UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	CRIM NO. 3:03-CR-241(JCH)
vs.	:	
	:	
GARY R. AGNEW	:	MAY 25, 2004
	:	

RULING ON MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE FOR NEW TRIAL

Gary Agnew was indicted and convicted on fifteen counts of mail fraud, 18 U.S.C. § 1341, and one count of federal employees compensation fraud, 18 U.S.C. § 1920. He moves for judgment of acquittal or in the alternative for a new trial. For the following reasons, both motions are denied.

I. FACTS

Mr. Agnew is a former U.S. Postal Service employee, who was classified as having a "total disability," and received monthly disability compensation from the United States. In February 2001, the date in the indictment, Mr. Agnew had knee replacement surgery; he had additional surgeries in August 2001 and February 2002.

The government began conducting 215 days of video surveillance of Mr. Agnew's activities around the beginning of 2002. He was observed, videotaped, and audiotaped acting in what the jury could have reasonably found was a "sales" capacity at International Motorcars in Berlin, Connecticut. Mr. Agnew was observed and videotaped opening and

closing the business, showing vehicles to customers, and taking them on test drives.

Further, he also showed cars to undercover agents posing as customers. Mr. Agnew told these agents that he was "semi-retired," and that he had been working with International Motorcars' owner, James Micca, "on and off for eight years." [Ex. 61] He consistently used "we" to refer to himself together with other International Motorcars workers. For instance, he was recorded as saying, "We took the place over and we are doing about forty to fifty cars a month since August, we don't play, we put one, one price on the vehicles and we sell as low as we possibly can" [Ex. 52]; "before we took this over, we were strictly an internet company, we were buried in uh a industrial park in Hartford." [Ex. 56].

Further, Mr. Agnew said he worked for International Motorcars. He told the agents: "If they catch me lying to the customer, they'll can me" [Ex. 56]; "there's like four of us who work here . . . we have one finance guy, one buyer. The lot guy and myself" [Ex. 57]; "We all work together, we all cover each other's back, but the four of us have been it. And we, we try not to interfere with the other guy's specialty's" [Ex. 57]; "I get paid the same where (sic) I sell you this car, I sell you a Mercedes, or sell you the smallest car we got on the lot." [Ex. 56].

The government further presented evidence of checks made out to Mrs. Agnew that corresponded with the time in which the defendant was perceived to be apparently working at International Motorcars. The government further presented a "washsheet," authored by Mr. Amica and segregated by year, indicating amounts associated with various vehicles that

Micca identified as associated with Mr. Agnew. [Ex. 64]. The government also presented evidence of checks from International Motorcars, made out to Mrs. Agnew, which the government argued were payments for Mr. Agnew's work.

Finally, Mr. Agnew's physicians testified that they had no knowledge of Mr. Agnew's activities at International Motorcars. Instead, on February 7, 2003, at the same time as videotapes showed Mr. Agnew performing various duties on the lot of International Motorcars, Mr. Agnew told one doctor that he "walk[s] with his grandchild at home and performs errands about the house." [Ex. 45].

Further, the defendant did not inform his physicians of the nature of the limited duty copy room position which he had been offered by the Postal Service. Rather, Dr. Murray, who previously certified the defendant as disabled, testified that he was under the impression that Mr. Agnew was a mail handler, and that if his position was actually to work in a copy room, the defendant would have been able to perform that type of work.

Counts 1 - 15 of the indictment allege a scheme to defraud the United States, beginning on or about February 2001. The government contended, and the jury agreed, that Mr. Agnew made false representations to the United States Department of Labor and the Office of Workers' Compensation, and his own physicians, by concealing his ability to work and his activities at International Motorcars, Inc., a car dealership, and with concealing his receipt of compensation for his work at International Motorcars. In relation to Count 16, the jury convicted Mr. Agnew with making a material false statement in connection with

an application for or receipt of federal workers' compensation benefits by covering up his International Motorcars activities on an OWCP Form-1032.

II. DISCUSSION

A. Motion for Judgment of Acquittal

Rule 29(a) of the Federal Rules of Criminal Procedure provides that district courts "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "A defendant bears a heavy burden in challenging the sufficiency of the evidence." United States v. Henry, 325 F.3d 93, 103 (2d Cir. 2003). In deciding such a motion, the court "view[s] the evidence in the light most favorable to the government and draw[s] all reasonable inferences in the government's favor." United States v. Johns, 324 F.3d 94, 97 (2d Cir. 2003). A jury's verdict must be sustained unless "no rational trier of fact could have found the defendant guilty beyond a reasonable doubt." United States v. Reyes, 302 F.3d 48, 52 (2d Cir. 2002). However, a jury may not base its verdict on "pure speculation" or "guesswork." United States v. Thai, 29 F.3d 785, 818-19 (2d Cir. 1994). The court "must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000) (internal citations omitted).

B. Mail Fraud

The essential elements of a mail fraud violation are "(1) a scheme to defraud, (2) money or property [as the object of the scheme], and (3) use of the mails [or wires] to further the scheme." Fountain v. United States, 357 F.3d 250, 256 (2004) (quoting United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996)). The jury could have reasonably found all of these elements as to Mr. Agnew.

