No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

JONATHAN WADE DUNNING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

_____

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16843

D.C. Docket No. 2:14-cr-00382-BJR-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JONATHAN WADE DUNNING,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(July 10, 2018)

Before WILSON and JORDAN, Circuit Judges, and CONWAY,[*] District Judge.

PER CURIAM:

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[*] Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

Defendant Jonathan Wade Dunning was charged in a 112-count[1] indictment related to a fraudulent scheme to divert funds from two federally-funded community healthcare centers he had managed as chief executive officer. The indictment charged him with substantive and conspiracy counts to commit wire fraud, bank fraud, federal program fraud, and money laundering in violation of 18 U.S.C. §§ 2, 371, 666, 1343, 1344, 1349, 1956, and 1957. Dunning pleaded not guilty and his trial began on May 24, 2016.

At the close of the Government's case, and again at the close of all the evidence, Dunning unsuccessfully moved for judgments of acquittal. Following seventeen days of testimony, on June 17, 2016, the jury convicted Dunning on 98 of the 112 charged counts and he was sentenced to 216 months' imprisonment. Dunning appeals the convictions, arguing there was insufficient evidence presented at trial to support the jury's verdict. After review of the record and with the benefit of oral argument, we AFFIRM.

I. BACKGROUND

Dunning began his employment at Birmingham Health Center (BHC) in 1995 as clinical director, and became the chief executive officer in 1998. During

[1] Specifically, Counts 1-3 and 5-69 charged wire fraud in violation of 18 U.S.C. §§ 1343, 1349 and 2; Count 4 charged conspiracy to defraud an agency of the United States via wire fraud, bank fraud, and money laundering in violation of 18 U.S.C. § 371, and federal program fraud (18 U.S.C. § 666); Counts 70-72 charged bank fraud in violation of 18 U.S.C. §§ 1344 and 2; Counts 73-78 charged money laundering in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 2; and Counts 79-112 charged money laundering in violation of 18 U.S.C. §§ 1957 and 2.

his tenure, BHC expanded the number of clinic locations, patients served, and revenue. Dunning additionally became the chief executive officer of Central Alabama Comprehensive Health (CACH) in 2005. Both community healthcare centers were non-profit organizations funded in part through federal grants from the United States Department of Health and Human Services, Health Resources & Services Administration ("HRSA"), to provide healthcare at no-cost or low-cost to homeless and economically disadvantaged populations.

After years of managing the centers, Dunning told others that he knew he was more "valuable" than the $290,000 annual salary he was being paid by the non-profits, and he had "found a way to make money off the government." Beginning in 2006, Dunning formed the first of several of his for-profit companies—each containing "Synergy" in the business name (collectively "the Synergy Entities")—which would subsequently take over the management duties of BHC and CACH as well as ownership of certain real estate used by BHC. Throughout the ensuing seven years, Dunning and the Synergy Entities had no other source of income, no other paying clients, and no other significant commercial real estate tenants other than BHC and CACH.

On October 31, 2008, Dunning left his employment with the community healthcare centers to focus on the operation of his for-profit Synergy Entities. However, Dunning retained management control over BHC and CACH through his

manipulation of the individuals he handpicked to succeed him as chief executive officer at the centers. Jimmy Lacey, who succeeded Dunning at BHC, lacked the appropriate experience in healthcare and was unemployed at the time he was selected; Lacey was an unindicted coconspirator who died six months before trial.[2]

The chief financial officer, Terri Mollica, and the lead grant-writer, Sharon Waltz, both left BHC with Dunning to work at the Synergy Entities although they continued to perform the same duties and continued to direct employees at BHC.[3] Despite leaving BHC, Mollica maintained her access to both centers' federal grant funding accounts. Mollica was indicted separately and entered into a plea agreement in her case in April 2015; however, she refused to testify at Dunning's trial.

Dunning also continued his influence over the BHC controller, Sheila Parker, who remained employed at BHC, and managed (with Lacey) the affiliated Birmingham Financial Federal Credit Union (the "Credit Union"), which primarily served employees of BHC. Parker subsequently pleaded guilty to embezzling money from CACH's bank account, and testified at Dunning's trial.

[2] Dunning's successor at CACH, Alan Yoe, testified that he did not feel capable of doing the job and he had previously received a "very poor" performance review; Dunning remarked that he believed Yoe "could not get the job done." No criminal charges were filed against Yoe.

[3] Sharon Waltz was Dunning's romantic partner and had two children with him. Waltz was an unindicted coconspirator.

Over the course of several years, Dunning used his control over BHC and CACH to divert $13.5 million to his for-profit Synergy Entities through consulting contracts, real estate leases, and transfers from BHC's revenue account containing federal grant funds. The Synergy Entities' main source of rental income of approximately $4 million was primarily from leases negotiated with Lacey on behalf of BHC. Through Dunning's fraudulent activities, he engineered the transfer of ownership to his Synergy Entities of two buildings housing BHC clinics, paying half of its appraised value for one building's purchase from BHC, and using BHC funds to pay the full purchase price from a third-party for the other building. Dunning used BHC funds to pay three-years worth of the debt service on a third building to be renovated for a BHC clinic; however, Dunning never renovated the property as promised, diverting the renovation loan funds to a separate property he owned, and keeping all of the profits from its eventual sale when BHC could not open a clinic. Because Dunning remained in control of the management of BHC and CACH, he diverted funds from the centers' federal grants and BHC's clinic operating account into his personal account, and used BHC funds to make payments on the loan for a new $85,000 Jaguar. Dunning also defrauded a business partner out of the proceeds in a joint venture performing work for BHC by diverting the full payments to his Synergy Entities and denying BHC had paid.

To disguise his fraudulent activities from an investigator at HRSA, Dunning directed Lacey and others to provide false information about payments from BHC to the Synergy Entities. Through the course of their multi-year relationship with Dunning's Synergy Entities, the community healthcare centers suffered significant financial problems which eventually forced BHC to the brink of bankruptcy and CACH to close its doors for good.

II. DISCUSSION

A.

Dunning challenges the sufficiency of the evidence to sustain his convictions. We review the sufficiency of evidence to support a conviction *de novo* while viewing the evidence in the light most favorable to the government and resolving all credibility evaluations in favor of the jury's verdict. *United States v. Hernandez*, 743 F.3d 812, 814 (11th Cir. 2014) (per curiam). A jury's verdict must stand "if any reasonable construction of the evidence would have allowed the jury to find the defendant guilty beyond a reasonable doubt." *United States v. Rodriguez*, 732 F.3d 1299, 1303 (11th Cir. 2013). It is unnecessary for the government "to disprove every reasonable hypothesis of innocence, as the jury is free to choose among reasonable constructions of the evidence." *United States v. Mieres–Borges*, 919 F.2d 652, 656 (11th Cir. 1990).

