IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NO. 15-398**
	:	
WAYDE MCKELVY	:	

GOVERNMENT'S RESPONSE TO DEFENDANT WAYDE MCKELVY'S MOTION FOR A NEW TRIAL PURSUANT TO FED. R. CRIM. P. 33

The United States of America, by its attorneys, William M. McSwain, United States Attorney for the Eastern District of Pennsylvania, and Robert J. Livermore and Sarah M. Wolfe, Assistant United States Attorneys, hereby responds to defendant Wayde McKelvy's motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. For the following reasons, the defendant's motion should be denied.

I. Introduction

On September 2, 2015, a federal grand jury in the Eastern District of Pennsylvania returned a ten-count indictment charging Troy Wragg, Amanda Knorr, and Wayde McKelvy with one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, seven counts of wire fraud, in violation of 18 U.S.C. § 1343, one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371, and one count of securities fraud, in violation of 15 U.S.C. §§ 78j(b), 78ff and 17 C.F.R. § 240.10b-5. The charges in the indictment stemmed from the defendants' participation in the Mantria Ponzi scheme that collapsed in November 2009 when the SEC filed a motion for a temporary restraining order with the United States District Court in Colorado. Both defendants Wragg and Knorr entered guilty pleas to all ten counts of the

indictment. In October 2018, defendant Wayde McKelvy was convicted on all counts at trial.

II. Standard of Review

Rule 33 of the Federal Rules of Criminal Procedure provides that "[o]n a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." When a court evaluates a challenge to the weight of the evidence under Rule 33, it does not view the evidence in the light most favorable to the verdict winner, but instead exercises its own judgment in assessing the evidence. Greenleaf v. Garlock, Inc., 174 F.3d 352, 365 (3d Cir. 1999); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure 2806 (2d ed. 1995). However, as explained in United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002), a district court can "order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it 'believes that there is a serious danger that a miscarriage of justice has occurred – that is, that an innocent person has been convicted."' Id. (quotations and citations omitted). Thus, "[m]otions for a new trial based on the weight of the evidence are not favored. Such motions are to be granted sparingly and only in exceptional cases." Government of Virgin Islands v. Derricks, 810 F.2d 50, 55 (3d Cir. 1987) (citations omitted). See also United States v. Miller, 987 F.2d 1462, 1466 (10th Cir. 1993).

III. Discussion

Contrary to the defendant's assertions, this is not an exceptional case warranting the extraordinary relief of a new trial. As the Court witnessed during the trial, and as summarized below, the evidence presented at McKelvy's trial overwhelmingly supported his conviction on each count charged.

A. Sufficiency of the Evidence – the Elements of the Offenses

In order to properly evaluate a motion for a new trial to determine if the government's evidence was sufficient, the court must examine the elements of the offenses charged. Notably, in his 50-page motion, the defendant did not make any reference to the elements of the offenses.

1. Conspiracy

To prove a violation of 18 U.S.C. § 371 (conspiracy), the government must prove the following elements beyond a reasonable doubt:

1. the defendant conspired with at least one other person to do an unlawful act, in this case to commit securities fraud;
2. the defendant did so knowingly and willfully; and
3. an overt act was knowingly committed in furtherance of the conspiracy.

2. Wire Fraud

To prove a violation of 18 U.S.C. § 1343, the government must prove:

1. The defendant devised a scheme to defraud or to obtain money or property by materially false or fraudulent pretenses, representations or promises;
2. The defendant acted with the intent to defraud; and
3. That in advancing, furthering, or carrying out the scheme, the defendant transmitted any writing, signal, or sound by means of a wire, radio, or television communication in interstate commerce or caused the transmission of any writing, signal, or sound of some kind by means of a wire, radio, or television communication in interstate commerce.

As this court instructed the jury, a "scheme to defraud" is any plan, device, or course of action to deprive another of money or property by means of false or fraudulent pretenses,

representations or promises reasonably calculated to deceive persons of average prudence. Third Circuit Model Jury Instruction 6.18.1341-1.