On the first element, Mr. Agnew argues that the defendant presented no evidence that Mr. Agnew "knowingly devised a scheme to defraud the Government." Def. Mem. at 3. A scheme to defraud may consist of numerous elements and can be supported by sufficient overall proof that a scheme exists. United States v. Amrep Corp., 560 F.2d 539 (2d Cir. 1977). The term is not intended to convey any technical meaning; it simply requires a plan reasonably calculated to deceive persons of ordinary prudence and comprehension. United States v. Goldman, 439 F. Supp. 337 (S.D.N.Y. 1977).

The government's case included video and audiotape evidence of Mr. Agnew engaging in activities that the jury could reasonably have found to have been "work" at International Motorcars; evidence of him receiving payment through Mrs. Agnew from International Motorcars; and evidence that he concealed his abilities and activities from his physicians in order to continue to be classified as totally disabled. This and other evidence was sufficient for the jury to conclude that Mr. Agnew knowingly devised a scheme to defraud the United States government by continuing to receive disability payments to which he was not entitled.

The government also satisfied the other elements of the crime. It presented evidence that Mr. Agnew received 15 checks – each the subject of a separate count – during the period of the indictment: one for $3185.49; five in the amount of $2071.28; and nine in the amount of $2081.16. This is sufficient to satisfy the "money or property" requirement. It also presented evidence that Mr. Agnew received those checks through the United States mail.

The government's evidence on all three elements was thus sufficient to support a reasonable determination that Mr. Agnew was guilty of mail fraud. The defendant's Motion for Judgment of Acquittal on Counts 1-15 is denied.

C. False Statement

Count 16 charged Mr. Agnew with making a false statement to the Department of Labor when he submitted the OWCP Form 1032 on or about May 15, 2002, and on that form concealed his ability to work and work and activities at International Motorcars. The defendant argues that there is no evidence that he attempted to conceal his activities at International Motorcars.

Mr. Agnew contends that he just "hung around" at International Motorcars, and occasionally helped out for no pay. As discussed above, however, from the government's trial evidence, the jury could have reasonably inferred that Mr. Agnew was actually "working" at International Motorcars, and being compensated for that work; and, moreover, that he had misrepresented his condition to his physicians and was capable of

working and thus not "totally disabled." As the government argued to the jury, the form provided Mr. Agnew with several opportunities to disclose his International Motorcars activities, regardless of whether he was being compensated. The jury could have also concluded that Mr. Agnew's decision to list those activities on his 2003 form, after he had learned of the investigation, was evidence of an intent to conceal his activities by their omission on the 2002 form. In sum, there was ample evidence from which the jury could have soundly concluded that Mr. Agnew was able to work, and in fact worked at International Motorcars, and that he concealed that fact on his OWCP form. As a result, the defendant's Motion for Judgment of Acquittal on Count 16 is denied.

III. Motion for a New Trial

A. Standard

Rule 33 provides that the court may grant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33. The rule gives the trial court "broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Ferguson, 246 F.3d 129, 133 (2d Cir. 2001) (internal citation omitted). The district court, when examining the entire case, must make an objective evaluation of the evidence and determine whether "'competent, satisfactory and sufficient evidence' in the trial record" supports the jury's verdict. Id. Unlike in a Rule 29 motion, where the court must draw every inference in favor of the government, in a Rule 33 motion the court is entitled to "weigh the evidence and in doing so evaluate for itself the credibility of the witnesses."

United States v. Sanchez, 969 F.2d 1409, 1413 (2d Cir. 1992) (internal citation omitted). Although a trial court has substantially more discretion to grant a new trial under Rule 33 than it does to grant a motion for acquittal under Rule 29, the authority should be exercised "sparingly" and only in "the most extraordinary circumstances." Ferguson, 246 F.3d at 133. "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." Id. A manifest injustice is found where the court has "a real concern that an innocent person may have been convicted." Sanchez, 969 F.2d at 1414.

B. Discussion

Mr. Agnew argues that he should be granted a new trial because the government's proof was "weak at best," and because the jury deliberated for only ninety minutes. However, as discussed above, there was sufficient evidence from which the jury could have inferred that Mr. Agnew was able to work, in fact working at International Motorcars, and concealing that work from the Department of Labor and from his doctors, thus constituting a "scheme to defraud" in violation of the mail fraud statute, and that he further concealed that work on an OWCP form, thus making a false statement to the Department of Labor in violation of 18 U.S.C. § 1920. Thus, the court does not agree that the government's proof was "weak at best" and declines to award a new trial on that ground.

Nor does the fact that the jury reached a verdict quickly suggest that the verdict was hasty or reached without adequate review of the evidence submitted. This simple fraud case involved a limited number of exhibits, all of which were published to the jury during trial,

some at considerable length. The jury viewed several hours of videotape alone during trial, both as part of the government's case-in-chief and as during the defendant's rebuttal case. Further, the jury had more than adequate time to review the limited number of paper exhibits before reaching its verdict. Though the defendant disputes the inference drawn from the evidence and the conclusion reached, there is no indication that the verdict was anything other than thoughtfully rendered. This is not an "extraordinary case" where letting the verdict stand would be a manifest injustice. Sanchez, 969 F.2d at 1414.

III. CONCLUSION

For the reasons stated above, the Motion for a New Trial and the Motion for Judgment of Acquittal [Dkt. No. 60] are DENIED.

SO ORDERED.

Dated at Bridgeport, Connecticut this 25th day of May, 2004.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge