No. 20-1336

United States Court of Appeals for the First Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

JOSEPH A. ROWAN,
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (CRIM. NO. 16-10343-6) (THE HONORABLE ALLISON D. BURROUGHS, J.)

REPLY BRIEF OF DEFENDANT-APPELLANT JOSEPH A. ROWAN

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I. THE SUFFICIENCY OF THE GOVERNMENT'S EVIDENCE OF ROWAN'S INTENT IS A "CLOSE" QUESTION THAT JUSTIFIES BAIL PENDING APPEAL.

The government's response confirms what Rowan stated in his opening brief: the government seeks to deny Rowan release pending appeal (and ultimately, to preserve his RICO conviction) by impermissibly deeming him guilty by association. The government's argument and recitation of facts make clear that the only evidence relating to the IRC insurance fraud that ostensibly was connected to Rowan was the tape. Gov't Br. 3-29 & 79-84. In order to make this tape appear as if it could carry the burden of a RICO conviction, the government splits and splices the tape transcript in ways that misrepresent the context of the recorded statements. *Id.* at 81. Though the government also pointed to a few snippets of testimony by other sales representatives, none of these witnesses reported to Rowan or testified about Rowan—and the government misrepresents what they said. *Id.* at 81-82 & 12-13.[1]

The government's argument boils down to this: It proved that Rowan specifically intended the IRC insurance fraud scheme because it offered evidence that *other* Insys employees (in other divisions, both geographically and operationally remote from Rowan) either committed insurance fraud or may have been aware of it. This is not proof beyond a reasonable doubt. Rowan's conviction highlights the risk

[1] The short reference to sales representatives and opt-in forms in the government's fact section does not prove anything about intent and, later in the argument section, the government does not argue that it does.

when applying the RICO statute to legitimate businesses—that employees may be found guilty based on other employees' knowledge, with no proof of individual intent.

To resolve this appeal, however, this Court need not decide whether the evidence was sufficient to prove Rowan's guilt beyond a reasonable doubt. The Court need only decide whether Rowan's appeal of his conviction will raise substantial questions of law likely to result in reversal or a new trial. *See United States v. Bayko*, 774 F. 2d 516, 523 (1st Cir. 1985).[2] As discussed below, the government's timid defense of the evidence and blurring of the standards of review provides no reason to conclude it would not.

A. The Tape and the Testimony of Witnesses Who Did Not Testify About Rowan Were Not Sufficient Evidence of Rowan's Intent

The government's response brief leaves no doubt that out of 50 days of trial, thousands of exhibits, and testimony from 40 witnesses, there is only one piece of evidence on which the government stakes Rowan's conviction: the taped training session led by Elizabeth Gurrieri, which Rowan and his sales team attended at the Insys National Sales Meeting in April 2013. Gov't Br. 79-84. At that time, Rowan was not yet a regional manager, but one of several Insys district managers, the lowest

[2] The government does not contest any of the other statutory factors for granting Rowan continued release pending his appeal.

managerial level above sales representative, supervising approximately a dozen sales representatives from Florida and neighboring states. *See, e.g.*, 3/21/19 Trial Tr. 211:13-212:2.

As Rowan explained in his opening brief, a careful and chronological review of that tape excerpt (from a much longer presentation) would reveal that, at the training, Rowan did not discuss or instruct anyone to commit insurance fraud—not surprisingly, the government never argued to the jury that the tape proved Rowan's intent. *See* Rowan Br. 11-22. What the government offers in its brief is the opposite of a careful analysis of the tape. First, the government juxtaposes statements made by Gurrieri and Rowan at completely different moments on the tape. The government points to Gurrieri's statements about history of cancer, the "list," and request for tried and failed medication and then jumps to Rowan's later comment to his sales representatives, '[t]his is how you get paid," to imply Rowan's awareness of the IRC insurance fraud. *See* Gov't Br. 80-81. In reality, several pages of transcript (and minutes of tape) flow by between Gurrieri's statements and Rowan's comment. Rowan's comment was not a response to any statement concerning history of cancer or tried and failed medication, but another chastisement of sales representatives for not submitting legible opt-ins (a necessary step in obtaining reimbursement for Subsys). *See* Rowan Br. 19.

Second, the government cites without context two statements Gurrieri made to her audience about tried-and-failed medication, *see* Gov't Br. 80, emphasized below:

> [GURRIERI]: **Include a med list of tried and failed**. I'm seeing more and more opt-ins come in with the tried and failed on there. The more you can include the better. **We have our own list we go off of if there's nothing on there**, but we really would like that information because that would be helpful. And legible opt-in forms.

J.A. 351(emphasis added).

According to the government, these statements prove Rowan's awareness of the IRC insurance fraud. Yet, the only proximate context for these statements was Lillian Logatti's testimony, the single witness the government called to testify about the tape and its meaning. The government tried to elicit a nefarious interpretation from Logatti at trial, but failed:

> [AUSA YEAGER]: Stop right there. Do you have an understanding what she's talking about when she says "a list of tried and failed"?
>
> [MS. LOGATTI]: Yes.
>
> [AUSA YEAGER]: How did you gain that understanding?
>
> [MS. LOGATTI]: Medications the patients have tried and not agreed with them. So that would incline the insurance to approve our medication versus what they tried and hasn't really agreed with the patient.
> …
>
> [AUSA YEAGER]: Did you have an understanding of what Ms. Gurrieri meant when she said "We have our own list to use if there's nothing on there"?

[MS. LOGATTI]: Not really, but – I don't.

J.A. 347-348.

In other words, Logatti testified that she understood that there was a valid and proper reason for Gurrieri's instruction to include a patient's tried-and-failed medication on opt-ins, and had no understanding that there was anything inculpatory when Gurrieri made her cryptic references to some "list" that "we" used when the opt-in forms did not include tried-and-failed information. Logatti could not give the government a helpful answer even though it had met with her twice to prepare her testimony. *See* 3/22/19 Trial Tr. 21:7-17. As noted in Rowan's initial brief, the government called Gurrieri to testify for multiple days but strategically did not ask her any substantive questions about the tape or Rowan.[3] *See* Rowan Br. 21.

To make up for the obvious weakness of the tape, the government also cited to testimony from two sales representatives, Holly Brown and Brett Szymanski, to

[3] At trial, the government briefly asked Gurrieri whether she had conducted a training session with Rowan and his sales team at the 2013 National Sales Meeting and whether, as part of that training, she had requested sales representatives to provide her with a patient's history of cancer—i.e., facts that were evident from the tape itself. 2/22/19 Trial Tr. 225:2-14. The government chose not to ask her any questions that might have shed light on Rowan's knowledge or intent regarding the IRC insurance fraud, e.g., whether she was asking Rowan and his sales representatives to "adopt IRC's fraudulent strategies," J.A. 581, or whether she was asking Rowan to "endors[e]" any illegal message, Rowan Br. at A16. The government's failure to ask Gurrieri these questions after preparing her extensively is glaring.

argue that the IRC's fraudulent strategies were well-known among sales representatives. *See* Gov't Br. 81-82. The government fails to mention that these two witnesses did not report to Rowan, did not testify about Rowan, and worked in sales regions geographically and operationally remote from Rowan's sales territory in April 2013. *See, e.g.*, 1/29/19 Trial Tr. 57:22-58:18 & 60:22-24; 1/30/19 Trial Tr. 123:19-20. That Brown and Szymanski may have known something about the IRC fraud does not prove (and certainly does not prove beyond a reasonable doubt) that *Rowan* knew about the IRC fraud. Transferring one individual's potential knowledge and intent (Brown/Szymanski) to another (Rowan), where the individuals, other than being employees of the same company had no connection to each other, does not pass muster. *See United States v. Izzi*, 613 F.2d 1205, 1210 (1st Cir. 1980).

Moreover, the government could not infer guilt in any case because contrary to the government's interpretation, neither Brown nor Szymanski testified that they knew about the IRC fraud. The government incorrectly implies that Brown's testimony that she was instructed to "drop the word 'cancer' and just talk about breakthrough pain in general'" when talking to potential prescribers, was related to the IRC's fraudulent strategy of misleading insurers that a patient had a current diagnosis of cancer. *See* Gov't Br. 81-82. Brown was clearly testifying about sales strategies to get the doctor to prescribe Subsys off-label (i.e., for illnesses other than cancer), not about strategies to mislead insurance companies. *See* 1/29/19 Trial Tr.

