the remaining counts:

(1) Bazar is entitled to acquittal or new trial because his trial occurred in a “general atmosphere” of feelings that “arsons occurring in this community are ignited by the Arab ethnic group to which Bazar belongs.” (Def. Bazar’s Second Revised Motion at 3.);

(2) Bazar is entitled to acquittal or new trial because the Court made the following statement after hearing arguments for acquittal at the close of the Government’s case in chief: “[T]here are some criminal cases in which a jury trial should not be demanded. If this case were being tried by me, the Government would be out on the street” (Trial Tr. April 9, 2001 at 64.);

(3) Bazar is entitled to a new trial because jurors were apparently under pressure of fatigue, frustration or harassment;

(4) Bazar is entitled to a new trial because he was denied the opportunity to recall a Government witness, insurance adjuster John Graff, for further examination; and

(5) Bazar is entitled to a new trial because the Government, by improper argument, attempted to “distance the accused from [his] counsel.” (Def. Bazar’s Second Revised Motion at 13.).

Defendant Yousef makes the following arguments in support of his motion for judgment of acquittal, new trial or arrest of judgment:³

(1) Defendant Yousef, like Defendant Bazar, is entitled to a judgement of acquittal because the Court stated “[i]f this case were being tried by me, the Government would be out on the street” (Trial Tr. April 9, 2001 at 64.);

(2) Defendant Yousef is entitled to a new trial or an arrest of judgment because of a clerical error in the verdict form. The form, entitled “Verdict Form for Defendant Nayef Yousef,” named Defendant Hashim Bazar rather than Defendant Nayef Yousef in the text of each count;

(3) Defendant Yousef is entitled to a judgment of acquittal because there was insufficient evidence presented on which to convict Defendant Yousef of fraud; and

³ Defendants Bazar and Yousef each adopt the other’s motions and arguments.

(4) The Court must dismiss the Indictment because during the grand jury proceedings two Government witnesses made disparaging remarks about Arabs.

The Government opposes both Defendants' motions.

II. Legal Standards for Judgment of Acquittal and New Trial

A motion for judgment of acquittal and a motion for new trial are governed by two different standards. In determining a motion for judgment of acquittal for insufficiency of the evidence under Fed. R. Crim. P. 29, a district court "must view the evidence in the light most favorable to the verdict, and must presume that the jury has properly carried out its functions of evaluating credibility of witnesses, finding the facts, and drawing justifiable inferences. A verdict will be overruled only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1986) (citing United States v. Castro, 776 F.2d 1118, 1125 (3d Cir. 1985); United States v. Dixon, 658 F.2d 181, 188 (3d Cir. 1981)). The Court must determine "whether all the pieces of evidence against the defendant, taken together, make a strong enough case to let the jury find him guilty beyond a reasonable doubt." United States v. Allard, 240 F.2d 840, 841 (3d Cir. 1957), *cert. denied*, 353 U.S. 939 (1957). A trial court has the duty to grant a judgment of acquittal when the evidence is so scant that the jury could only speculate as to the defendant's guilt. See 2 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 467, at 660-61 & n. 23 (West 1982). The Government must prove every element of the offense beyond a reasonable doubt. United States v. Samuels, 741 F.2d 570, 573 (3d Cir. 1984).

A motion for a new trial pursuant to Fed. R. Crim. P. 33, on the other hand, requires a broader standard of review than that applied to a motion for judgment of acquittal. Government of Virgin Islands v. Leycock, 93 F.R.D. 569, 571 (D.V.I. 1982); United States v. Pepe, 209 F. Supp. 592, 594 (D. Del. 1962), *aff'd*, 339 F.2d 264 (3d Cir. 1964) (per curiam). Under Rule 33, “the Court . . . may grant a new trial . . . if required in the interest of justice.” Fed. R. Crim. P. 33. Unlike a motion for judgment of acquittal, the motion for new trial is based upon the weight of the evidence, and the Court may weigh evidence and consider the credibility of witnesses. United States v. Smith, 619 F. Supp. 1441, 1443 (M.D. Pa. 1985); Pepe 209 F. Supp. at 595. The decision whether to grant a new trial is left to the discretion of the trial court. However, such an exercise of discretion is to be used only in exceptional circumstances. United States v. Kermidas, 332 F. Supp. 1312, 1316 (M.D. Pa. 1971), *aff'd*, United States v. Rohland, 468 F.2d 238 (3d Cir. 1972); 2 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 553 (West 1982). The trial judge may not set aside the verdict simply because he came to a different conclusion than the jury. See Schirra v. Delaware L. & W. R. Co., 103 F. Supp. 812, 820 (M.D. Pa. 1952).

III. Defendant Bazar

A. The Jury: Anti-Arab Sentiment and Jury Fatigue

With respect to Bazar’s first argument regarding the “general atmosphere” of anti-Arab sentiment in the community regarding arson crimes, Bazar points to nothing in particular

showing that any jury member was biased or that Bazar was in any way prejudiced.⁴ Moreover, any questions posed by the Court to the jury pool concerning jurors' sentiment toward Arabs were asked at the request of Bazar's attorney. Bazar never sought a change of venue, nor objected to the composition of the jury. In any event, Bazar's general allegations of community prejudice are insufficient to support a judgment of acquittal.

Likewise, as to Bazar's second argument that the "jurors were under pressure of fatigue, frustration and/or harassment" during their deliberations, Bazar points to nothing other than a lengthy, two-day deliberation in support of his argument. (Def. Bazar's Second Revised Motion at 4.) He shows no evidence of harassment and no evidence of prejudice to Bazar by any fatigue. The Court declines to grant a new trial on such grounds.

B. The Court's Statement

Bazar next argues that acquittal or a new trial should be granted because the Court, upon hearing Bazar's Rule 29 motion for acquittal at the close of the Government's evidence, stated: "[T]here are some criminal cases in which a jury trial should not be demanded. If this case were being tried by me, the Government would be out on the street." (Trial Tr. April 9, 2001 at 64.) This argument, too, lacks merit. The Court by its statement simply noted that if the Court were the trier of fact, it would have granted Defendant's Rule 29 motion. Such statement alone does not create or demonstrate any reason to grant Defendant's posttrial motion at this time. The

⁴ Defendants were instructed by Court order to provide citations to the record regarding their posttrial challenges. Bazar did not do so.

Court did not, as Bazar suggests, state that the Government's case lacked sufficient evidence to sustain a conviction. In fact, in making the statement at the close of the Government's case, the Court noted that despite its conclusions there was sufficient evidence to submit the case to the jury for consideration. The Court's full statement was as follows:

You know, there are some criminal cases in which a jury trial should not be demanded. If this case were being tried by me, the government would be out on the street, but there are inferences here in this case that I cannot take from the jury. Significant inferences. And these inferences suggest to me that I must look at the case in the light most favorable to the government, whether or not that legal situation will exist on post trial motions I don't know. But for now I deny the motions to dismiss.

(Trial Tr. April 9, 2001 at 64.)

It is well established that on a posttrial motion for a new trial, the trial judge may not set aside the verdict simply because he came to a different conclusion than the jury. See Schirra v. Delaware L. & W. R. Co., 103 F. Supp. 812, 820 (M.D. Pa. 1952). Accordingly, Bazar's motion on that basis will be denied.

C. Defendant's Right to Call Witnesses

Bazar next argues that he was denied the opportunity to recall the Government's wire fraud witness, insurance adjuster John Graff, in his defense.⁵ At the conclusion of Graff's testimony for the Government, however, the following exchange occurred:

PROSECUTOR: Your honor, I would ask that Mr. Graff be allowed to leave subject to being available by cell phone to return to the

⁵ Again, Bazar failed to direct the Court to the parts of the trial record to which he objects, as he was specifically directed to do by the Court's Order dated July 24, 2001.

Court next week, in the event that he's needed on rebuttal.

THE COURT: Very well.

(Trial Tr. April 6, 2001 at 136.) Neither Defendant Bazar nor Defendant Yousef objected to the arrangement. At the time the prosecutor addressed Graff's availability for rebuttal, Defendant Bazar did not indicate that he intended to use Graff as a defense witness. Further, Bazar later agreed to a stipulation regarding the testimony he sought from Graff in lieu of Graff's personal appearance. (Trial Tr. April 9, 2001 at 84-88.) Accordingly, Bazar's statement that he was deprived of his Sixth Amendment right to compulsory process is inaccurate.

D. Improper Argument by the Government

Finally, Bazar argues that the prosecutor improperly attempted to "distance" Bazar from his counsel by statements made during closing argument. Bazar cites no authority for his position, fails to state in what way the argument was improper and, again, fails to direct the court to the disputed statements in the record. Accordingly, his argument lacks merit and his motion on such grounds will be denied.

IV. Defendant Yousef

A. The Court's Statement

Defendant Yousef makes the same argument as does Bazar with respect to the Court's statement: "If this case were being tried by me, the Government would be out on the street" Because the argument is no different than the argument made by Defendant Bazar discussed

above, Yousef's motion will be denied for the same reasons.

B. Clerical Error in the Verdict Form

Yousef next argues that he is entitled to a new trial or an arrest of judgment because of a clerical error in the verdict form. Specifically, the verdict form submitted to the jury was entitled in bold print "**VERDICT FORM for DEFENDANT NAYEF YOUSEF,**" but it erroneously named Hashim Bazar rather than Nayef Yousef in the text of each count. Yousef's counsel objected to the error upon reviewing the document prior to its submission to the jury, yet due to error the jury received the erroneous form and found Yousef guilty on each count charged. Yousef now argues that as a result of the clerical error no verdict was ever returned for him, because he was not named in each count. On that basis he requests an arrest of judgment. Alternatively, Yousef argues that the jurors may have mistakenly believed that a conviction of Bazar necessarily required that Yousef also be convicted, or that the evidence against Bazar was to be used against Yousef. Yousef provides no law in support of his argument.

First, with respect to the issuance of an arrest of judgment in this situation, this Court notes that Fed. R. Crim. P. 34 governing arrest of judgment applies only "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." Fed. R. Crim. P. 34. Whereas the Indictment in this case clearly charged the offenses and the Court was not without jurisdiction, Rule 34 is inapplicable here.

Turning to whether a new trial should be granted as a result of the error in the verdict form, the Court finds that several factors weigh against a new trial. First, in reading the verdicts

for each Defendant, the jury foreman distinguished the verdicts as to Yousef from the verdicts as to Bazar, announcing them separately and by each Defendant's name. (Trial Tr. April 12, 2001 at 3.) Upon being polled, each and every juror concurred in the verdicts. (Id. at 3-5.)

Second, the Court's instructions to the jury acted to cure any confusion created by the error. The Court clearly and unambiguously instructed the jury that it must reach its verdicts separately as to each Defendant, and only upon the evidence presented against each individual Defendant. The Court said:

You must consider the alleged evidence against each defendant separately. Evidence admitted against one defendant cannot be used against another defendant. You must give separate individual consideration to each charge against each defendant. The fact that you find one defendant guilty or not guilty of one of the offenses charged should not control your verdict as to any other offense charged against that defendant, or as to any offense charged against any other defendant.

(Trial Tr. April 9, 2001 at 149.) The Court expounded on the above general instruction with the following specific instruction: "Defendant Nayef Yousef is not charged with arson which is charged in count 5 of the indictment. You are not to use any evidence of arson whatsoever against defendant Yousef." (Id.) In light of such instructions, there could be no confusion that a verdict of guilty as to Bazar did not also require a verdict of guilty as to Yousef, and that evidence against Bazar could not be used against Yousef.

Third, the Indictment in this case was presented to the jury for use in its deliberations. The Indictment clearly indicated the name of each Defendant and the specific acts charged in each count. Should the jurors have faced any confusion as a result of the error in the verdict form, they were able to refer to the Indictment for clarification of the acts charged against each

Defendant.

In light of the above considerations, the Court finds it unlikely that there was prejudice caused by the error in the verdict form sufficient to warrant a retrial. Nonetheless, this Court consults the reasoning of the Third Circuit in Government of the Virgin Islands v. Bedford, 671 F.2d 758, 762-64 (3d Cir. 1982), in making its determination whether to grant Yousef a new trial. In Bedford, the verdict form submitted to the jury erroneously referred to the crime charged as “possession of a dangerous weapon during the commission of a crime of violence,” a statutory provision separate and distinct from “possession of a firearm during a crime of violence,” the offense actually charged. On appeal, the Third Circuit looked to the Information in the case, which correctly described the charged offense, and to the evidence set forth at trial, which clearly referred to a “firearm” rather than a “dangerous weapon.” The court noted that the trial court’s instructions to the jury were correct and unambiguous as to the proper elements of the offense. The court concluded that the clerical error in the verdict form did not prejudice the defendant and was harmless. See id. at 764.

A similar analysis applies in the instant case. The Indictment, to which the jury had full access, correctly described the charges as they pertained to each individual Defendant. Excepting the error, such charges were identical to those listed on the verdict form, which was clearly entitled in bold print: “**VERDICT FORM for DEFENDANT NAYEF YOUSEF.**” The evidence set forth at trial was clear and unambiguous as to Defendant Yousef’s role in the acts charged. The Court’s instructions to the jury clarified any confusion on the issue of whether the charges against the two Defendants were to be analyzed independently. Accordingly, this Court

finds that the clerical error in the verdict form did not prejudice Defendant Yousef and was harmless.⁶

C. Insufficient Evidence

Yousef next argues that there was insufficient evidence presented by the Government at trial to support his wire fraud convictions. Specifically, he argues that there is no evidence that Yousef submitted or intended to submit any documentation, invoices or claims to the insurance company in furtherance of wire fraud in this case. He further argues that there is no evidence that any of the telefaxes forming the bases of Counts 1, 2, or 3 were used for the purpose of executing any scheme to defraud.

Considered under the standard that the Court must grant the motion only if no reasonable trier of fact could have found proof of guilt beyond a reasonable doubt, Yousef's arguments fail. The Government presented the following evidence to the jury connecting Yousef to the scheme to defraud. Yousef and Bazar were partners in Crown Furniture, a furniture importation and retail sales business on St. Croix in the Virgin Islands. The business maintained an active commercial warehouse. The contents of the warehouse were insured by Lloyd's of London against risk of loss by fire. On September 14, 1999, a fire of unnatural origin in the warehouse

⁶ The Court will correct the clerical error pursuant to Fed. R. Crim. P. 36, which provides: "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders." Fed. R. Crim. P. 36; see also Bedford, 671 F.2d at 764.

destroyed or severely damaged the imported inventory of furniture that was stored there.⁷ That night, Yousef called his insurance agent and notified him of the loss. Later, but before an adjuster was assigned to the claim, Yousef called his friend in Miami, Mr. Hamid, who was employed as a furniture wholesaler with Reina, Inc. (“Reina”). Yousef had previously placed furniture orders with Reina. Yousef requested that Hamid fax him three documents which appeared to be invoices evidencing the purchase of over \$70,000 in furniture from Reina several months earlier (the “Reina Invoices”). The three Reina Invoices indicate that they were faxed from a telephone within the Miami area code on September 20, 1999. The merchandise represented in the Reina Invoices had neither been shipped by Reina nor paid for by Yousef and Bazar. Bazar submitted the Reina Invoices to the insurance adjuster, Graff, several days later as proof of loss.

Additionally, the Government introduced testimony from several witnesses that other invoices of furniture purchases by Crown Furniture had been altered. Virgin Islands Fire Marshal Rivera received altered invoices in the course of his investigation. Two representatives from a furniture dealer by the name Furniture Mart confirmed alterations to serial numbers and dates on invoices originating at their company. According to Furniture Mart, Defendants Bazar and Yousef had purchased items with a wholesale value of about \$48,000 which were evidenced in twelve invoices. Bazar instead presented his insurance adjuster with thirty-two Furniture Mart invoices valued at a total of about \$120,000.

The Government presented evidence that throughout these transactions, the insurance

⁷ Yousef’s co-defendant, Bazar, was convicted of arson for starting the fire. This Court denied his motions for acquittal on that conviction.

adjuster assigned to the case engaged in numerous communications with Defendant Yousef. Yousef was unable to justify apparent alterations to numerous invoices. When confronted with evidence of alterations in the form of mismatched typefaces, modified dates and changed serial numbers, Yousef attempted to justify the alterations by saying that the same furniture items were ordered repeatedly. Documentation from the furniture vendors proved otherwise.

Based on the evidence presented and inferences drawn therefrom, the jury was entitled to conclude that Defendant Yousef: (1) actively and intentionally participated in a scheme to defraud his insurance company, and (2) in furtherance of such scheme caused the invoices and adjuster's reports detailed in Counts 1, 2 and 3 of the Indictment to travel by telefax in interstate commerce. Accordingly, Yousef's argument claiming insufficiency of the evidence must be denied.

D. Remarks to the Grand Jury

Finally, Yousef argues that the Court must dismiss the Indictment because two Government witnesses made disparaging remarks about Arabs during the grand jury proceedings. Yousef fails, however, to provide the court with record or evidence of any such statements. The Court thus declines to dismiss the Indictment.

V. Conclusion

Based on the foregoing analysis, Defendant Bazar's and Defendant Yousef's motions for acquittal, new trial and arrest of judgment are denied. An appropriate Order is attached.

ENTER:

Dated: October ____, 2002

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:

Wilfredo F. Morales
Clerk of the Court

By:

Deputy Clerk

cc: Natalie Nelson, Esq.
Andrew Capdeville, Esq.
Stephen Bruschi, Esq.
Derek Hodge, Esq.
David Lewis, AUSA
Honorable Jeffrey L. Resnick, U.S. Magistrate Judge