"The test for sufficiency of evidence is identical regardless of whether the evidence is direct or circumstantial, and no distinction is to be made between the weight given to either direct or circumstantial evidence." *United States v. Doe*, 661 F.3d 550, 560 (11th Cir. 2011) (quotation omitted). However, "[w]here the government relies on circumstantial evidence, reasonable inferences, and not mere speculation, must support the jury's verdict." *Id.* (quotations omitted). "To the extent that [the defendant's] argument depends upon challenges to the credibility of witnesses, the jury has exclusive province over that determination and the court of appeals may not revisit this question." *United States v. Chastain*, 198 F.3d 1338, 1351 (11th Cir. 1999).

B.

Dunning was convicted of multiple counts of substantive and conspiratorial criminal conduct to defraud a federal agency, 18 U.S.C. § 371, based on wire fraud, bank fraud, money laundering, and federal program fraud. "A conspiracy is an agreement between two or more persons to accomplish an unlawful plan." *United States v. Chandler*, 388 F.3d 796, 805 (11th Cir. 2004). To sustain a conspiracy conviction based on fraud in violation of 18 U.S.C. § 371, the Government was required to prove (1) an agreement between Dunning and at least one other person to commit an offense against or defraud the United States; (2) Dunning's knowing and voluntary participation in the agreement; and (3) the

commission of an act in furtherance of the agreement. *See United States v. Tampas*, 493 F.3d 1291, 1298 (11th Cir. 2007); *United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003); 18 U.S.C. § 371. "The knowledge requirement is satisfied when the [g]overnment shows a defendant's awareness of the essential nature of the conspiracy." *United States v. Ndiaye*, 434 F.3d 1270, 1294 (11th Cir. 2006). "[T]he defendant's assent can be inferred from acts which furthered the conspiracy's purpose." *United States v. Miller*, 693 F.2d 1051, 1053 (11th Cir. 1982) (quotation omitted).

In order to convict someone of fraudulently obtaining or misapplying funds from an organization receiving federal assistance, the Government must prove: (1) the defendant converted property owned by, or under the care, custody, or control of an organization receiving federal assistance; (2) the defendant was an agent of such an organization; (3) that property was valued at $5,000 or more; and (4) the organization received in excess of $10,000 in federal funds during the one-year period in which the defendant converted the property. 18 U.S.C. § 666(a)-(b); *see Tampas*, 493 F.3d at 1298. The statute defines an "agent" as one who is "authorized to act on behalf of another" and, "in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative." 18 U.S.C. § 666(d)(1); *United States v. Langston*, 590 F.3d 1226, 1233–34 (11th Cir. 2009).

To sustain Dunning's convictions for wire fraud, 18 U.S.C. § 1343, the Government must prove beyond a reasonable doubt that he intentionally participated in an unlawful "scheme to defraud" and used the interstate wires to carry out that scheme. *United States v. Langford*, 647 F.3d 1309, 1320 (11th Cir. 2011) (describing the elements of wire fraud in violation of 18 U.S.C. § 1343). To prove bank fraud under 18 U.S.C. § 1344, the Government must show beyond a reasonable doubt that the defendant intentionally engaged in a scheme or artifice to defraud, or made materially false statements or representations to obtain moneys, funds or credit from a federally insured financial institution. *United States v. De La Mata*, 266 F.3d 1275, 1298 (11th Cir. 2001) (setting forth the elements for bank fraud, 18 U.S.C. § 1344). Proof of fraud also is necessary to sustain Dunning's convictions for money laundering.[4] *See United States v. Naranjo*, 634 F.3d 1198, 1207 (11th Cir. 2011).

"A scheme to defraud requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property." *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009) (citation omitted). "A misrepresentation is material if it has 'a natural

[4] The indictment charged violations of the money laundering statutes which prohibit use of illegal proceeds from the other crimes alleged in the indictment. *See Naranjo*, 634 F.3d at 1207 (citing 18 U.S.C. §§ 1956(a)(1)(A)(i) (promotional money laundering); *id.* § 1956(a)(1)(B)(i) (concealment money laundering); *id.* § 1957 (engaging in monetary transactions in property derived from specified unlawful activity)). As Dunning concedes, the money laundering convictions are derivative of the wire fraud and bank fraud counts in this case.

tendency to influence, or [is] capable of influencing, the decision maker to whom it is addressed.'" *Id*. (quoting *Hasson*, 333 F.3d at 1271). We frequently have noted that "direct evidence of an agreement is unnecessary; the existence of the agreement and a defendant's participation in the conspiracy may be proven entirely from circumstantial evidence." *United States v. McNair*, 605 F.3d 1152, 1195 (11th Cir. 2010). "Because conspiracies are secretive by nature, the jury must often rely on 'inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme.'" *United States v. Martin*, 803 F.3d 581, 588 (11th Cir. 2015) (quoting *United States v. Vernon*, 723 F.3d 1234, 1273 (11th Cir. 2013)).

C.

Viewed in the light most favorable to the government and the jury's verdict, the evidence sufficiently established that Dunning knew of and voluntarily joined a long-running conspiracy and actively participated in siphoning millions of dollars out of BHC and CACH consisting of the federal grant funds provided by HRSA; by manipulating BHC's account at the Credit Union; and by making material misrepresentations to his business partner in a billing service for BHC. A reasonable jury could find that while still chief executive officer of BHC, Dunning and Lacey misrepresented the value of the BHC headquarters building in convincing the BHC board to sell it to a Synergy Entity. Dunning and Mollica

diverted grant funds from BHC's federal grant funds to purchase a second building held in the name of a Synergy Entity, and Dunning used BHC funds to pay the debt service on a third building which he failed to renovate and eventually sold, keeping the entire profit. Dunning directed Parker to move BHC's revenue account to the affiliated Credit Union in order to manipulate and conceal transfers into his personal account and transfers to pay for his new Jaguar.

