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

UNITED STATES OF AMERICA,

OPINION & ORDER

Plaintiff,

v. 14-cr-22-jdp

DAVID WEIMERT,

Defendant.

Defendant David Weimert was convicted after a jury trial of five counts of wire fraud. He has moved for a new trial under Rule 33, or, in the alternative, for a judgment of acquittal under Federal Rule of Criminal Procedure 29.

The court will dispense with a summary of the evidence because that information is well known to the parties. Other readers can find the material facts summarized in the court's order on restitution. Dkt. 147.

A. Motion for a new trial based on erroneous jury instructions

Weimert contends that the jury instructions permitted the jury to convict him on legally insufficient grounds. The phrasing of the instructions is left to the discretion of the district court. But jury instructions must accurately summarize the law for the jury; a new trial is warranted if the court misstates the law in a way that prejudices the defendant. *United States v. McKnight*, 665 F.3d 786, 791 (7th Cir. 2011).

Weimert argues that the jury instructions in his case would have allowed a juror to find Weimert guilty on the basis of isolated immaterial statements to non-victims, which would not be sufficient to constitute the crime of wire fraud. If a juror could have convicted Weimert on a legally insufficient basis, remand for a new trial is required under principles

expressed in *United States v. Borrero*, 771 F.3d 973, 976-77 (7th Cir. 2014) ("But when the instructions allow a jury to convict on two theories, one of which is legally insufficient, then the court must remand for a new trial, because a jury that followed its instructions might have convicted on the invalid ground while disdaining the proper one."). Another way of phrasing the question presented is whether a juror could have followed the jury instructions in this case and yet convicted Weimert on the basis of conduct that did not constitute wire fraud. The court concludes that the jury instructions correctly stated the law by listing the elements of the offense with which Weimert was charged and by correctly defining the pertinent terms in those elements.

Weimert objects to an aspect of the definition of "scheme to defraud," which relates to the materiality of the alleged misrepresentations. Weimert objects most pointedly to parts of the instructions that reflect principles in *United States v. Seidling*, 737 F.3d 1155, 1160 (7th Cir. 2013): "The government is not required to prove that the defendant intended to obtain money or property from the same persons he deceived. . . . It is not necessary that the misrepresentations or omissions be directed at the victim." Weimert argues that these instructions would have allowed a juror to convict him on the basis of immaterial misstatements or omissions directed to third parties, such as Weimert's failure to disclose to Nachum Kalka that Kalka's offer was going to be used as a "stalking horse" to induce an offer from the Burkes. (Weimert gives several other examples of statements that he thinks are immaterial, but for purposes of analyzing the jury instructions, one example will do.)

Weimert's argument is based, in part, on a faulty reading of *Seidling*. Weimert acknowledges that *Seidling* recognized the principle that a fraud charge does not require that misrepresentations be made to the victim; a fraud charge could be based on

misrepresentations to a third party. Dkt. 112, at 4-5. But, according to Weimert, *Seidling* also delimited three circumstances under which a third party misrepresentation is "material": when the third party was a "conduit" to the victim; when the third party has the capacity to require the victim to part with money or property; or when the misrepresentation prevents disruption or exposure of the scheme. *Id.* These are all fine examples of how a misrepresentation to a third party might be material, but nothing in *Seidling* suggests that these are the *only* such circumstances.

The court now steps back to the larger question in this case: could a juror have followed the jury instructions and convicted Weimert merely because Weimert, for example, failed to disclose to Kalka that he intended to use Kalka's offer as a stalking horse? Maybe Kalka would not have made any offer at all if he knew that Weimert planned to use it primarily to solicit a bid from the Burkes. In this sense, the omission was "material" under the definition in the jury instructions because it had the capacity to influence Kalka. But Weimert contends that this is not the sort of materiality that a conviction for wire fraud requires. He directs the court to *Loughrin v. United States*, 134 S. Ct. 2384, 2393 (2014), for the proposition that misrepresentations must relate to the overall scheme and its objectives. According to Weimert, his "statements to non-victim third parties [were] capable of influencing only that party and [were] incapable of [a]ffecting the victim to part with money or property." Dkt. 112, at 7. Weimert does not quite put it this way, but the heart of his argument is that the jury could have believed his testimony that he never intended to deceive IDI, but that it might have nevertheless convicted Weimert simply because he deceived Kalka.