46:19-25.[4] Knowledge of one thing does not imply knowledge of another: it is one thing to persuade doctors to prescribe a drug off-label (which the law permits doctors to do), and a very different thing to lie to insurance companies and tell them it is an ON-label prescription when it is not. In line with this, Brown's other testimony cited by the government, Govt' Br. 82, concerning the inclusion of the term "breakthrough pain" rather than "breakthrough cancer pain," which was Subsys's indication, in the template for letters of medical necessity that patients or physicians sometimes submitted to insurance companies proves no more awareness of IRC's fraudulent strategies than Brown's testimony about her marketing strategy. Similarly, while the other sales representative, Brett Szymanski, testified that he would include the cancer codes from a patient's chart on the opt-in form, if any were available, *id.* at 82, the government could not extract any testimony from the immunized Szymanski[5]

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[4] [AUSA WYSHAK]: So what did [Mike Hemenway] tell you about dropping the "cancer"?

> [MS. BROWN]: I think the idea was that physicians could use this product off-label in any way that they wanted. And we would be calling on oncology doctors, but even more than that we would be calling on pain management physicians. So the pain management physicians may or may not have been using this drug for cancer patients.

[5] Brett Szymanski testified he received immunity from prosecution from the government, prior to testifying at trial in large part about his illegal speaker payment

that he understood how the IRC used these codes (or that the IRC could use the codes to mislead insurers), beyond the fact that including past cancer codes helped increase the chance of insurance approval.[6]

The government's claim that testimony about other employees with no meaningful contact with Rowan is circumstantial evidence of Rowan's intent is illogical. The government's claim that it proved Rowan's intent through "circumstantial evidence," *id.* at 83, is not a pass for the government to fill any evidentiary gap with unsupported speculation based on the logic of guilt by association. *See United States v. Garcia*, 919 F.3d 489, 503 (7th Cir. 2019) ("Circumstantial evidence that leads only to a strong suspicion that someone is involved in a criminal activity is no substitute for proof of guilt beyond a reasonable doubt. . . . It is simply not enough to fill the evidentiary gaps with inferences of guilt by association . . . ." (internal quotation and parentheses omitted)).

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arrangements with Dr. Gavin Awerbuch (a prescriber outside of Rowan's sales territory). *See* 1/30/19 Trial Tr. 102:22-103:4.

[6] It is telling that while the government repeatedly asked testifying IRC employees directly whether they understood that so and so IRC strategy was misleading insurers (e.g., history of cancer portrayed as active cancer, using the "list" of tried and failed medication), the government avoided posing the same question to cooperating sales representatives who testified. *See, e.g.*, 2/8/19 Trial Tr. 128:2-21 (Testimony of Kimberly Fordham, IRC specialist). And only now, the government claims these sales representatives knew and understood that IRC was misleading insurers.

It is not sufficient for a jury to have "reasonably inferred" that Rowan was guilty, as the government argues, *see, e.g.*, Gov't Br. 82, because not every inference can support proof beyond a reasonable doubt. *See O'Laughlin v. O'Brien*, 568 F.3d 287, 302 (1st Cir. 2009) (stating that "reasonable speculation" does not rise to the level of "sufficient evidence"). Moreover, the question before the Court on this appeal is not whether a reasonable jury could have concluded beyond a reasonable doubt that Rowan was guilty, but only whether Rowan's sufficiency of the evidence argument presents a "'close' question or one that very well could be decided the other way." *United States v. Bayko*, 774 F. 2d 516, 523 (1st Cir. 1985). Rowan's insufficiency of the evidence claims meet this standard.

B. Rowan Has Preserved His Mail Fraud Sufficiency Challenge.

The government also tries to blur the standard of review by asserting erroneously that Rowan forfeited his IRC insurance fraud sufficiency challenge with respect to the mail fraud predicate, requiring a more demanding standard of review for Rowan's mail fraud sufficiency claim. Gov't Br. 79. As Rowan noted in his opening brief, this argument makes no sense. *See* Rowan Br. 21-26.

First, the district court rejected the defendants' challenge to the sufficiency of the mail fraud predicate, which defendants based on the "prescriber fraud theory," *see id.* at 6, by finding that the government could instead prove this predicate based on a theory of proof the government had never argued before with respect to mail fraud -- the IRC "insurance fraud theory." *See id.* The district court logically could

not substitute in a different legal and factual theory of proof to establish sufficiency unless *that other theory* was supported by sufficient evidence, and in fact, in her order, the district court specifically discussed her view that there was sufficient proof of the defendants' intent regarding the IRC insurance fraud. *See* J.A. 575; Rowan Br. at A9. The government completely ignores the First Circuit precedent that a sufficiency challenge is not forfeited where the district court actually decides the issue, as happened here. *See United States v. Marston*, 694 F. 3d 131, 135 (1st Cir. 2012) ("That the trial judge considered such a ground would alone justify review, as if such a motion had been made."). Moreover, as a matter of due process, Rowan cannot forfeit or waive his ability to challenge the basis on which the district court rejected one of his sufficiency claims, particularly if the basis had never been previously raised by the government or the district court.

Second, Rowan made a general sufficiency of the evidence challenge, which under *Marston* amounts to preservation. *See* 694 F. 3d at 134. The government acknowledges Rowan's general challenge, but argues that "while Rowan joined in defendants' global post-verdict Rule 29/ Rule 33 motions, that motion made only a general challenge to the mail fraud predicate applicable to all defendants." Gov't Br. 79. In other words, the government is claiming that including a general sufficiency challenge in the joint Rule 29 motion (which, for the avoidance of any doubt, Rowan incorporated by reference in his supplemental Rule 29/33 motion, J. A. 488), implies that the general challenge protects only sufficiency challenges that all defendants

decide to make and submit jointly. This distinction has no basis in law (and the government offers none): a joint submission more economically addresses arguments that multiple defendants wish to make, but does not have less legal force than an individual submission.[7] Rowan challenged the sufficiency of the mail fraud evidence under the "prescriber fraud theory" the government and defendants had consistently argued as describing the scope of the mail fraud proof. *See* Rowan Br. 6. When the district court affirmed Rowan's conviction on a completely different theory (the "insurance fraud theory"), Rowan's general sufficiency challenge preserved his right to appeal the district court's order subject to the 18 U.S.C. § 3143(b) standard of review.[8]

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[7] The distinction also makes no sense because it does not necessarily impose any limitations in this case: defendants could after all choose to argue and submit all of their sufficiency challenges jointly, including challenging the sufficiency of the evidence under the district court's new theory of proof for the mail fraud predicate, if they so wished.

[8] The district court commented in a footnote to her bail order that she had understood Rowan to be challenging only the sufficiency of the wire fraud predicate. J.A. 580. However, the pertinent question is not about what Rowan had separately and expressly argued before the district court decision on Rule 29 (which is what the district court discussed in her bail order and the government cites at page 80 of their response brief) but about the fact that the judge rejected the defendants' mail fraud sufficiency challenge by substituting in a theory of proof that no party had ever argued before – which then merged the proof of mail fraud with the proof of wire fraud.

II. ROWAN'S APPEAL WILL ALSO RAISE OTHER SUBSTANTIAL QUESTIONS.

The government's response to the arguments made in Appellant's Brief, *US v. Kapoor*, No. 20-1325 (1st Cir.) ("Kapoor's Opening Brief") (incorporated by reference in Rowan's opening brief) is equally inapposite for the reasons detailed in Reply Brief for Appellant, *US v. Kapoor*, No. 20-1325 (1st Cir.) ("Kapoor's Reply Brief"), which Rowan incorporates and adopts by reference herein, as permitted by Fed. R. App. P. 28(i).

CONCLUSION

For all the foregoing reasons, the reasons included in Rowan's opening brief, and Kapoor's Opening and Reply Briefs, Rowan should be permitted to remain on release pending this Court's resolution of his appeal.

That Rowan did not separately and expressly challenge a theory of proof that he had no reason to believe was relevant to his conviction is not a forfeiture. The judge was fully aware that Rowan was challenging the sufficiency of the government's proof of his intent regarding the IRC insurance fraud. That she decided to make that fraud the basis of the mail fraud predicate in addition to the basis of the wire fraud predicate does not indicate any forfeiture by Rowan. That would be tantamount to saying he forfeited something by failing to predict that the district court would adopt a factual theory no one had previously argued.

Respectfully submitted,

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APRIL 17, 2020

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies as follows:

1. Exclusive of the exempted portions of the motion, as provided in Fed. R. App. P. 32(f), the brief contains 2381 words in compliance with the length limitation in Fed. R. App. P. 32(a)(7)(B)(ii).

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Century font.

/s/ Michael Kendall
MICHAEL KENDALL

DATED: APRIL 17, 2020

CERTIFICATE OF SERVICE

I, Michael Kendall, counsel for defendant-appellant Joseph Rowan, certify that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit and sent via transmission of Notice of Electronic Filing generated by CM/ECF system to counsel of record on April 17, 2020.

/s/ Michael Kendall
MICHAEL KENDALL

DATED: APRIL 17, 2020