NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEROY BACA, Defendant-Appellant.	No. 17-50192 D.C. No. 2:16-cr-00066-PA MEMORANDUM* (Filed Feb. 11, 2019)

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted November 6, 2018
Pasadena, California

Before: RAWLINSON and HURWITZ, Circuit Judges, and BOUGH,** District Judge.

Leroy Baca appeals from the district court's judgment and challenges his jury-trial convictions for conspiracy, in violation of 18 U.S.C. § 371; obstruction of justice, in violation of 18 U.S.C. § 1503(a); and making a false statement, in violation of 18 U.S.C. § 1001(a)(2).

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. In his case in chief, Baca sought to introduce expert testimony by Dr. James Spar, M.D., regarding Baca's Alzheimer's diagnosis. We review a district court's decision to exclude expert testimony under Federal Rules of Evidence 403 and 702 for abuse of discretion. *See United States v. Spangler*, 810 F.3d 702, 706 (9th Cir. 2016); *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000). The district court did not abuse its discretion in rejecting Dr. Spar's testimony as unreliable given his speculation about whether Baca suffered from cognitive impairments when making his false statements, and, if so, how those impairments affected his answers. The district court also did not abuse its discretion in excluding this testimony under Rule 403 given its probative value in relation to the risk of jury confusion. Nor did exclusion of this evidence deny Baca his constitutional right to present a defense. *See United States v. Waters*, 627 F.3d 345, 354-55 (9th Cir. 2010).

2. At trial, Baca sought to elicit testimony that after Assistant Sheriff Rhambo warned Baca not to interfere with the federal investigation, Baca responded by stating that federal authorities had broken the law. The district court excluded this testimony as hearsay. On appeal, Baca argues this statement was either not hearsay or subject to the state-of-mind exception to the hearsay rule. Because Baca failed to raise either argument before the district court, we review for plain error. *See United States v. Chang*, 207 F.3d 1169, 1176

(9th Cir. 2000). Even assuming arguendo that the district court erred in excluding this testimony, Baca has failed to demonstrate that any error affected his substantial rights. *See*, *e.g.*, *United States v. Aighazouli*, 517 F.3d 1179, 1190 (9th Cir. 2008). Baca introduced evidence of similar instances where he told others that he believed federal authorities had broken the law during their investigation. He was therefore able to argue to the jury in closing that it was this belief, and not an intent to obstruct justice, which motivated his actions. Accordingly, we find no plain error.

3. Baca also argues that the district court erred in empaneling an anonymous jury. We review for abuse of discretion, *see United States v. Shryock*, 342 F.3d 948, 970-71 (9th Cir. 2003), and find none. The district court's decision to empanel an anonymous jury was reasonable in light of the highly publicized nature of this case, Baca's and his co-conspirator's positions as former high-ranking law enforcement officers, and the nature of the charges at issue. *See id.* at 971 (setting forth factors considered in deciding whether to empanel an anonymous jury). Additionally, the district court minimized any risk of prejudice to Baca by instructing the jury that an anonymous jury was utilized to protect the jurors' privacy and was unrelated to Baca's guilt or innocence. *See id.* (requiring the district court to adopt "reasonable safeguards" to minimize the risk that the defendant's rights are infringed).

4. Baca next contends that the district court erred in denying his motion to dismiss the indictment on double jeopardy grounds after the mistrial in Baca's

first trial. The district court declared a mistrial after the jury reported (and reaffirmed in open court) that it was unable to reach a verdict and there was not a reasonable probability that further deliberations would be productive. We review a district court's determination that there was manifest necessity to declare a mistrial for abuse of discretion. *United States v. Chapman*, 524 F.3d 1073, 1082 (9th Cir. 2008). Given the jury's assessment and the length of the deliberations, the district court did not abuse its discretion in declaring the mistrial. *See United States v. Hernandez-Guardado*, 228 F.3d 1017, 1028 (9th Cir. 2000) (setting forth factors a district court should consider in determining whether to declare a mistrial because of jury deadlock, and noting the "most critical factor" is the "jury's own statement that it is unable to reach a verdict").[1] Because the district court did not abuse its discretion in finding manifest necessity for a mistrial in Baca's first trial, the Double Jeopardy Clause did not bar his retrial. *See*, *e.g.*, *United States v. Alvarez-Moreno*, 657 F.3d 896, 900 (9th Cir. 2011).

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[11] [sic] Baca requests that we adopt a rule requiring a district court to give a potentially deadlocked jury an *Allen* charge when the defendant requests it and the charge would not be *per se* coercive under this Court's precedent. *See Allen v. United States*, 164 U.S. 492 (18960 [sic]. We decline to do so. As we have recognized, "[e]xtraordinary caution must be exercised when acting to break jury deadlock," and this is particularly the case with *Allen* charges. *United States v. Evanston*, 651 F.3d 1080, 1085 (9th Cir. 2011). The decision on whether to give an *Allen* charge is left properly to the discretion of the district court. *See*, *e.g., United States v. See*, 505 F.2d 845, 854 (9th Cir. 1974).