The evidence was sufficient for the jury to find that Dunning misrepresented to HRSA in grant applications prepared by Waltz that BHC and CACH would provide thousands of expensive chip-enabled "smart cards" to clients in emergency preparedness kits, instead supplying inexpensive paper business cards that cost pennies. The centers' contracts with Synergy Entities were intentionally concealed from HRSA. Dunning misled his business partner, telling him BHC was not paying for the billing work provided by their joint business, when in reality Dunning had directed others to send BHC's payments to a Synergy Entity so he could pocket the full amount. Dunning directed others in misrepresenting and omitting information from BHC's response to an investigation by the HRSA Financial Integrity Division in order to conceal their conspiracy. The jury was entitled to draw the reasonable inference that Dunning knew of and voluntarily participated in the fraudulent scheme to "make money off the government" by diverting federal grant funds from the non-profit healthcare centers.

In February 2008, six months before Dunning left BHC, he orchestrated the sale of BHC's headquarters, the Plaza Building, for $2.8 million to a Synergy Entity, who leased it back to BHC following the sale. Although serving as BHC's chief executive officer at the time, Dunning did not apprize BHC's board of directors that an earlier appraisal from September 26, 2007 had valued the Plaza Building at $6 million.[5] Within two days of the $6 million appraisal's completion, on September 28, 2007, Dunning paid $25,000 to Lacey, chairman of the BHC board at that time. Less than a month later, and just two days before incorporating a Synergy Entity as a real estate holding company, on October 23, 2007, Lacey sent an email to Dunning entitled "For the Record" which read: "Just a reminder, 'Our collaboration is a conspiracy that is essential to our success!'"[6] (Three years

[5] The September 26, 2007 appraisal was performed for a potential bank loan to finance the transfer of ownership from BHC to a Synergy Entity and the $6 million value was built on the income approach with a "triple net" lease. A January 2008 appraisal valued the Plaza Building at $3.2 million based on the income approach where expenses were paid by the landlord. The difference in the appraised values was attributable to the difference in costs expected to paid by the tenant; the evidence established that, if the January 2008 appraisal had been conducted under an assumption that the tenant would pay those costs, the value for the Plaza Building would have been approximately $5.5 million.

[6] Dunning argues the district court erred in admitting the email because it was not properly authenticated. However, Dunning stipulated to the authenticity of Lacey's emails at the pretrial conference; therefore, he cannot appeal the issue of authenticity. *Ponderosa Sys., Inc. v. Brandt*, 767 F.2d 668, 670 (10th Cir. 1985) (holding where plaintiff had stipulated to authenticity of records at trial, defendant was not required to introduce evidence authenticating the records). The district court admitted Lacey's email as a statement in furtherance of the conspiracy and, therefore, outside the hearsay exclusion. *See* Fed.R.Evid. 801(d)(2)(E) (statements made by a co-conspirator "during and in furtherance of the conspiracy" are not hearsay). Once the email was admitted, "the ultimate question of authenticity [was] then decided by the jury." *United States v. Lebowitz*, 676 F.3d 1000, 1009 (11th Cir. 2012). To the extent Dunning argues the district court erred in excluding evidence of an industry magazine called "For The Record" on grounds of relevance, we find the error to be harmless given the "overwhelming evidence" of Dunning's

later, Dunning subsequently obtained a new bank loan based in substantial part on $1.3 million in the equity from the Plaza Building.)

Members of the BHC board had expressed a willingness to sell the Plaza Building to Dunning in order to reduce BHC's monthly operating expenses and increase its cash flow. However, Lacey committed BHC to a triple-net lease obligating it to pay for all taxes, insurance, and maintenance fees for the entire property, which amounted to *more* than BHC's previous mortgage payment. In addition, by foregoing ownership of the Plaza Building, BHC lost any equity it had accumulated in the property and any rental income from the other tenants.

Dunning also diverted BHC's grant funds to the purchase of a second building, the Norwood Building, for his own benefit. In late 2009, after Dunning had already contracted for a Synergy Entity to buy the Norwood Building from a third party, Dunning found out he would not receive the bank financing in time to close the deal before the purchase contract expired. Dunning then directed Terri Mollica, the Synergy employee who continued to have access to BHC's financial accounts, to make three transfers totaling $1.1 million from BHC's accounts to the third-party seller's closing agent in Texas to complete the purchase on time. Ownership of the Norwood Building was nonetheless conveyed to Dunning's Synergy Entity who was listed as the purchaser. BHC Board members testified

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guilt as set forth in the text. *See United States v. Phaknikone*, 605 F.3d 1099, 1109 (11th Cir. 2010).

they had no knowledge of the transfers to purchase the Norwood Building.[7] Once the purchase closed, Lacey signed a ten-year lease for BHC to pay rent of $18,750 per month for the Norwood Building even though BHC's own funds had been used to purchase the property.

Although BHC had paid $1.1 million to purchase the Norwood Building, in March 2010, Dunning represented the Synergy Entity as the building owner to a new lender and subsequently refinanced the property, borrowing $850,000 against the equity in the Norwood Building. Three months later he used the Norwood Building as collateral for a $300,000 line-of-credit. Dunning did not return to BHC the $1.1 million transferred for the purchase; instead, he deposited the money from the re-finance into his Credit Union account, labeling it as his money.

In January 2010, another Synergy Entity purchased a third property, the 2030 Building, which Dunning intended to renovate and lease to BHC to operate a new clinic location. Despite BHC paying the full $353,000 to service the debt on the mortgage for three years, BHC was never able to move into the building because it was not sufficiently renovated by Dunning, who was supposed to fund

[7] We find no error in the district court's admission of the grand jury testimony of the BHC auditor regarding the five-year delay in determining that a BHC receivable (for $652,000) was connected to the Norwood Building purchase and not a "normal trade account." The Government introduced the auditor's prior inconsistent statement on cross-examination when he testified at trial "he could not conclude" BHC's grant funds had been misused. Fed. R. Evid. 801(d)(1)(A) (hearsay excludes a testifying declarant's prior statement if it was inconsistent with the current testimony and was given under penalty of perjury at a trial, hearing, or other proceeding).

the renovation. When Dunning sold the 2030 Building in September 2013 without finishing the restorations, he kept all of the profit from the sale for himself even though BHC had paid the debt service for three years.

D.

