IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

KRISTEN SMITH,

Defendant.

ORDER

14-cr-24-jdp

After trial, defendant, Kristen Smith, filed a written motion that renewed her oral motion for judgment of acquittal and moved for a new trial. Dkt. 120. The court denied these motions from the bench at sentencing. Dkt. 146. This order provides a written articulation of the court's reasons for denying defendant's motions.

Defendant's motion is succinct: it enumerates eight points, about a sentence each, why her motion should be granted. The government contends that defendant's motion is perfunctory and underdeveloped, and thus her arguments are waived. The written motion is terse, to say the least. But defendant's counsel pressed most of these issues in greater depth during trial, and thus I will give her the benefit of the doubt and hold that she has adequately presented these issues for me to consider them and to preserve them for appeal.

A. Motion for judgment of acquittal

Points 1 and 2 of defendant's motion are apparently directed at her motion for judgment of acquittal. She contends that the government failed to prove all the elements of the crime beyond a reasonable doubt. Specifically, she challenges that government's evidence that (a) she did not have consent to take K.P., and (b) that the taking of K.P. benefited defendant in any way.

In considering a motion for acquittal under Federal Rule of Criminal Procedure 29(a), the court reviews the evidence in the light most favorable to the prosecution, and defendant must convince the court that no rational trier of fact could have found her guilty beyond a reasonable doubt. *United States v. Warren*, 593 F.3d 540, 546 (7th Cir. 2010). Rule 29 does not authorize the court to reassess the credibility of witnesses or second-guess the jury's credibility determinations. *United States v. Arthur*, 582 F.3d 713, 717 (7th Cir. 2009).

Defendant's principle theory of defense was that K.P.'s father, Bruce Powel, told defendant to take K.P. to Colorado. Bruce Powell testified that he went to bed about 9 p.m., slept through the night, and found out the next morning that K.P. was missing when K.P.'s mother, Brianna Marshall, woke him at 4:30 a.m. Bruce also testified that he was devastated when he learned that K.P. was missing, overcome with relief when he was found, and never suspected defendant of taking K.P. A rational jury could believe Bruce's testimony, which contradicted the defense theory. Thus, at the close of the prosecution's case, there was evidence that a rational jury could accept that defendant did not have permission to take K.P. And at that point, there was no evidence at all to the contrary.

In the defense's case, defendant testified that Bruce was awake, but sleepy or drugged, in the middle of the night when defendant was preparing to leave for Colorado. According to defendant, Bruce put K.P. into her arms and told her that it would be better for her to take K.P. to Colorado and that Bruce and Brianna would move to Colorado in a couple of days. A rational jury could disbelieve defendant's testimony for many reasons. First, her testimony was contradicted by Bruce's testimony and by his conduct while K.P. was missing and when K.P. was found. Second, defendant's credibility was thoroughly undermined. She was shown to have lied about being pregnant (she posted faked sonograms of her purported fetus) and about having taken K.P., and she denied knowledge of basic personal facts such has her birthday and social

security number and whether she had been charged and convicted of crimes of dishonesty. Third, her story is inherently implausible, given that K.P. was only four days old and nursing, when Bruce allegedly told defendant abruptly to take him on a 20-hour drive to Colorado without his mother. Thus, at the close of the case, a rational jury could have disbelieved defendant's testimony and found beyond a reasonable doubt that defendant did not have consent to take K.P.

Defendant also contends that the taking of K.P. was of no benefit to her. This, too, is contradicted by ample evidence at trial. Defendant announced on social media that she was pregnant and pretended to be pregnant by faking sonograms and wearing a prosthetic pregnancy belly. Defendant's fake pregnancy coincided with Brianna's real pregnancy, and defendant prepared a partially complete birth certificate with information that matched K.P. The evidence at trial showed that defendant wanted a baby, and that she planned to get one by taking K.P. The fact that her plan was not ultimately successful does not mean that taking K.P. did not provide a benefit to defendant.

In sum, defendant's motion for judgment of acquittal is really an attack on the credibility of the prosecution's evidence, and not a strong one. Because this court cannot reweigh the evidence on a motion for judgment under Rule 29, defendant's motion must be denied.

B. Motion for a new trial

It appears that defendant's remaining points, numbered 3 through 8, are directed at defendant's motion for a new trial, as these points allege errors made by the court during trial.[1] Rule 33 allows the court to grant a motion for a new trial "when justice so requires." But to

[1] It does not appear from her submissions that defendant contends that she is entitled to a new trial on the ground that the verdict was against the manifest weight of the evidence. *See United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999). The court would reject that argument. Not only was there sufficient evidence to support the verdict, the verdict was consistent with the weight of the evidence because defendant's testimony was discredited.

succeed on such a motion based on alleged evidentiary errors, defendant must show that the alleged errors resulted in the admission of improper evidence and that the prosecution's case would have been significantly less persuasive to the average juror without the improper evidence. *United States v. Causey*, 748 F.3d 310, 316 (7th Cir. 2014).

1. Government's argument that defendant benefited from hiding K.P.

Defendant contends that it was error for the court to allow the prosecution to argue that "leaving K.P. at the gas station in West Branch, Iowa, was a benefit to the Defendant." Dkt. 120, ¶ 3. The basis for this objection, as provided by defense counsel at trial (Dkt. 115, at 11), is that this particular benefit does not "fit[] the indictment." The government may not charge one crime in the indictment and prove a different crime at trial. *United States v. Krilich*, 159 F.3d 1020, 1027 (7th Cir. 1998). But here, there is no variance between the crime charged and the proof or argument at trial. The indictment charges that defendant "seized, confined, kidnapped, abducted, and carried away the victim, K.P." Dkt. 53. The indictment does not recite any particular benefit defendant derived from her crime, and defendant does not contend that the indictment needed to recite the specific benefits of her actions. The initial benefit derived from the seizing and carrying away was that defendant wanted a baby. Later, to avoid detection, she confined K.P. and carried him away to a hidden location, which conferred an additional benefit. *See Gooch v. United States*, 297 U.S. 124, 128 (1936) (concealment of the victim to avoid detection is a sufficient benefit under the kidnapping statute). It was not error to allow the government to argue that defendant derived a benefit from stashing K.P. behind the gas station. And, even if the government had not made this argument, the average juror would not have found the government's case significantly less persuasive.

2. Government's good-faith basis for cross-examination

Defendant contends that the prosecution adduced evidence of prior bad acts against defendant without relaying a good-faith basis for the questions. Dkt. 120, ¶ 4. When prior bad acts are proper topics for cross-examination, the government must have a good-faith basis for the factual predicate to questions about those prior bad acts. In some cases, when the prior bad acts go to a central issue in the case, the government must provide the evidence that supports the propriety of the question. *United States v. Elizondo*, 920 F.2d 1308, 1313 (7th Cir. 1990).

In this case, the government notified defendant and the court that it intended to offer prior acts evidence and it identified that evidence. Dkt. 67. Defendant did not object that any of that evidence was not factually supported. *See* Dkt. 89 (the court's rulings on motions in limine). The court is not aware of any question posed to defendant that was based on an unsupported factual predicate, and defendant has not identified any in her written submissions. Thus, defendant has not identified any error at all, let alone one that would warrant a new trial.

3. Extrinsic evidence of prior bad acts

Defendant contends that the government asked follow-up questions that were tantamount to introducing extrinsic evidence of prior acts, demonstrating defendant's character for dishonesty. Dkt. 120, ¶ 5. Under Federal Rule of Evidence 608(b), the court may allow cross-examination inquiry concerning prior acts that demonstrate the witness's character for truthfulness, but extrinsic evidence of those prior acts is not admissible. Defendant cites a portion of the trial transcript in which the government cross-examined defendant about her use of an ID card bearing the name "Kathryn Ann Petty." Dkt. 114, at 54, lines 7-12. Defendant was evasive and would not acknowledge that she had presented a fake ID. The government then asked if an ID with the name Kathryn Ann Petty had been found in the search of defendant's

home. Defendant denied that it had been, and the government moved on to another line of questioning.

This general line of questioning is proper under Rule 608(b), because the use of a false name is probative of truthfulness. *United States v. Ojeda*, 23 F.3d 1473, 1477 (8th Cir. 1994). But defendant contends that this line of questioning was "tantamount" to introducing extrinsic evidence of her use of a fake ID, presumably because the government's questions made pointed reference to a piece of extrinsic evidence, the false ID itself. But defendant's argument is foreclosed by *United States v. Dawson*, 434 F.3d 956, 959 (7th Cir. 2006), which draws a bright line between extrinsic evidence, which is barred by Rule 608(b), and attorney questions, which are not. As *Dawson* explains, the court has an obligation to keep all cross-examination under control, but Rule 608(b) does not concern questions at all. If a witness falsely denies a discrediting fact, the attorney examining the witness is entitled to follow up with reasonable questions, though not with evidence.[2] What else would be the point of allowing cross-examination? In this case, the government's line of questioning about the fake ID was brief and not confusing. Defendant did not object to it, and even if she had, there would have been no error in allowing it.

4. The extent of government examination of defendant's prior bad acts

Defendant points out that excessive questioning about prior bad acts is improper, Dkt. 120, ¶ 6, which I will construe as a claim that the questioning on this topic was excessive. The court has an obligation to ensure that cross-examination does not "get out of hand, confuse the

[2] According to the Advisory Committee notes to the 2003 Amendments, Rule 608(b) bars inquiry into the non-judicial consequences of a prior bad act, such as workplace discipline, because such consequences necessarily implicate the opinions of third parties as to the character of the witness. This concept may be in tension with *Dawson*, *see United States v. Holt*, 486 F.3d 997, 1002 (7th Cir. 2007), but it is not at issue in this case.

jury, and prolong the trial unnecessarily." *United States v. Holt*, 486 F.3d 997, 1002 (7th Cir. 2007).

The examination of defendant on her prior bad acts was somewhat extensive, about 20 pages of trial transcript. Dkt. 114, at 40-60. But extensive does not necessarily mean excessive. The government was entitled to a fair opportunity to impeach defendant, who had a long history of dishonest acts, including convictions admissible under Rule 609 and other acts of dishonesty that could be inquired into under Rule 608(b). Defense counsel objected during this cross-examination, and the court instructed the government to keep its cross-examination focused on acts by defendant that tended to show dishonesty. *See, e.g.,* Dkt. 114, at 57. The examination was prolonged, not by the government's inquiry, but by defendant's repeated false denials and her claims that she did not remember the events surrounding these acts. The examination was also prolonged by defendant's emotional breakdown, which required the court to recess for nearly an hour. Dkt. 114, at 47-52. But defendant put her own credibility at issue by taking the stand and testifying that Bruce gave her permission to take K.P., and that the exchange took place in the middle of the night when Bruce was sleepy or drugged and there were no other witnesses. It was not excessive or confusing to allow the government to spend an hour of trial time exploring defendant's character for truthfulness, when that was arguably the single most important issue in the case.

5. Government's introduction of defendant's map

Defendant filed a partially successfully motion to suppress her post-arrest statements. The court held that certain statements were made after she had invoked her right to counsel, but that the statements were not coerced. Dkt. 72. Thus, those statements were inadmissible in the government's case, but they could be used for impeachment. The statement at issue here is a map that defendant drew showing the location where she had left K.P.: *behind* the gas station,

which is where K.P. was found by a police officer. This map was available for impeachment, but inadmissible for affirmative use by the government.

Defendant contends that the government's introduction of this map was erroneous because defendant did not testify on direct examination about the map at all, and thus her trial testimony is not directly contradictory to the map. (This issue is raised in defendant's motion, Dkt. 120, ¶¶ 7, 8, and explained in defendant's reply, Dkt. 124, at 2-3.) Defendant argues that, if the government is allowed to introduce the map, then a defendant could never take the stand to testify unless she were willing to have any and all suppressed evidence used against her.

But that is indeed the choice a defendant must make. The exclusionary rules that protect a defendant from violations of her civil rights do not allow her to defend herself with perjured testimony. "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris v. New York*, 401 U.S. 222, 226 (1971). The same rule applies to physical evidence seized in violation of the Fourth Amendment. *United States v. Lott*, 854 F.2d 244, 247 (7th Cir. 1988) (reviewing the longstanding policy against countenancing false testimony at trial).

At trial, defendant testified that she had left K.P. *at the front* of the gas station, where there was an electrical outlet, into which she plugged an electrical blanket to keep K.P. warm. But shortly after her arrest, she admitted, by means of a hand-drawn map, that she had left K.P. behind the gas station, exactly where he was found. Defendant was not entitled to dress up her story for trial and escape impeachment simply by avoiding any mention of the map in her direct testimony. The admission of the map as an impeaching prior statement was not error.[3]

[3] The jury was instructed that defendant's post-arrest statements were to be considered only for impeachment. Dkt. 98, at 2.

CONCLUSION

The evidence against defendant was overwhelming. She admits that she took K.P., and that she lied about taking K.P. And she persisted in that lie for 29 hours, while K.P. lay in a plastic bin outside in freezing temperatures. Her story that Bruce told her to take K.P., a four-day-old breast-feeding infant, for a 20-hour drive to Colorado without his mother is inherently implausible. To the average juror, the prosecution's case would not have been significantly less persuasive even if the government had not cross-examined defendant at all. Thus, none of the errors alleged by defendant would warrant a new trial.

Entered this 26th day of January, 2015.

BY THE COURT:

/s/
JAMES D. PETERSON
District Judge