5. Baca also challenges the district court's jury instructions regarding the government's cooperating witnesses. We find no error. *See United States v. Ubaldo*, 859 F.3d 690, 700 (9th Cir. 2017) (a district court's formulation of jury instructions are reviewed for abuse of discretion). The district court properly instructed the jury that the cooperating witnesses were seeking leniency at sentencing and that the testimony of these witnesses' [sic] should be evaluated with greater caution than that of others. The district court's further instruction regarding the district court's exclusive authority to determine the cooperating witnesses' sentences independent of the government's recommendation was not misleading.

6. Baca next argues that the district court improperly instructed the jury regarding the obstruction of justice count's mens rea requirement. We disagree. The district court properly instructed the jury that in order to convict Baca for obstruction of justice, the government had to prove beyond a reasonable doubt that Baca acted "corruptly," meaning that he knew of the federal grand jury investigation and acted with an intent to obstruct it. *See United States v. Rasheed*, 663 F.2d 843, 852 (9th Cir. 1981) ("We hold that the word 'corruptly' as used in the statute means that the act must be done with the purpose of obstructing justice."). The Supreme Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), did not require the government to prove that Baca acted with a consciousness of wrongdoing or that his conduct was

wrongful, immoral, depraved, or evil. *See United States v. Watters*, 717 F.3d 733, 735-36 (9th Cir. 2013).

7. Baca argues that the prosecutor engaged in misconduct during his rebuttal argument. We find no basis for reversing. Contrary to Baca's contention, the government did not argue that the cooperating witnesses' guilty verdicts could be used as evidence of Baca's guilt. Further, the district court negated any unfair inference created by the government's references to the guilty verdicts in the jury instructions. *See*, *e.g.*, *Deck v. Jenkins*, 814 F.3d 954, 979 (9th Cir. 2014) ("[A] jury is presumed to follow the trial court's instructions."). Finally, although we do not condone the government's decision to reference Baca's counsel by name and accuse him personally of distorting the evidence or attempting to mislead the jury, we conclude that this line of argument did not materially affect the verdict. *See*, *e.g.*, *United States v. Taylor*, 641 F.3d 1110, 1120 (9th Cir. 2011).[2]

8. Finally, sufficient evidence supported Baca's convictions. First, the government was not required to introduce evidence that Baca engaged in bribery to satisfy the "corruptly" element of 18 U.S.C. § 1503(a). Rather, "the word 'corruptly' as used in the statute means the act must be done with the purpose of obstructing justice." *Rasheed*, 663 F.2d at 852. The government introduced sufficient evidence from which a jury could

[2] To the extent the Defendant argues the district court erred in how it handled the parties' objections during closing argument, we find no abuse of discretion. *See United States v. Etsitty*, 130 F.3d 420, 424 (9th Cir. 1997) (per curiam).

conclude that Baca acted with this requisite intent. Second, as to the false statement count, the government introduced sufficient evidence from which the jury could conclude that Baca made his false statements in a "matter within the jurisdiction" of the executive branch. 18 U.S.C. § 1001(a); *see also United States v. Rodgers*, 466 U.S. 475, 479-83 (1984).

AFFIRMED.

***U.S.A. v. Baca*, Case No. 17-50192**
Rawlinson, Circuit Judge, concurring in the result:

I concur in the result.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. LEROY BACA, Defendant.	Case No. CR16-66(A) PA FINDINGS RE USE OF ANONYMOUS JURY (Filed Mar. 26, 2017)

The Court finds that it is appropriate to empanel an anonymous jury in the above-entitled matter for the following reasons:

1. Defendant Leroy Baca ("defendant"), the former Sheriff of the Los Angeles County Sheriff's Department ("LASD"), is alleged to have engaged in an organized criminal conspiracy in which defendant had the ultimate power and decision-making authority.

2. The conspiracy involved multiple high-ranking law enforcement officers. Based on his former position of authority, defendant is extremely likely to have present connections to law-enforcement officers with the ability to access jurors' private information. Jurors have expressed apprehension [sic] the ability of defendant's co-conspirators' ability to access their private information and safety concerns in two factually and legally related criminal trials before this Court.

3. In this case, Defendant is alleged to have interfered with the judicial process and witnesses by

hiding a federal informant, disobeying a federal writ for testimony, tampering with witnesses, and intimidating federal officers. While Mr. Baca is presumed innocent of these charges, others associated with Mr. Baca have been found guilty beyond a reasonable doubt by three separate juries of interfering with the judicial process.

4. Defendant, if convicted, may suffer a lengthy period of incarceration of up to ten years' imprisonment for obstruction of justice and five years' imprisonment for conspiring to do so and for making false statements to governmental agencies 18 U.S.C. § 1503(b)(3); 18 U.S.C. § 371; 18 U.S.C. § 1001. Others proven guilty of the conspiracy have been sentenced to terms of imprisonment of up to 60 months.