3. Securities Fraud

> [W]hen a person desires to purchase a new car, appliance or a head of lettuce he can pretty well tell the quality of the product by examination and the reasonableness of the price, but . . . an investor purchasing a security must rely on the representations of the company as to its assets, management and products in determining the reasonableness of the price asked. For that reason [the federal securities statutes] require registration of securities based on reliable information with respect to the company or the security and prohibit fraudulent or deceptive practices . . . .

United States v. Bartlett, 449 F.2d 700, 704 (8th Cir. 1971).

Title 15, United States Code, Sections 78j(b) and 78ff; and 17 C.F.R. § 240.-10b-5 together constitute the criminal securities fraud enforcement mechanism. To establish a violation of these statutes, the government must prove the following elements beyond a reasonable doubt:

1. The defendant did any one or more of the following, as charged in the indictment:

   (a) knowingly employed a device, scheme, or artifice to defraud; or

   (b) knowingly made an untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

   (c) knowingly engaged in a transaction, practice or course of business that operated or would operate as a fraud and deceit on any person;

2. The defendant did so in connection with the purchase or sale of a security;

3. In connection with the purchase or sale of a security, the defendant made use of or caused the use of any means or instrumentality of interstate commerce, or of the mails, or of any

facility of any national securities exchange; and,

4. The defendant acted knowingly, willfully, and with the intent to defraud.

B. The Evidence Proved Beyond a Reasonable Doubt that McKelvy Had the Requisite Criminal Intent

As framed by both defendant and the government at trial, this whole case boils down to intent. Defendant Wayde McKelvy told prospective investors that Mantria was a profitable and successful company earning millions of dollars selling real estate and green energy products, and that Mantria investments posed no risk. There is no question that what McKelvy told the investors was substantively not true. Thus, the main question in this case was whether McKelvy acted with the requisite criminal intent – whether he knowingly and willfully made false statements and material omissions to the victims to induce them to invest. The jury answered that question with an emphatic "yes" in finding McKelvy guilty on each count. At trial, the government presented both direct and circumstantial evidence of McKelvy's intent. A summary review of that evidence confirms that the government proved McKelvy's criminal intent beyond a reasonable doubt.

The most direct evidence came from McKelvy's own sworn statements to the SEC on two occasions: first, on October 22, 2009, shortly before the district court in Colorado ordered Mantria to shut down, and second on November 19, 2010, approximately one year after Mantria was shut down.

In his October 22, 2009 sworn statement to the SEC (GX KG-32), McKelvy made a number of significant admissions demonstrating what he knew at that time, including the following:

1. Contrary to his representation to the victims, McKelvy admitted that he

knew that Mantria was not making money and that the only source of money for Mantria was the new investors which McKelvy induced to invest; in other words, that Mantria was a Ponzi scheme. Specifically, McKelvy stated, "The money had to come from somewhere, and I know this is the only place Troy gets money." GX KG-32 at p. 26.

2. Regarding his secret commissions of 12.5%, McKelvy admitted that the amount of the commission from Mantria was not disclosed to the victims. He stated that he did not tell investors that Mantria was paying him a commission "because I figured it would be assumed." GX KG-32 at p. 14.

3. Contrary to his representations to the victims, McKelvy admitted that he knew that the Dunlap factory was not yet up and running. He admitted that he knew the factory was still in the "test stages." GX KG-32 at p. 10.

4. Contrary to his representations to the victims, McKelvy stated that he knew that the Dunlap plant was not selling any biochar yet. McKelvy stated that they were "holding off on orders until we go through our tests." GX KG-32 at p. 27.

5. Contrary to his representations to the victims that Mantria was worth $100 million or more, McKelvy opined that his ownership interest in Mantria was worth "squat at this point" because their business had not come to "fruition." GX KG-32 at p. 10. When asked what his personal net worth was, which included his ownership in Mantria, McKelvy stated, "Real assets is in my opinion zero." Id. at p. 11. Accordingly, McKelvy knew that Mantria was worthless before Mantria was shut down by the SEC despite telling the victims that Mantria was worth more than $100 million.

6. When asked how he could possibly spend all the money he took from the

Mantria victims, McKelvy admitted that he lived lavishly by stating, "I live good" and "Yes, I don't save money. My testimony is I do not save money. I spend every dime I make." GX KG-32 at p. 44.

7. As for the land in Tennessee, McKelvy stated that it had been appraised at $100 million, however, "until it sells, I think it is worth nothing." GX KG-32 at p. 12. Thus, while Mantria was up and running, McKelvy knew the land in Tennessee was not worth $100 million as he told the victims.

8. When asked by the SEC about his statements that Mantria's technology was patented, McKelvy stated, "I've never said that. I've heard I said that, but I have never said that because it is false." GX KG-32 at p. 34. When confronted with his statement to the victims that it was patented, McKelvy again stated, "I knew it wasn't patented." Id. at p. 37. When pressed by the SEC attorney, McKelvy characterized his own statement to investors that Mantria's technology was patented as "a blatant lie." Id.

In his November 19, 2010 sworn statement to the SEC (GX KG-30), McKelvy made additional significant admissions, including the following:

1. He made approximately $6.2 million from Mantria between 2007 and 2009. GX KG-30 at p. 9.

2. When asked about Mantria profits, McKelvy stated, "I knew they were not profitable" contrary to his statements to the victims to induce them to invest. GX KG-30 at p. 6.

3. When asked if Mantria was a Ponzi scheme, McKelvy admitted that he knew that Mantria was using new investor funds to pay back old investors, but claimed that Mantria was not a Ponzi scheme. When the SEC attorney asked McKelvy for his definition of a

Ponzi scheme, McKelvy replied, "a Ponzi scheme is something that when you're going out and telling people you're going to reinvest their money for them, you're taking in money, you're living lavishly off the money, and as the new money comes in, you're just paying the returns out and telling them what returns they're getting." GX KG-30 at p. 8. As the government's evidence at trial proved, Mantria fit McKelvy's own definition of a Ponzi scheme, including living "lavishly" off the victims' money.

The government also presented significant circumstantial evidence to prove McKelvy's criminal intent and lack of good faith. For example, SEC attorney Kurt Gottschall testified about the prior 2007 SEC investigation concerning McKelvy, and the termination letter that clearly explained he was not being exonerated. Tr. 9/27/18 at 184-85; GX 3-5. Victims testified about McKelvy's failure to disclose his 12.5% commissions, the numerous lies he told them to induce them to invest in Mantria, and the multiple disclaimers he made them sign that included false information and created plausible deniability for himself. See, e.g., DX 26 (Speed of Wealth "Very Important Points to Keep In Mind"). The government also presented substantial evidence of the close relationship McKelvy had with Troy Wragg, including their gushing compliments to each other via email (GX KG-22, KG-23, KG-24, KG-28) and during the conferences (GX JL-2A at 30:8-9, 33:7-9), and McKelvy's own sworn statement that "Troy and I are very, very close friends. We have become very, very close friends, sweat equity. He realized that without me he probably wouldn't be where he is out today…" (GX KG-32 at p. 7).

In summary, the government presented a mountain of direct and circumstantial evidence showing that McKelvy knowingly and willfully made false statements and material omissions to the victims in order to induce them to invest in Mantria to support his lavish lifestyle. That

evidence was more than sufficient to prove his criminal intent beyond a reasonable doubt.

C. Defendant's Arguments

In his motion, after spending 30 pages myopically summarizing various witnesses' testimony, the defendant makes a series of weak and often tangential arguments in an attempt to detract from the abundant evidence presented by the government that proved his guilt beyond a reasonable doubt. His arguments appear to fall within the following four categories: (1) the government failed to offer any direct evidence of the defendant's criminal intent; (2) the government failed to prove that McKelvy had a legal duty to disclose his commissions or register as a broker, and the Mantria investments were not securities; (3) the court provided an erroneous good faith instruction; and (4) the defendant incorporates all of his arguments from his Rule 29 motion. As explained below, none of these arguments has merit.

1. The Government Presented Compelling Direct Evidence of McKelvy's Criminal Intent

In support of his claim that the government failed to present any direct evidence of his criminal intent, McKelvy points to the testimony of certain government witnesses who had little to no interaction with McKelvy and, thus, were not in a position to testify regarding McKelvy's intent. For example, co-defendant Amanda Knorr provided little evidence of McKelvy's criminal intent because she was not present for almost all of the conversations between Troy Wragg and McKelvy. The fact that Knorr's testimony did not prove McKelvy's intent is meaningless when the government's other evidence proved that fact beyond any doubt, as explained in depth above.

McKelvy also discusses at great length what other witnesses told McKelvy about the profitability of Mantria. However, what McKelvy was *told* by others about Mantria's

profitability is irrelevant in light of McKelvy's own sworn statements about what he actually *knew* – namely, that Mantria was not profitable. In the same manner, what other witnesses *told* McKelvy about the value of the real estate in Tennessee was irrelevant when McKelvy *knew*, as he testified under oath, that the real estate in Tennessee was worthless. As discussed above, the government proved McKelvy's intent largely through the direct evidence of McKelvy's own testimony before the SEC. Whatever information other witnesses may have told him does not change the fact that, at least in October 2009, before the SEC took legal action, McKelvy knew that Mantria was not profitable. And yet, he touted Mantria as a profitable company and safe investment for victim investors. In short, McKelvy's own testimony proved that he intentionally lied to the victims.

2. The Government Proved All the Necessary Elements of Securities Fraud

Next, defendant proffers a series of arguments regarding the securities fraud charges. First, McKelvy argues that he was under no legal duty to disclose his commissions because he was not a "broker." In so doing, McKelvy conflates the legal duty to register as a broker (the failure of which can serve as its own offense) with the evidentiary value of failing to register in proving a criminal fraud charge.

In this case, McKelvy was charged with wire fraud and securities fraud. To sustain a conviction, the government had to show that McKelvy "knowingly made an untrue statement of a material fact, or omitted to state a material fact." As the government's evidence proved, McKelvy omitted to state to the victims a material fact concerning their investment, namely, that he was receiving a 12.5% commission of all new investor funds. Victims testified that they did not know about McKelvy's commissions, that the 12.5% rate seemed high, and that they would

have wanted to know this in deciding whether to invest in Mantria. See, e.g., Tr. 9/26/18 at 163-64 (Phil Wahl testimony). Moreover, during the May 21, 2009 conference, McKelvy lied to the victims and told them that he did not charge them a "dime." GX JL-2A at 15:5-22.

To be clear, the indictment did not charge McKelvy with selling securities without a license. Nonetheless, the fact that McKelvy did not seek a license to sell securities and was attempting to evade SEC scrutiny is probative of both his intent to defraud, an element of the charged offenses, and his lack of good faith, a defense that the government had to disprove. As further evidence of McKelvy's lack of good faith, the government also introduced a number of e-mails between Troy Wragg and McKelvy during which Wragg told McKelvy that he needed a securities license to sell Mantria securities. In response, McKelvy replied, "While this seems like the most logical route I could get handcuffed by my marketing efforts trying to meet compliance issues. They [the SEC] really put the squeeze on what you can and cannot say." GX. KG-11 (email from McKelvy to Wragg, dated June 12, 2008). McKelvy continued, "I can guarantee you they [the SEC] will take out the most compelling pieces of my marketing material." Id. In other words, McKelvy intentionally chose not to register with the SEC or obtain the proper licenses because he was afraid that the SEC would learn of and crack down on his fraudulent conduct. This is compelling evidence of McKelvy's intent to defraud and lack of good faith.

Next, McKelvy argues that the government failed to prove that the Mantria investments were securities. Significantly, the defendant's argument is completely devoid of any discussion of the Howey test, the fundamental "investment contract" analysis from SEC v. W.J. Howey, 328 U.S. 293, 301 (1946). Under the Howey test, there are three requirements for an investment

to be deemed a security: (1) there must be an investment of money; (2) the investment must be made into a common enterprise; and (3) the profits from the investment must come solely from the efforts of others. Steinhardt Group v. Citicorp, 126 F.3d 144, 151 (3d Cir. 1997). In this case, the government clearly met all three elements of the Howey test. The victims testified that they invested money into the common enterprise known as Mantria with the expectation to receive profits from that company. In addition, both the SEC attorney, Kurt Gottschall, and Mantria's attorney, Christopher Flannery, testified that the Mantria investments were securities.[1] Tr. 9/27/18 at 174 (Gottschall testimony); Tr. 10/4/18 at 154 (Flannery testimony). Thus, the government presented sufficient evidence showing that the victims' investments in Mantria were securities.

3. The Court's Good Faith Instruction Was Entirely Correct and Appropriate to Give in This Case

Lastly, the defendant alleged that the district court improperly instructed the jury on the issue of "good faith." In this case, the district court used the Third Circuit's Model Jury Instruction on good faith to instruct the jury. The defendant argued that the district court's use of the model instruction was erroneous. In his motion, the defendant did not cite to any case law supporting his naked contention that the Third Circuit model instruction was erroneous.

To the contrary, the existing case law strongly supports the Third Circuit model instruction provided by the district court. This "good faith" issue was raised in United States v.

[1] Defendant also repeats his arguments from his Rule 29 motion based on one excerpt of Gottschall's testimony in which Gottschall affirmatively responded to what was clearly a misspoken question by the government, mistakenly referring to the PPM as securities, rather than the investments summarized within those PPMs as securities. Tr. 9/27/18 at 193. As explained in detail in the government's response to the defendant's Rule 29 motion, this is nothing more than a disingenuous effort to create the appearance of an evidentiary problem. Further review of Gottschall's testimony reveals that he clearly and accurately defined a security as "an interest usually, a partial ownership interest in a company or … debt." Tr. 9/27/18 at 174.

Quality Formulation Laboratories, Inc., 512 Fed. Appx. 237, 240–41 (3d Cir. 2013), an unpublished opinion by the Third Circuit. In that case, the defendant objected to the district court's instruction that "a defendant does not act in good faith if he also knowingly made false statements, representations, or purposeful omissions." Id. at *3. The Third Circuit held: "We also find no error in the Court's instruction that a defendant does not act in good faith if he makes false statements, representations, or purposeful omissions." Id. (citing Taberer v. Armstrong World Industries, Inc., 954 F.2d 888, 909 (3d Cir.1992). This principle is well-established in the reported cases that defense arguments to the contrary are often relegated to a mere footnote. See, e.g., United States v. Gilberg, 75 F.3d 15, 18 (1st Cir. 1996); United States v. Janusz, 135 F.3d 1319, 1322, n.1 (10th Cir. 1998). For these reasons, there was absolutely no error in the district court providing the Third Circuit model instruction on good faith. Moreover, it was an entirely appropriate instruction to give in this case, where the main defense was based on the defendant's purported good faith.

4. The Defendant's Rule 29 Arguments Still Fail Under Rule 33

Finally, at the end of his motion, the defendant invokes all the same arguments that he raised in his Rule 29 motion. Because the government's response to those arguments as set forth in the Rule 29 opposition prevail even under the higher standard of Rule 33, the Court should deny each of the defendant's arguments in this Rule 33 context as well.

IV. Conclusion

For all the reasons set forth above, the defendant's motion for a new trial should be denied.

Respectfully submitted,

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/s/
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Government's Response has been served filing upon:

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/s/
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