Dunning was also able to divert funds from the centers' federal grants because Sharon Waltz, who had moved to the Synergy Entities, remained the lead grant-writer for the centers. In September 2009, BHC and CACH each received a $331,000 federal grant from the HRSA for 3,000 emergency preparedness kits to be provided free to patients. Although the grant applications prepared by Waltz represented that there would be no contractual expenses, in October 2009, Dunning's Synergy Entities subcontracted with the centers to produce the kits. A significant portion of the cost of each kit was for a "smart card" which would look like a credit card with an electronic chip containing the patient's medical information, valued at $50 each, along with technical support. Synergy never provided the chip-enabled smart cards or system support, substituting instead paper cards worth 18 cents a piece, and HRSA was never informed of the change. Instead of giving the kits away for free to patients as represented in the centers' HRSA grants, Dunning directed that they should be sold for $79.95 each, and thousands of undistributed kits remained at the centers years later.

Dunning was able to divert funds from BHC's financial accounts in his role as president of the Credit Union, which was primarily for the benefit of BHC employees. It was such a small operation, however, that the Credit Union kept its deposits in a single account at a commercial bank, and tracked deposits through an internal accounting system. In September 2010, Dunning directed the BHC controller, Sheila Parker, who co-managed the Credit Union with Lacey, to stop depositing BHC's clinic revenue at the commercial bank, and begin depositing BHC's revenue into an operational account at the Credit Union. Soon after creating the BHC revenue account at the Credit Union, Dunning directed Parker to transfer substantial amounts out of the BHC revenue account into Dunning's personal Credit Union account. A year later, Dunning had the name on his personal Credit Union account changed to "BHC Revolving Credit Line," although no "credit line" appeared on BHC's financial records. When BHC staff or external accountants tried to make sense of the credit union transfers between BHC's revenue account and Dunning's personal account, Dunning always insisted BHC owed him more or directed them to "zero out" the excess amount BHC had overpaid him. Dunning also made sure the accountants were not given access to checks BHC made payable to Dunning and the Synergy Entities, preventing a full and accurate accounting.

When Dunning purchased an $85,000 Jaguar in July 2010, he used his influence over the Credit Union management to obtain a loan for 100% of the purchase price without a loan application, credit check, or approval from the Credit Union board. Although national examiners flagged the loan as an "exception," Dunning, Lacey, and Parker created loan application documents after-the-fact in an attempt to avoid further scrutiny. Dunning subsequently directed Parker to take the payments for the Jaguar loan from BHC's account. Eventually, in late 2011, national examiners determined the Credit Union was insolvent and closed it.

Dunning also diverted funds from his partner, Jayson Meyer, in a joint venture Dunning formed in late 2008 with Meyer's company, WorkSmart MD, which had been providing billing services to BHC since 2006. Dunning instructed BHC to start sending the payment checks for the billing services to the Synergy Entity, and no longer directly to Meyer. Once Dunning took over this arrangement, the payments to Meyer—whose employees were the ones actually performing the work—became sporadic and delayed. Meyer learned belatedly in 2013 that Dunning had signed contracts on behalf of the joint venture to provide additional services—which Meyer's company had been providing to BHC all along. However, payments from BHC for the original and additional services were going to Dunning, who had been keeping Meyer's portion of the payments while blaming BHC for the "delays."

At some point in late 2010, an accountant in the Financial Integrity Division of HRSA, Valerie Holm, received a citizen complaint about BHC's expenditures and began investigating payments made by BHC to a Synergy Entity. Ms. Holm emailed Terri Mollica, Sharon Waltz, and Jimmy Lacey to request information about BHC's relationship with the Synergy Entities. Dunning directed Lacey to respond to HRSA with false and misleading information, including redacted contracts with the Synergy Entities and altered board meeting minutes from February 2008 which concealed Dunning's purchase of the Plaza Building from BHC while he was still chief executive officer. Dunning also told Lacey to misrepresent the status of the chief financial officer (Mollica), who had become a Synergy employee in late 2008 but had retained her control over BHC's federal grant accounts. Dunning directed Lacey to withhold the check registers HRSA had expressly requested as part of the investigation into BHC's expenditures of grant funds. Eventually, as the financial problems at the centers continued to mount, they were forced to lay off employees and delay payments for medicine, equipment, supplies, all the while following Dunning's demand to "pay Synergy first."

III. CONCLUSION

Viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the jury's verdict, the evidence established that Dunning knew of and voluntarily joined the conspiracy and that

Dunning actively participated in the fraud related to purchases of the Norwood, Plaza, and 2030 Buildings; siphoning of BHC funds at the Credit Union; lying to Meyer about BHC's payments for billing work; and misrepresentations and omissions made to HRSA regarding federal grant fund expenditures. Thus, based upon the totality of the evidence presented, we conclude that the district court did not err in denying Dunning's motion for judgments of acquittal: sufficient evidence allowed a reasonable jury to conclude that Dunning was guilty of the charged conspiracy and wire fraud, bank fraud, federal program fraud, and money laundering offenses, beyond a reasonable doubt. Accordingly, we affirm Dunning's convictions.

AFFIRMED.

FILED
2017 Jan-11 PM 03:30
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA, **v.** **JONATHAN WADE DUNNING,** **Defendant.**	**MEMORANDUM ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR NEW TRIAL** **Case Number: 14-cr-382**

This matter is before the Court on Defendant Jonathan Wade Dunning's Motion for Judgment of Acquittal, Or in the Alternative, For New Trial. According to Defendant, a judgment of acquittal is appropriate because there is insufficient proof to sustain his convictions; or, what evidence there is weighs so heavily against the verdict that a new trial is warranted. The Government opposes the motion arguing that the evidence is clearly sufficient to sustain the jury's verdict, and that the record presents no basis for a new trial. Having reviewed the parties' briefs together with all relevant material and legal authorities, the Court DENIES Defendant's motion. The Court's reasoning follows:

I. PROCEDURAL HISTORY

Following a 17-day trial, on June 17, 2016, Defendant was convicted of 98 of 112 charged counts. Specifically, the jury found the Defendant guilty of having committed the following offenses: wire fraud, in violation of 18 U.S.C. Sections 1343 and 1342 (Counts 1-3, 5-7, 9-41, 43-49, 51-54, 56-60, 62-64, 66-69); bank fraud, in violation of 18 U.S.C. Sections 1344 and 1342 (Counts 70-71); money laundering, in violation of 18 U.S.C. Sections 1956 and 1952 (Counts 73-

78), and in violation of 18 U.S.C. Sections 1957 and 1952 (Counts 79-97, 100, 105-107, 109-112); and conspiracy to commit wire fraud, bank fraud, and money laundering, in violation of in violation of 18 U.S.C. Section 371, and theft from an entity receiving federal funds, in violation of 18 U.S.C. Section 666 (Count 4).

At the close of the Government's and Defendant's cases, respectively, Defendant timely moved for a judgment of acquittal. The Court denied Defendant's motions. Defendant filed the present motion for judgment of acquittal, or for a new trial, on July 28, 2016.

II. LEGAL STANDARDS

In considering a motion for judgment of acquittal made after the jury has reached a verdict pursuant to Rule 29(c), a district court must "apply the same standard used in reviewing the sufficiency of the evidence to sustain a conviction." *United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999) (citing *United States v. Sellers*, 871 F.2d 1019, 1020 (11th Cir.1989). The court "must view the evidence in the light most favorable to the government[;] resolve any conflicts in the evidence in favor of the government[;] accept all reasonable inferences that tend to support the government's case[; and] ascertain whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Ward*, 197 F.3d at 1079 (internal citations omitted). The evidence presented need not "exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt[.]" *Sellers*, 871 F.2d at 1021 (quoting *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. Unit B 1982) (en banc)). "The jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial, and the court must accept all reasonable inferences and credibility determinations made by the jury." *Sellers*, 871 F.2d at 1021.

In contrast to a motion for a judgment of acquittal—where the court must assume the truth of the evidence offered by the government—"[o]n a motion for a new trial based on the weight of

the evidence, the court need not view the evidence in the light most favorable to the verdict. It may weigh the evidence and consider the credibility of the witnesses." *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985) (citing *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980); *United States v. Simms*, 508 F. Supp. 1188, 1202 (W.D.La.1980)). "If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury." *Martinez*, 763 F.2d at 1312 (internal quotation omitted). However, "[t]he court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Id*. Rule 33 motions "based on weight of the evidence are not favored. Courts are to grant them sparingly and with caution, doing so only in those really 'exceptional cases.'" *Id*.[1] (quoting *Lincoln*, 630 F.2d at 1319). Indeed, the Eleventh Circuit scrutinizes more closely the grant of a new trial based on the weight of the evidence in order "to assure that the judge does not simply substitute his [or her] judgment for that of the jury." *United States v. Hernandez*, 433 F.3d 1328, 1336 (11th Cir. 2005) (internal quotations omitted). Thus, defendants face a "high burden in demonstrating that a new trial is warranted." *United States v. Spellissy*, 346 F. App'x 446, 451 (11th Cir. 2009).

III. FACTUAL BACKGROUND

During the trial, more than 650 exhibits were admitted and over 50 witnesses testified. The evidence demonstrated[2] that for a number of years prior to 2008, Defendant served as the CEO of

[1] "[C]ourts have granted new trial motions based on weight of the evidence only where the credibility of the government's witnesses had been so impeached and the government's case had been marked by uncertainties and discrepancies." *Martinez*, F.2d at 1313 (citing *Simms*, 508 F. Supp. at 1204-08; *United States v. Hurley*, 281 F. Supp. 443, 449 (D. Conn. 1968)).

[2] The Government's opposition, at pages 4-26, provides a comprehensive summary of the highlights of the evidence presented in the trial. *See* Dkt. 306.

Birmingham Health Care ("BHC") and Central Alabama Comprehensive Health ("CACH")—medical facilities that received grants from the Health Resources & Services Administration ("HRSA") division of the United States Department of Health and Human Services ("HHS"). BHC and CACH were non-profit organizations designed to provide medical care to the homeless and indigent populations. During Defendant's tenure as CEO, federal grant funding increased and BHC opened more clinic locations. In August 2006, Defendant formed the first of many for-profit companies, collectively referred to as the "Synergy Entities." Some of the Synergy Entities provided consulting and billing services to BHC and CACH, while others served as real estate holding companies. The first of the Synergy Real Estate Holding companies was incorporated in 2007.

Through voluminous exhibits and many witnesses, the Government established that by means of a series of consulting, real estate, and other contractual agreements between the federally-funded non-profits and Defendant's Synergy Entities, Defendant defrauded BHC and CACH of money and property. Defendant did so by, *inter alia*, maintaining his control and influence over the non-profits, directing the activities of their respective CEOs and employees—even after his departure from BHC and CACH in 2008.[3] Indeed, the banks with whom Defendant contracted for the various real estate transactions labored under the belief that Defendant was the CEO of BHC long after he had vacated that role. Defendant's for-profit companies had no significant source of income other than that provided by BHC and CACH. Years later, when BHC and CACH were in dire financial straits and struggling to pay their bills, employees were repeatedly told to pay

[3] Most significantly, the record reflects that Defendant assured that Jimmy Lacey and Alan Yoe would succeed him as CEO of BHC and CACH, respectively. Board members testified that they believed others to have been more qualified for the positions. Similarly, Defendant employed at the Synergy Entities BHC's grant writer, Sharon Waltz, and head of finance, Terri Mollica, each of whom continued to control and direct the activities of BHC employees while employed by the Synergy Entities.

Defendant first. BHC was driven to the brink of bankruptcy. CACH was defunded by HRSA in 2013 and was ultimately dissolved.

The evidence also established that in his role as Board Chairman, Defendant fraudulently manipulated the activities of Birmingham Financial Federal Credit Union ("BFFCU"), a federally-insured financial institution chartered in the 1950's to serve the employees of BHC and the Birmingham Housing Authority. In 2011, the National Credit Union Administration ("NCUA") determined that BFFCU was insolvent and had no prospect for restoring viable operations on its own. Thus, NCUA liquidated and discontinued the operations of BFFCU. The Government admitted multiple communications between Defendant, BHC employees, and Synergy employees regarding BFFCU, and, specifically, the NCUA investigation.

Finally, the evidence established that Defendant (and others) provided misleading—and at times false—information to HRSA regarding the relationship between BHC, CACH, and the Synergy Entities.[4]

Defendant had presented a "good faith" defense.[5] The jury was instructed that for those many charges that required intent to defraud, it was the Government's burden to prove this intent beyond a reasonable doubt (Court's Jury Instruction 11). It was Defendant's position that he was operating legitimate for-profit businesses for lawful purposes, and that he acted in good faith in his transactions with BHC and CACH, and in transacting business with BFFCU (Court's Jury Instruction 13). Defendant also maintained that some of his actions were done in reliance upon the advice of counsel (Court's Jury Instruction 12).

[4] Most significantly, the evidence demonstrated that Defendant (and others at Defendant's direction) withheld requested check registers; blacked out requested information in contracts between the Synergy Entities and the non-profits; and submitted a different set of BHC Board meeting minutes for the meeting in which the Board agreed to sell Defendant the Plaza property.

[5] Defendant did not testify.

IV. THERE IS SUFFICIENT EVIDENCE TO SUSTAIN DEFENDANT'S CONVICTIONS

Defendant, in his motion, contends that the record does not contain sufficient proof to sustain his convictions. Dkt. 303 at 3. According to Defendant, the Government failed to identify any material misrepresentations that provided a basis for the fraud charges, and thus failed to present sufficient evidence that Defendant committed—or conspired to commit—money laundering and theft. *Id.* Ultimately, Defendant asserts, the Government did not prove why the funds paid by BHC and CACH to Defendant violated the law as opposed to being merely "unseemly" or "distasteful." *Id.* at 3-4. The Government, in its opposition, contends that Defendant's motion "avoids viewing the record as a whole." Dkt. 306 at 30. According to the Government, Defendant employs an improper "cherry-picking" approach to the evidence; and does not explain (or even include in his motion) in what way the Government failed to sufficiently prove the elements of the substantive charges (wire fraud, bank fraud, money laundering, and conspiracy). *See id.* at 31. Moreover, the Government asserts, Defendant does not apply the Eleventh Circuit's deferential standards. *Id.* at 2-3, 32. Thus, the Government argues, Defendant has failed to meet his high burden in demonstrating that a judgment of acquittal or a new trial is warranted. *Id.* at 2-3, 32. Finally, the Government asserts, many of Defendant's claims are based on a given witness's lack of credibility, which is squarely within the province of the jury.[6] *Id.*

A. Wire Fraud—Counts 1-3, 5-7, 9-41, 43-49, 51-54, 56-60, 62-64, 66-69 (18 U.S.C. §§ 1343, 2)

Wire fraud requires proof that a defendant "knowingly devised or participated in a scheme to defraud someone or obtained money or property using false or fraudulent pretenses, representations, or promises; [] intended to defraud someone[;]" and used wire communications to

[6] It is notable that the jury exercised great care in rendering its verdict, as can be seen from its selective findings of guilt.

further the fraudulent scheme. *United States v. Derosa*, 544 F. App'x 830, 834 (11th Cir. 2013) (citing *United States v. Brown*, 665 F.3d 1239, 1246 (11th Cir.2011)); *United States v. Jennings*, 599 F.3d 1241, 1250 (11th Cir. 2010). "A scheme to defraud requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property." *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009) (citing *United States v. Svete*, 556 F.3d 1157, 1161, 1169 (11th Cir.2009) (en banc)). A misrepresentation is material if it has "a natural tendency to influence, or capable of influencing, the decision maker to whom it is addressed," and "must be one on which an ordinary person would rely." *United States v. Hasson*, 333 F.3d 1264, 1271 (11th Cir. 2003). The "intent to defraud may be found when the defendant believed that he could deceive the person to whom he made the material misrepresentation out of money or property of some value." *Maxwell*, 579 F.3d at 1299 (internal quotation omitted). Intent to defraud may be proved by circumstantial evidence, and "a jury may infer an intent to defraud from the defendant's conduct [or e]vidence that a defendant personally profited from a fraud[.]" *United States v. Forehand*, 577 F. App'x 942, 945 (11th Cir. 2014) (internal quotation omitted).

Here, Defendant references only the Norwood transaction,[7] arguing that the evidence does not sufficiently establish that Defendant "outright stole the funds used to purchase the Norwood property." *See* Dkt. 303 at 15-19. Specifically, Defendant asserts, BHC's financial statements

[7] Defendant, in a two-page supplemental filing, contends that the Eleventh Circuit's recent decision in *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), creates a "previously unrecognized" distinction between "'schemes to defraud' and 'schemes to do other wicked things, *e.g.*, schemes to lie, trick or otherwise deceive.'" Dkt. 305 at 1 (quoting *id*. at 1310). According to Defendant, *Takhalov* provides a new framework by which this Court should consider Defendant's fraud convictions. Dkt. 305 at 1. Defendant does not explain however, how or why *Takhalov* is applicable to his own convictions. *See generally id*. In any event, the Government, in its opposition, is correct that *Takhalov* applies existing fraud jurisprudence, and is, fundamentally, about the district court's refusal to give a jury instruction that accurately stated what constituted a material misrepresentation. Dkt. 306 at 28. In the instant case, Defendant has made no such argument. *See* Dkts. 303, 305. Moreover, Defendant presented—and the Court instructed the jury regarding—a good faith defense. *See* Court's Jury Instructions 11-13. The Court additionally instructed the jury on what constitutes a material misrepresentation. *See* Court's Jury Instruction 18.

admitted through defense witness Jeff White, an auditor, "contain[] the receivables documenting the supposed 'stolen' funds'" used to purchase the Norwood property. *Id*. at 16. These statements, Defendant maintains, demonstrate that BHC knowingly (and willingly) provided Defendant a bridge loan so that one of Defendant's Synergy Entities could purchase the Norwood property. *Id*. at 16 (citing Def. Ex. 584, 585). Defendant maintains that one of his Synergy companies later paid BHC back a portion of this loan—ostensibly the amount equaling the Norwood purchase price minus the amount BHC owed Defendant for services he had previously rendered. *See id*. at 16-18. Thus, Defendant argues, BHC's post-loan rent payments on the Norwood property were legitimately owed to Synergy and were not procured by any fraudulent conduct. *See id*.

The evidence at trial demonstrated that in late 2009, Defendant's Synergy Real Estate Holdings II ("SREH II") contracted with the seller of the Norwood building, and applied for bank financing from Wachovia (Wells Fargo). Shortly thereafter, Wachovia emailed Defendant that the bank could not close by the end of the calendar year. Defendant forwarded that email to Terri Mollica, who, though employed by Synergy, still controlled BHC's finances. Shortly after that, three wire transfers from BHC bank accounts totaling $1.1 million were used by SREH II to purchase the Norwood building. BHC Board members testified that they had no knowledge that BHC's funds had been used to purchase the Norwood property for SREH II. Despite BHC's funds having been used for the purchase, Defendant charged BHC rent for its use of the Norwood building. Further, when Defendant applied for an $810,000 mortgage in March 2010 and a $300,000 loan in June 2010 from Wachovia, he (continued to) represent that SREH II—and not BHC—was the owner of the Norwood building. Defendant never returned to BHC the $1.1 million; instead, he deposited the money from the re-finance into BFFCU, labeling it as his own. Had the transfer of funds actually been a loan to SREH II to purchase the Norwood building, the

Government argued to the jury, there would have been a record of it, Board members would have known of it, and Defendant would have eventually paid back the loan.[8]

In his motion, Defendant does not explain why this evidence is insufficient, especially when viewed in the light most favorable to the Government. *See* Dkt. 303 at 15-19. Instead, Defendant focuses on what the Government "ignored" at trial; but what the Government "ignored," Defendant presented to the jury. "The jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial, and the court must accept all reasonable inferences and credibility determinations made by the jury." *Molina*, 443 F.3d at 828 (quoting *Sellers*, 871 F.2d at 1021 (11th Cir. 1989). Viewing this evidence in the light most favorable to the Government and accepting all reasonable inferences that tend to support the Government's case, there is sufficient evidence to sustain Defendant's wire fraud convictions. *See e.g.*, *United States v. Gutierrez-Acanda*, 628 F. App'x 642, 648 (11th Cir. 2015); *United States v. Forehand*, 577 F. App'x 942, 945 (11th Cir. 2014).

B. Bank Fraud—Counts 70-71 (18 U.S.C. §§ 1344, 2)

Bank fraud requires proof that "(1) a scheme existed to obtain money in the custody of a federally insured bank by fraud; (2) the defendant participated in the scheme by means of material false pretenses, representations or promises; and (3) the defendant acted knowingly." *United States v. Gutierrez-Acanda*, 628 F. App'x 642, 644 (11th Cir. 2015) (citing *United States v. McCarrick*, 294 F.3d 1286, 1290 (11th Cir. 2002). A defendant's knowledge may be proved by circumstantial evidence. *United States v. Williams*, 390 F.3d 1319, 1325 (11th Cir. 2004).

[8] Defendant, sometime after having purchased the Norwood property, returned $500,000 to BHC. However, this return was not documented as a repayment of a loan, nor did the BHC Board members know that this money had been transferred. Further, Defendant does not, in his motion, maintain that this transfer was done in connection with the Norwood purchase. *See* Dkt. 303 at 15-19.

Here, Defendant contends that the evidence does not sufficiently establish that the transfer of funds from BHC to BFFCU for Defendant was fraudulent or done without regard for BHC's solvency, as charged in Count 70. Dkt. 303 at 31-32. Defendant maintains that BHC did, in fact, legitimately owe Defendant money. *Id*. at 32-33. Further, Defendant asserts, the Government was unsuccessful in challenging defense witness Les Alexander and Defense Exhibit 15. *Id*. at 32-33.

The evidence at trial demonstrated that Defendant told Sheila Parker, Raiford Dyer, and other accountants that BHC owed him money. Defendant argued to the jury that Defense Exhibit 15 showed the debt owed from BHC to Defendant. Parker testified, however, that Defendant repeatedly maintained that any debt owed to him by BHC was significantly higher than any amount she had calculated. Moreover, Parker testified, none of the money transferred from BHC to Defendant via BFFCU was actually used to pay off any supposed loan from Defendant to BHC. Over one million dollars of BHC's revenue was diverted from BHC's account at various banks and instead placed on deposit with BFFCU. Defendant used this money to pay himself, the Synergy Entities, and third parties—all to the financial detriment of BHC, which was driven to the brink of bankruptcy.

The Government presented evidence that Defendant used the BFFCU—a nonprofit cooperative—and, specifically, funds designated for BHC, as his own personal bank account. As one example of this, the Government established that Defendant—without filling out an application, having a credit check run, or receiving BFFCU Board approval—used $85,000 on deposit with BFFCU to purchase a Jaguar (Count 71). After having done so, Parker testified, Defendant called Parker, and Parker wrote a corresponding loan application after the fact. Further, Parker testified, the Jaguar payments were made with BHC money. Specifically, the Government demonstrated, when BHC funds were diverted from its accounts at various banks into BFFCU,

these funds were transferred to Defendant's personal account at BFFCU. Parker had written on the Jaguar loan payment checks that Defendant had directed them. When NCUA's attention was later turned towards BFFCU, NCUA noted this loan as an example of preferential treatment because BFFCU's established policy limited its members to auto loans in an amount not to exceed $50,000. Shortly thereafter, Lacey, the CEO of BHC and an officer at the credit union, emailed Defendant stating that the two of them needed to talk about NCUA's note. Shortly after that, Lacey produced documentation purportedly justifying the increase in BFFCU's auto loan policy.

In his motion, Defendant does not explain why this evidence is insufficient, especially when viewed in the light most favorable to the Government. For example, he does not explain why it was unreasonable for the jury to conclude Lacey documented a "change" in BFFCU policy well after the fact in hopes of deceiving NCUA. Viewing this evidence in the light most favorable to the Government and accepting all reasonable inferences that tend to support the Government's case, there is sufficient evidence to sustain Defendant's bank fraud convictions. *See, e.g.*, *United States v. Gutierrez-Acanda*, 628 F. App'x 642 (11th Cir. 2015); *United States v. Williams*, 390 F.3d 1319 (11th Cir. 2004).

C. Money Laundering—Counts 73-78, 79-97, 100, 105-107, 109-112 (18 U.S.C. §§ 1956, 57)

Money laundering in violation of § 1956(a)(1)(A)(i) requires proof that the defendant "(1) engaged in a financial transaction, (2) which he knew involved funds that were the proceeds of some form of unlawful activity, (3) where the funds involved in the financial transaction in fact were the proceeds of a specified unlawful activity, and (4) that the defendant engaged in the financial transaction with the intent to promote the carrying on of the specified unlawful activity." *United States v. Molina*, 413 F. App'x 210, 212 (11th Cir. 2011). Money laundering in violation of § 1956(a)(1)(B)(i) requires proof of the first three elements listed in (A), substituting the fourth

element for proof that "the defendant engaged in the financial transaction knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of such unlawful activity." *Id.* at 212-13 (quoting *United States v. Tarkoff*, 242 F.3d 991, 994 (11th Cir. 2001). These "promotion and concealment prongs are simply two different means by which the requisite *mens rea* for the single offense of money laundering may be proven." *United States v. Felts*, 579 F.3d 1341, 1344 (11th Cir. 2009).

Money laundering in violation of § 1957 requires proof that "(1) the defendant knowingly engage[d] or attempt[ed] to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000, and (2) the property is derived from specified unlawful activity." *United States v. Forehand*, 577 F. App'x 942, 947 (11th Cir. 2014) (internal quotation omitted).

Here, Defendant maintains that these counts share a "common bond: they were all premised on the concept that the funds in question were the proceeds of specified unlawful activity" substantively charged in the wire and bank fraud counts. Dkt. 303 at 35. Thus, Defendant argues, these convictions "cannot stand." *Id.* (quoting *United States v. Ward*, 197 F.3d 1076, 1080, 1082 (11th Cir. 1999) ("observing that money laundering conviction is 'viable' only where there is sufficient evidence to support [the] substantive count comprising 'specified unlawful activity upon which the money laundering is premised'").

Defendant, in his motion, dedicates a mere paragraph to these counts. *See* Dkt. 303 at 34-35. For the reasons highlighted in the Government's opposition at pages 10-19 and 21-25, when viewing the evidence in the light most favorable to the Government, there is sufficient evidence to sustain Defendant's money laundering convictions. *See, e.g.*, *United States v. Forehand*, 577 F. App'x 942, 947 (11th Cir. 2014); *United States v. Molina*, 413 F. App'x 210, 212 (11th Cir. 2011). Defendant does not explain why the money laundering charges are substantively the same as the

wire and bank fraud charges. Accordingly, he has not met the demanding burden required by Rule 29(c) and Rule 33. *See, e.g., United States v. Cross*, 258 F. App'x 259, 261 (11th Cir. 2007); *United States v. Spellissy*, 346 F. App'x. 446, 451 (11th Cir. 2009); *United States v. Martinez,* 763 F.2d 1297, 1313 (11th Cir. 1985).

D. Conspiracy—Count 4 (18 U.S.C. §§ 1371, 666(a)(1)(A))

"Conspiracy demands proof of: (1) an agreement to achieve an unlawful objective; (2) knowing and voluntary participation in the agreement; and (3) an act in furtherance of the agreement." *United States v. Jennings*, 599 F.3d 1241, 1250–51 (11th Cir. 2010) (alterations and internal quotation omitted). The Government need not prove the existence of a "formal" agreement, nor even provide evidence of the co-conspirator's name. *United States v. Enrico*, 643 F. App'x 873, 876 (11th Cir. 2016) (citing *United States v. Vernon,* 723 F.3d 1234, 1273 (11th Cir.2013); *United States v. Rodriguez,* 765 F.2d 1546, 1552 (11th Cir.1985)). Instead, the Government satisfies its burden by "showing the second person exists and there was a meeting of the minds to commit an unlawful act." *Enrico*, 643 F. App'x at 876 (citing *Vernon,* 723 F.3d at 1273–74; *Rodriguez,* 765 F.2d at 1551).

Here, Defendant maintains that the evidence does not sufficiently establish that Defendant conspired with anyone to try to accomplish a shared and unlawful plan. Dkt. 303 at 39. Specifically, Defendant asserts, there is insufficient proof regarding a plan between Defendant and any of the following people: Jimmy Lacey; Sharon Waltz; Terri Mollica; Sheila Parker; and Donyatta Foster. *Id*. at 39-48. Given that the Government need only prove a meeting of the minds with one (even unnamed) person, by way of example, the Court examines only Defendant's

contentions regarding Sheila Parker.[9] According to Defendant, the "gap" in the Government's evidence of a conspiratorial relationship is "glaring." Dkt. 303 at 47. Specifically, Defendant asserts, Parker testified that she and Defendant did not have an "agreement to commit crimes." *Id*. Additionally, Defendant maintains, Parker is not a credible witness both because she and her son participated in a separate, fraudulent scheme, having stolen over $116,000 from CACH; and because the FBI threatened her into cooperating. *Id*. at 44.

In his motion, Defendant does not satisfy the Eleventh Circuit's standards for either Rule 29(c) or Rule 33 to his arguments. *See* Dkt. 303 at 39-48. He does not demonstrate why this evidence is insufficient, especially when accepting all credibility determinations made by the jury and considered in the light most favorable to the Government, *see id*.; *United States v. Molina*, 443 F.3d 824, 828 (11th Cir.2006); *United States v. Cross*, 258 F. App'x 259, 261 (11th Cir. 2007); or why sustaining the conspiracy conviction is a miscarriage of justice, *United States v. Hernandez*, 433 F.3d 1328, 1335 (11th Cir. 2005). In any event, the evidence demonstrated, for example, that Parker signed checks from BHC to Defendant for mortgage payments on the "2030 building"—a property that, because of its dilapidated condition, BHC never used, but for which BHC was listed as a guarantor; and that Parker handled the checks and paperwork surrounding the Jaguar that was the subject of Count 71. Viewing this and the other evidence presented at trial concerning Parker in the light most favorable to the Government, and allowing for the jury's proper role in assessing the credibility of a witness, there is sufficient evidence to sustain Defendant's conspiracy

[9] For the reasons articulated *supra*, and in the Government's brief at pages 8-23, the Court finds that there is sufficient evidence to sustain a conviction of conspiracy premised on shared plan between Defendant and all of those individuals, respectively, named in his motion. *See* Dkt. 306.

conviction.[10] *See, e.g.*, *United States v. Williams*, 527 F.3d 1235 (2008). Accordingly, Defendant's motion is denied.

V. CONCLUSION

NOW, THEREFORE, it is HEREBY ORDERED that Defendant's Motion for Judgment of Acquittal, or, in the Alternative, For New Trial is DENIED.

IT IS SO ORDERED.

DATED this 11th day of January, 2017.

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

[10] Defendant, in his motion, at times "points to evidence that is arguably contrary to a finding of guilt[; but] there is also a reasonable construction of the evidence that would have allowed the jury to find the defendant guilty beyond a reasonable doubt." *United States v. Derosa*, 544 F. App'x 830, 834 (11th Cir. 2013) (internal quotation omitted). "The issue is not whether a jury reasonably could have acquitted but whether it reasonably could have found guilt beyond a reasonable doubt." *United States v. Williams*, 527 F.3d 1235, 1244 (11th Cir. 2008). It is squarely within the province of the jury to determine credibility and accept one hypothesis over another. *See, e.g.*, *United States v. Leflore*, 2016 WL 3522164, *5 (11th Cir. June 28, 2016). Here, the evidence is not such "that the jury had to speculate to reach its conclusion." *Derosa*, 544 F. App'x at 834.