5. This case has already attracted publicity and the Court expects it will be followed by the media, thereby enhancing the possibility that jurors' names would become public. Such exposure could lead to potential intimidation and harassment, as well as interference with the judicial process.

6. This procedure will also protect the defendant and allow him to receive a fair trial and protect the integrity of the judicial process. In addition, an anonymous jury will ensure that the jurors are not exposed to the litigation history of the case.

7. Instructing the jury at the beginning of jury selection and at the beginning of trial that an anonymous jury procedure is commonplace and is being utilized in order to protect juror privacy, to ensure that

the parties receive a fair trial, and that the reasons for juror anonymity have nothing to do with the guilt or innocence of the defendant, will safeguard against any potential prejudice that might otherwise result from the use of an anonymous jury procedure.

DATED: March 26, 2017

/s/ Percy Anderson
Percy Anderson
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. LEROY BACA, Defendant.	No. CR 16-66 PA JURY INSTRUCTIONS (Filed Mar. 13, 2017)

* * *

You have heard evidence and argument regarding the federal government's investigation of allegations of abuse and corruption by the Los Angeles County Sheriff's Department ("LASD"), including its use of an informant and an undercover operation. Law enforcement officials may engage in stealth and deception, such as the use of informants and undercover agents, in order to investigate criminal activities. Undercover agents and informants may use false names and appearances and assume the roles of members in criminal organizations.

Local law enforcement departments, including the LASD, do not have authority to direct or control federal investigations, including those by the FBI, the U.S. Attorney's Office, or a federal grand jury. In order to investigate crime, federal law enforcement agencies are entitled to choose their own tactics and strategies, conduct their own evaluations of risks, assign their own

personnel, and make their own decisions regarding whether to inform others, including targets, that an investigation is underway.

When an undercover investigation involves the use of informants and undercover agents, neither the law enforcement officers conducting the operation nor the informants assisting in the investigation become co-conspirators with the target of the undercover activity.

It is not for you to decide whether or how the federal government should have conducted its investigation. Your duty is to decide whether the government has proved beyond a reasonable doubt that the defendant committed the crimes charged in the indictment.

A local officer has the authority to investigate potential violations of state law. This includes the authority to investigate potential violations of state law by federal agents. A local officer, however, may not use this authority to engage in what ordinarily might be normal law enforcement practices, such as interviewing witnesses, attempting to interview witnesses or moving inmates, for the purpose of obstructing justice.

* * *

The defendant is charged in Count One of the indictment with conspiring to obstruct justice, in violation of Section 371 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, beginning on or about August 18, 2011, and ending on or about September 26, 2011, there was an agreement between two or more persons to commit the crime of obstruction of justice;

Second, the defendant became a member of the conspiracy knowing its objects and intending to help accomplish it; and

Third, one of the members of the conspiracy performed at least one overt act for the purpose of carrying out the conspiracy.

A conspiracy is a kind of criminal partnership – an agreement of two or more persons to commit one or more crimes. The crime of conspiracy is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit the crime of obstruction of justice as alleged in the indictment.

One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is

as responsible for it as the originators. On the other hand, one who has no knowledge of a conspiracy, but happens to act in a way which furthers the object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing that a conspiracy exists.

An overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. The government is not required to prove that the defendant personally did one of the overt acts.

The defendant is charged in Count Two of the indictment with obstruction of justice in violation of Section 1503 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant influenced, obstructed, or impeded, or tried to influence, obstruct, or impede a federal grand jury investigation; and

Second, the defendant acted corruptly, meaning the defendant had knowledge of the federal grand jury investigation and intended to obstruct justice.

The government does not need to prove that actual obstruction of the pending grand jury investigation occurred, so long as you find that the defendant acted with the purpose of obstructing the pending grand jury

investigation, and he knew that his actions had the natural and probable effect of interfering with the pending grand jury investigation, and the government proves the elements of the offense beyond a reasonable doubt.

For the conspiracy charge in Count One and the obstruction of justice charge in Count Two, the government need not prove that the defendant's sole or even primary intention was to obstruct justice so long as the government proves beyond a reasonable doubt that one of the defendant's intentions was to obstruct justice. The defendant's intention to obstruct justice must be substantial.

The government may establish the FBI was acting as an arm of the grand jury by showing the FBI agents: (1) undertook the investigation to supply information to the grand jury in direct support of a grand jury investigation; (2) were integrally involved in the investigation; and (3) undertook the investigation with the intention of presenting evidence before the grand jury.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEROY BACA, Defendant-Appellant.	No. 17-50192 D.C. No. 2:16-cr-00066-PA-1 Central District of California, Los Angeles ORDER (Filed Apr. 19, 2019)

Before: RAWLINSON and HURWITZ, Circuit Judges, and BOUGH,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Rawlinson and Judge Hurwitz vote to deny the petition for rehearing en banc, and Judge Bough so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Baca's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 95) are denied.

* The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.