The jury instructions must be considered as a whole, and not by dissecting the individual components and considering them in "artificial isolation." *United States v. Webber*, 536 F.3d 584, 599 (7th Cir. 2008). The instructions given in this case, taken as a whole, would not have allowed a juror to convict Weimert solely on the basis of the isolated statements that he cites. The instructions on the elements of wire fraud required that the jury find that Weimert "knowingly devised or participated in a scheme to defraud [IDI]," as that scheme was described in the indictment. Dkt. 98, at 8. The instructions defined "scheme to defraud" as "a scheme that is intended to deceive or cheat another and to obtain money or property . . . by means of materially false or fraudulent pretenses, representations or promises." *Id.* at 9. Thus, the instructions made clear to the jury that they had to find, beyond a reasonable doubt, that Weimert knowingly intended to cheat or deceive IDI. The instructions further explained that Weimert did not need to "intend[] to obtain money or property from the same persons he deceived," but that his fraudulent statements needed to contribute to the overall scheme. *Id.* It would not be enough, under these instructions, to show only that Weimert misled Kalka by failing to disclose that he would use Kalka's offer as a stalking horse.

Every juror, if they followed the instructions, had to find not only that Weimert made one or more misrepresentations or omissions to third parties, but that Weimert did so as part of a scheme to cheat or defraud IDI. The instructions included the required relational component that linked Weimert's misrepresentations to his objective of deceiving or cheating IDI out of money or property. *See Loughrin*, 134 S. Ct. at 2393 (2014). It is not required that jurors be unanimous as to the alleged misrepresentations that constitute a scheme to defraud. *United States v. Daniel*, 749 F.3d 608, 613-14 (7th Cir.), *cert. denied*, 135 S. Ct. 138 (2014).

All that is required is that the jurors agree that the elements of wire fraud have been proven. *Id*. Under the jury instructions in this case, the jury had to find, unanimously, that Weimert knowingly devised or participated in a scheme to defraud, and that the scheme was the means by which Weimert intended to deceive or cheat IDI.

The jury instructions were not erroneous, and a new trial is not warranted on that basis.

B. Motion for a new trial based on the weight of the evidence

Weimert also contends that he is entitled to a new trial under Rule 33 because the verdict is contrary to the manifest weight of the evidence. The decision to grant a motion for a new trial based on the weight of the evidence is within the discretion of the district court, but such motions are to be granted only in the extraordinary case where the evidence preponderates strongly against the verdict. *United States v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989). A motion for a new trial does not afford this court the opportunity to reweigh the evidence or to set aside the verdict because some other result would be more reasonable. *Id*. However, a district court should set aside the verdict if there is a real concern that an innocent person has been convicted. *United States v. Morales*, 902 F.2d 604, 606 (7th Cir.), *amended*, 910 F.2d 467 (7th Cir. 1990). Weimert's core argument is that testimony of the IDI management and board members was vague and ill-recalled, and that this testimony was inconsistent with the contemporaneous reports that Weimert prepared. The court is not persuaded for multiple reasons.

First, Weimert's argument against the credibility of the testimony of IDI management (Mark Timmerman, Doug Timmerman, Omachinski, Larson, and Bergstrom) does not establish that their testimony was so fundamentally incredible that it would preponderate

against the verdict. At trial, Weimert argued to the jury that the testimony of IDI management and board members about what Weimert said should be discredited because it involved events that had occurred six years earlier and it was poorly remembered. The jury was not persuaded, and the court sees no reason to reweigh the jury's credibility determination.

Second, the court is not persuaded that the testimony of IDI management established only what they "understood," and not what Weimert told them. Omachinski testified that at the meeting at which Weimert presented the Burke deal, Weimert "reiterated it was a necessity that he be a participant in the deal from both an equity standpoint and some ongoing management standpoint." Dkt. 101, at 38. The minutes of the meeting, Ex. 3-8, were prepared by Mark Timmerman at some indefinite time after the meeting, and at trial, Mark Timmerman did not have a specific recollection of what Weimert had said at the meeting. Thus, Weimert argues, the minutes do not reliably reflect what Weimert actually said at the meeting. But this, too, is a subtle question of weight that is within the purview of the jury. The minutes provide evidence that supports the verdict because they reflect that Weimert told IDI management that his participation in the deal was required.

Third, evidence that Weimert actually lied at the meeting is sufficient to support the verdict, but it is not necessary. Weimert could have committed fraud even without any express statements to IDI that his participation in the Burke deal was necessary. The evidence was unequivocal that IDI management believed that Weimert's participation was absolutely necessary, and that this belief was, in fact, incorrect. The Burkes included Weimert in the deal because they thought Weimert was a decision-maker, and that it might make their offer more appealing. If Weimert knowingly led IDI into this mistaken belief,

with the intent to acquire money or property from IDI that it would not have otherwise provided, then Weimert is guilty of fraud even if he made no express statements to IDI.

Fourth, the evidence supports the fact that Weimert misled the IDI board. Weimert's written reports about the Burke deal, Government Exhibits 2-1 and 2-2, support the verdict. Weimert argues that neither document actually contains an express statement that *the Burkes* required his participation. He contends that the statements about his required participation refer only to Kalka's offer. Weimert's interpretation of these documents is, at best, an arguable one. But a fair reading of these exhibits supports the government's interpretation and the verdict. The "Position Paper," Ex. 2-1, expressly states that Kalka required Weimert's participation. But it also contains statements about Weimert's required participation that do not refer to the Kalka bid. The description of "Piece Two of the Puzzle (The Deal)" is a description of the state of the deal as it was to be pitched to the Burkes. And in that section, it says "Fee to Dave Weimert—Will Allow Investment As Kalka Has Required—Will Pass Through To The Burke Deal." This statement fairly implies that the requirement of Weimert's investment will pass through to the Burkes. The "A Personal Note" document, Ex. 2-2, does not merely state that the Burkes would like Weimert to be involved. Weimert reported that "Bill [Burke] seemed to be especially focused on my continued involvement." These are not merely statements about the Kalka deal. A jury could reasonably conclude that these statements were intended by Weimert to mislead IDI management.

Fifth, the jury's acquittal on count 6 is not inconsistent with its conviction on counts 1-5. Weimert argues that because the counts are "virtually identical," the acquittal on one count suggests jury confusion. Counts 1-5 charged wire fraud based on the transmission of individual emails relating to the terms of the Letters of Intent from Kalka and the Burkes.

Those emails were sent to Weimert (counts 1-4) or to IDI management (count 5). But the wire communication in count 6 was different: that was the wire transfer paying Kalka the "break-up" fee, from S&D Oakmont's bank (IDI's subsidiary that held its interest in the Chandler Creek partnership) to Kalka's bank in Florida. On each count, the jury had to conclude that Weimert knew that the wire communication would actually occur, knew that it would occur in the ordinary course of business, or knew facts from which the wire communication could be foreseen. Weimert was closely involved in the emails in counts 1-5. But in the case of the wire transfer in count 6, the jury could have concluded that Weimert did not have the requisite knowledge.

The evidence in this case amply supports the verdict. Exhibits 2-1 and 2-2 contain half-truths, misleading statements, and omissions that led IDI management to believe that to consummate the sale of IDI's interest in the Chandler Creek partnership to the Burkes, they would have to include Weimert as an owner of Chandler Creek and pay him a bonus. Weimert's statements to Kalka, Petershack, the Burkes, and IDI management might not be enough to sustain a charge of fraud, if each statement were taken in isolation. But taken together, the evidence of Weimert's statements shows a pattern that strongly suggests a scheme to defraud IDI.

The weight of the evidence does not preponderate strongly against the verdict, and a new trial is not warranted on that basis.

C. Motion for a judgment of acquittal

Weimert moves for a judgment of acquittal under Rule 29(a). On such a motion, a district court reviews the evidence in the light most favorable to the prosecution and draws all reasonable inferences in favor of the prosecution. *United States v. Torres-Chavez*, 744 F.3d 988,

993 (7th Cir. 2014). This is a "nearly insurmountable hurdle," overcome only if there is no evidence, regardless of how it is weighed, from which a jury could find guilt beyond a reasonable doubt. *Id*.

The basis for Weimert's motion under Rule 29 is the same as his motion under Rule 33. Accordingly, the court will deny this motion for the reasons given above. Based on the evidence presented by the government in this case, a reasonable jury could have found beyond a reasonable doubt that Weimert had: (1) participated in a scheme to defraud IDI; (2) intended to defraud IDI; and (3) for each of counts 1-5, used an interstate wire in furtherance of that scheme. *Cf. United States v. Powell*, 576 F.3d 482, 490 (7th Cir. 2009) (articulating elements of wire fraud).

Judgment of acquittal is not warranted.

ORDER

IT IS ORDERED that Weimert's motions for judgment of acquittal or for a new trial, Dkt. 112, are DENIED.

Entered August 10, 2015.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge