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UNITED STATES V. BECKHAM,
917 F.3D 1059 (8TH CIR. 2019)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK A. BECKHAM,

Defendant-Appellant.

No. 18-1406

Appeal from United States District Court
for the Eastern District of Missouri–St. Louis

Before: GRUENDER, WOLLMAN, and
SHEPHERD, Circuit Judges.

SHEPHERD, Circuit Judge.

Mark Beckham appeals his conviction for corruptly endeavoring to obstruct and impede the due administration of the internal revenue laws in violation of 26 U.S.C. § 7212(a). Beckham argues that the jury instructions were erroneous, that the district court[1] erroneously admitted evidence and expert testimony, and that the district court should have granted his motion

[1] The Honorable Ronnie L. White, United States District Judge for the Eastern District of Missouri.

for a mistrial based on improper witness statements. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

I.

In 2009 and 2010, Beckham prepared and filed tax returns for John Horseman, owner of the financial advisory firm JM Horseman Group, LLC. Beckham allegedly induced Horseman to participate in a tax-loss scheme designed to offset Horseman's own taxes. As part of this scheme, Horseman signed subscription agreements giving him $3,300,000 of common stock in Arbor Homes, Inc. and $3,000,000 of equity in SNB Consulting, LLC. Horseman initially paid roughly $80,000 in cash and executed over $6 million in promissory notes pursuant to the subscription agreements. In return, Horseman claimed losses sustained by these businesses on his individual and corporate tax returns. Horseman eventually made around $240,000 in payments on these notes, but made the payments to an entity Beckham controlled rather than to Arbor Homes or SNB Consulting.

Horseman's 2009 and 2010 individual returns claimed "nonpassive" losses from Arbor Homes that totaled $4.3 million. Taxpayers prefer to claim nonpassive losses because they may offset ordinary income, while passive losses may only offset passive income. However, in order to claim nonpassive losses, a taxpayer must have a sufficient economic investment in a business entity, and the taxpayer must also materially participate in the entity's activities. *See* 26 U.S.C. §§ 469(c), 1366(d); 26 C.F.R. § 1.469-5T. Horseman did not work for or otherwise materially participate in Arbor Homes during this time period. In addition, the Horseman Group's 2010 corporate

tax return—also prepared by Beckham—claimed $1.8 million in partnership losses from SNB Consulting. However, this loss exceeded the Horseman Group's basis in SNB Consulting.

In 2011, the IRS began a civil audit of Horseman's 2009 individual tax return, later expanding that audit to include the 2010 individual and corporate returns. Beckham provided the IRS agents assigned to the audit with completed forms authorizing him to act as Horseman's representative, representing that he was a currently-licensed CPA in Missouri. In reality, Beckham was not licensed as a CPA, which would have precluded him from serving as Horseman's representative.

In the course of the audit, IRS Revenue Agent Anthony Grinstead requested information regarding Horseman's participation in Arbor Homes. Agent Grinstead requested this information in order to verify that Horseman met the "material participation" requirement to claim Arbor Homes' losses as nonpassive losses. In response to this request, Beckham provided Agent Grimstead with Horseman's 2009 day planner, which contained falsified entries purportedly showing that Horseman had worked several hundred hours for Arbor Homes during 2009.

The IRS continued to request additional documents, many of which Beckham never provided or admitted did not exist. On July 23, 2012, the IRS discovered Beckham was not a licensed CPA. Beckham told the agents conducting the investigation that his license had lapsed and he was in the process of getting it renewed. In reality, Beckham's license had been revoked in 2008, following a 2006 federal conviction

for mail fraud. *See* Gov't Mot. Determ. Admissibility Evid. 2, Dist. Ct. Dkt. 92.

On April 3, 2013, the IRS discovered that Horseman "did not pay Arbor Homes 3 million dollars . . . [and] had not paid any money on the loan." Evid. Hr'g Tr. 68, Dist. Ct. Dkt. 51. This indicated that the deal between Horseman and Arbor Homes was a sham, and that Horseman had overstated his economic interest in Arbor Homes and had improperly claimed Arbor Homes' losses on his individual tax returns. Suspecting fraud, IRS Revenue Agent John Shake referred the case to IRS criminal investigation. While the initial referral was for criminal investigation of Horseman, the IRS later added Beckham as a target. In June 2013, Beckham admitted to IRS Special Agent Patric Murray that the nonpassive losses Horseman claimed from Arbor Homes were actually passive losses because Horseman was not sufficiently involved in Arbor Homes.

Beckham was charged in a superseding indictment with one count of corruptly endeavoring to obstruct the due administration of the internal revenue laws in violation of 26 U.S.C. § 7212(a) and three counts of willfully assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2). He filed a pretrial motion to suppress all evidence the IRS gathered after July 23, 2012, claiming that after that date the IRS impermissibly conducted a criminal investigation under the guise of a civil audit. The district court denied Beckham's motion.

On June 27, 2017, the Supreme Court granted certiorari in *United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016), *cert. granted* 137 S.Ct. 2327 (2017), to resolve a circuit split over whether § 7212(a) requires

a defendant to know about a pending IRS proceeding when he engages in purportedly obstructive conduct. Beckham filed a motion to stay his trial pending the Supreme Court's decision. The district court denied Beckham's motion, agreeing with the government that the issue could be addressed through the use of a special verdict form that asked the jury whether Beckham committed a corrupt act after becoming aware of the audit and, if so, what that act was. Beckham also filed a motion in limine to exclude the proposed expert testimony of IRS Revenue Agent Sarah Parman regarding Parman's opinion that the losses claimed on Horseman's tax returns were improper. The district court denied that motion as well.

Horseman testified at trial. During his testimony, the prosecution asked Horseman whether he had ever stopped making payments to Beckham pursuant to the subscription agreements. Horseman responded that he eventually stopped making such payments because a tax attorney told him the deal was "fraudulent." Beckham moved for a mistrial based on this statement. The district court denied the motion, but offered to give a curative instruction instead. Beckham declined the offer.

At the instruction conference, Beckham objected to Jury Instruction 9—the instruction on the § 7212(a) offense—because it did not require the jury to find that he knew about the IRS audit at the time that he committed a corrupt act. He also argued that the special verdict form—which directed the jurors, if they found Beckham guilty of that offense, to indicate whether Beckham committed "at least one corrupt act after becoming aware of the existence of an Internal Revenue Service audit or proceeding[,]" *see* Proposed Jury

Instructions 25, Dist. Ct. Dkt. 96, and, if so, to identify which corrupt act they unanimously agreed Beckham committed after learning of the proceeding—did not cure the faulty instruction. Beckham did not, however, specifically object to the language of the special verdict form. The district court overruled his objection.

The jury acquitted Beckham of the three § 7206(2) charges, but found him guilty of violating § 7212(a). On the special verdict form, the jury indicated that it found Beckham committed at least one corrupt act after learning of the audit and that it unanimously agreed Beckham committed the acts alleged in paragraph 10 of the Superseding Indictment—submitting Horseman's day planner to the IRS—after learning of the audit. Beckham filed a motion for judgment of acquittal or, in the alternative, for a new trial, which the district court denied. The district court sentenced Beckham to 36 months imprisonment and Beckham appealed.

II.

Six months after Beckham's trial, the Supreme Court decided *Marinello v. United States*, 138 S.Ct. 1101 (2018). The Court held that, for a § 7212(a) offense, "the Government must show . . . that there is a 'nexus' between the defendant's conduct and a particular administrative proceeding[.]" *Marinello*, 138 S.Ct. at 1109. Further, that proceeding must be "reasonably foreseeable by the defendant" at the time he acted. *Id.* at 1110. Because "[i]t is not enough for the Government to claim that the defendant knew the IRS may catch on to his unlawful scheme eventually[,]" if the proceeding is currently pending, the defendant must be aware of that proceeding. *Id.*

Before *Marinello*, this Court required three elements for a § 7212(a) offense: "(1) in any way corruptly (2) endeavoring (3) to obstruct or impede the due administration of the Internal Revenue Code." *United States v. Williams*, 644 F.2d 696, 699 (8th Cir. 1981), *superseded by statute on other grounds*, Tax Reform Act of 1984, Pub. L. No. 98-369, § 159, 98 Stat. 494, 696, *as recognized in United States v. Brooks*, 174 F.3d 950, 956 (8th Cir. 1999). *Marinello* thus added two elements—a nexus and knowledge of a currently-pending or reasonably foreseeable proceeding—that this Court did not previously require. Beckham argues on appeal that the district court erroneously instructed the jury on the § 7212(a) offense by failing to include these two elements. The government concedes on appeal that, post-*Marinello*, Jury Instruction 9 is erroneous. However, the government contends that the district court cured the instructional error through the use of a special verdict form and that, even if the special verdict form did not cure the error, the error was harmless.

We apply "harmless error analysis . . . to issues of instructional error," including "omitting an element altogether." *United States v. Dvorak*, 617 F.3d 1017, 1024-25 (8th Cir. 2010) (citation omitted). An instructional error is harmless beyond a reasonable doubt if the evidence supporting the jury's verdict is so overwhelming that no rational jury could find otherwise. *Neder v. United States*, 527 U.S. 1, 18-19 (1999) (stating that an error is harmless if "the court can[] conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error"); *see also United States v. Inman*, 558 F.3d 742, 750-51 (8th Cir. 2009) (finding evidence sufficient to support

conviction despite failure to submit an element of the offense to the jury when the government presented uncontroverted testimony on the disputed element). Whether the instructional error here was harmless hinges on whether overwhelming evidence supports finding (1) that there was a nexus—in either time, causation, or logic—between Beckham's actions and the IRS audit; and (2) that Beckham knew or should have known about the audit when he committed some corrupt act. *See Marinello*, 138 S.Ct. at 1109-10.

We first address *Marinello*'s nexus requirement. *Marinello* requires the prosecution to prove that a defendant's actions had "a relationship in time, causation, or logic with [a pending IRS] proceeding." *Id.* at 1109 (internal quotation marks omitted). The government relies on a specific action to prove the nexus requirement—Beckham providing the IRS with Horseman's falsified day planner. Because the IRS indisputably obtained the day planner as a functional part of the audit during the audit, if Beckham provided the IRS with the planner, that would be an act that has a nexus in time, causation, and logic to the pending IRS audit.

At trial, Agent Grinstead testified that he received Horseman's planner from Beckham at an in-person meeting on January 19, 2012, while conducting the audit. 3 Trial Tr. 103, Dist. Ct. Dkt. 167. Beckham never contradicted this testimony, arguing only that he acted as Horseman's representative in his contacts with the IRS. *See* 3 Trial Tr. 103, 144-45, Dist. Ct. Dkt. 167. Because, then, the government presented uncontroverted evidence that Beckham gave Agent Grinstead the day planner—evidence that Beckham did not attempt to dispute, *see Inman*, 558 F.3d at 750

(finding testimony constituted overwhelming evidence when the defendant "did not question the credibility or accuracy of [the] testimony")—no rational juror could find that Beckham did not give the day planner to the IRS. *See id.* ("We have no doubt that any rational jury would have concluded that the government proved the [disputed element], for the record contains no evidence that could rationally lead to a contrary finding."). We therefore find the jury instruction error harmless as to the nexus requirement.

In addition to the nexus requirement, *Marinello* requires a defendant to act with knowledge or a reason to know of a pending or imminent IRS proceeding, such as an IRS audit. *Marinello*, 138 S.Ct. at 1104. We find that the evidence overwhelmingly shows Beckham knew of a currently-pending IRS audit at the time he gave Agent Grinstead Horseman's day planner. On December 1, 2011—over a month before his meeting with Agent Grinstead—Beckham undisputedly submitted falsified power of attorney forms allowing him to act as Horseman's representative throughout the audit. *See* 3 Trial Tr. 75, Dist. Ct. Dkt. 167. He then proceeded to actually act on Horseman's behalf during the audit. Significantly, Beckham provided Agent Grinstead with the planner in response to a request for information undisputably made as part of the audit. We therefore find that no rational jury could find Beckham was unaware of a pending IRS proceeding—the audit—at the time the IRS received the day planner.

Because we conclude that no rational jury could find reasonable doubt as to either of the two *Marinello* elements, we find that failure to instruct the jury on those elements was harmless. We thus need not

determine whether the special verdict form properly cured the instructional error, and we decline to reverse Beckham's conviction on these grounds.

III.

Beckham appeals the district court's denial of his motion to exclude Agent Parman's expert testimony, arguing that the district court impermissibly allowed her to instruct the jury on what the law is. "We review the district court's decision to admit expert testimony for abuse of discretion, according it substantial deference." *United States v. Bailey*, 571 F.3d 791, 803 (8th Cir. 2009). "Improperly admitted testimony warrants reversal of a conviction if the testimony substantially influence[d] the jury's verdict." *United States v. Merrell*, 842 F.3d 577, 582 (8th Cir. 2016) (alteration in original) (internal quotation marks omitted).

Agent Parman testified that, in her opinion, Horseman improperly claimed the nonpassive losses on his tax returns because he did not materially participate in Arbor Homes—a key part of the government's case against Beckham on the § 7206(2) charges. As part of her testimony, she discussed statutory requirements and regulatory tests for whether a shareholder has materially participated in a business. Beckham alleges that her testimony was improper because she instructed the jury on (1) the economic substance doctrine; and (2) the law regarding material participation. Significantly, these two points relate only to the § 7206(2) charges against Beckham and do not relate whatsoever to the sole count of conviction—the § 7212(a) offense. Thus, even if Parman testified improperly, her testimony did not influence the jury because it acquitted Beckham of the charges

about which she testified. *See United States v. Shores*, 700 F.3d 366, 374 (8th Cir. 2012) (finding that any error in admitting testimony was harmless when the jury acquitted the defendant of the charge to which the testimony related); *United States v. Webb*, 214 F.3d 962, 965 (8th Cir. 2000) (same). We therefore decline to reverse Beckham's conviction based on improper testimony, and we uphold the district court's denial of Beckham's motion to exclude.

IV.

Beckham next argues that the district court improperly denied his motion to suppress evidence that the IRS obtained after the civil audit morphed into a criminal investigation. Specifically, Beckham alleges that any evidence gathered after the IRS discovered he lacked a valid CPA license was inadmissible because, at that point, the IRS began investigating him for criminal activity while maintaining that it was merely conducting a civil audit of Horseman. We review facts underlying denial of a motion to suppress for clear error, and we apply de novo review to any "legal conclusions based upon those facts." *United States v. Wadena*, 152 F.3d 831, 851 (8th Cir. 1998).

"[T]he IRS may not develop a criminal investigation under the auspices of a civil audit." *United States v. Grunewald*, 987 F.2d 531, 534 (8th Cir. 1993). In order to succeed on a motion to suppress evidence obtained through a criminal investigation disguised as a civil audit, a defendant must show that "1) the IRS had firm indications of fraud by the defendant, 2) there is clear and convincing evidence that the IRS affirmatively and intentionally misled the defendant, and 3) the IRS's conduct resulted in prejudice to

defendant's constitutional rights." *Id.* Here, Beckham seeks to suppress all evidence he provided to the IRS after July 23, 2012—the date the IRS discovered Beckham was not a licensed CPA.[2]

Firm indications of fraud are different than initial indications or suspicions. *Wadena*, 152 F.3d at 851. Whether the IRS had firm indications of fraud is a question of fact. *Id.* Here, the district court found that the IRS had only "a mere suspicion of fraud" until it discovered that a loan on Horseman's tax returns was a sham. Beckham points to nothing that indicates this factual finding is clearly erroneous. He presented the IRS with a plausible explanation for his license expiration when asked why he had no CPA license. At most, the IRS merely suspected the case might involve fraud until it discovered the sham loan, at which point it suspended the civil audit. Thus, we find no clear error in the district court's determination that the IRS developed firm indications of fraud on April 3, 2013—the date it discovered the sham loan.

Affirmative and intentional misleading requires something more than the IRS failing to tell the defendant that "information developed in an audit may result in a further criminal investigation . . . ." *Grunewald*, 987 F.2d at 534. To affirmatively and intentionally deceive a defendant by disguising a criminal investigation as a civil audit, the IRS must utilize the audit "with the express purpose of obtaining records for the

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[2] Neither party has raised the issue of whether Beckham could credibly be considered a target of the audit—which focused on Horseman and the Horseman Group—or discussed whether Beckham must be considered a target of the audit for *Grunewald* to apply. We therefore decline to address these questions and assume that *Grunewald*'s framework applies.

criminal investigation." *Wadena*, 152 F.3d at 852. This Court has found no *Grunewald* violation when a civil auditor failed to inform defendants about a simultaneous criminal investigation conducted by a different IRS agent. Here, despite preliminary consultations with an IRS Fraud Technical Advisor, the auditing agents did not involve IRS Criminal Investigation in the case until after they suspended the civil audit. We thus find no clear error in the district court's determination that the IRS did not affirmatively and intentionally mislead Beckham.

We also agree with the district court that the IRS's conduct in its audit of Horseman's individual and corporate tax returns did not violate Beckham's constitutional rights. Beckham moved to suppress all evidence gathered after July 23, 2012. However, the only count of conviction hinged on evidence provided to the IRS in January 2012—six months before that cutoff date. Because the IRS collected this evidence before the date Beckham alleges a criminal investigation began, Beckham cannot claim that it was the fruit of that investigation. We thus find no clear error in the district court's determination that the IRS's conduct did not result in prejudice to Beckham's constitutional rights.

Finding no error in the district court's analysis of the relevant factors, we find no error in the district court's denial of Beckham's motion to suppress. We affirm the district court's ruling.

V.

Finally, Beckham argues that the district court erred in denying his motion for a mistrial based on improper statements Horseman made while testifying.

We review a district court's denial of a motion for a mistrial based on improper witness statements for an abuse of discretion. *United States v. Branch*, 591 F.3d 602, 607 (8th Cir. 2009).

A mistrial is a drastic remedy for jury exposure to improper witness statements—a remedy which we disfavor. *United States v. Sherman*, 440 F.3d 982, 987 (8th Cir. 2006). This Court considers five factors in determining whether a motion for a mistrial based on improper witness statements should be granted: "(1) whether the remark was unsolicited; (2) whether the government's line of questioning was reasonable; (3) whether a limiting instruction was immediate, clear, and forceful; (4) whether any bad faith was evidenced by the government; and (5) whether the remark was only a small part of the evidence against the defendant." *Branch*, 591 F.3d at 608 (citing *United States v. Caver*, 470 F.3d 220, 243 (6th Cir. 2006).

Beckham moved for a mistrial based on Horseman's statement that Beckham's actions constituted fraud, an element of the § 7206(2) charges. Applying the *Branch* factors here, we find no abuse of discretion in the district court's decision to deny Beckham's motion. The government asked Horseman if he ever stopped paying Beckham pursuant to the subscription agreements. Horseman responded that he continued making payments until he "spoke with a tax attorney who informed [him] that this whole deal was fraudulent . . . ." 2 Trial Tr. 106-07, Dist. Ct. Dkt. 166. His statement as to fraud did not directly respond to the question and was therefore unsolicited. *See Branch*, 591 F.3d at 608. The government's line of questioning directly related to the charges against Beckham. While the district court did not give a

curative instruction, it failed to do so because Beckham refused such an instruction. *See United States v. Peyton*, 108 F.3d 876, 878 (8th Cir. 1997) (upholding denial of a motion for a mistrial when the district court offered a curative instruction and the defendant refused it). The jury clearly disregarded Horseman's statement that the "deal was fraudulent" because it acquitted Beckham of the charges with fraud as an element—the § 7206(2) charges. Moreover, whether Beckham convinced Horseman to enter into a fraudulent transaction is irrelevant to the sole count of conviction—obstructing and impeding administration of the internal revenue laws—because fraud is not a requirement for that offense. *See* 26 U.S.C. § 7212(a). We therefore uphold the district court's denial of Beckham's motion for a mistrial.

We affirm the district court's judgment.

ORDER OF THE EIGHTH CIRCUIT GRANTING MOTION FOR RELEASE ON BAIL PENDING APPEAL (MAY 15, 2018)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MARK A. BECKHAM,

Appellant.

No. 18-1406

Appeal from United States District Court
for the Eastern District of Missouri–St. Louis
(4:16-cr-00300-RLW-1)

Before: GRUENDER, WOLLMAN, and SHEPHERD, Circuit Judges.

Appellant's motion for release on bail pending appeal is granted. The release shall be upon such conditions as may be set by the United States District Court for the Eastern District of Missouri upon receipt of a copy of this order.

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

May 15, 2018

ORDER DENYING MOTION TO STAY TRIAL DUE TO PENDING SUPREME COURT CASE, *UNITED STATES V. BECKHAM*, 4:16-CR-300-RLW (E.D. MO. AUGUST 10, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK A. BECKHAM,

Defendant.

No. 4:16CR300 RLW

Before: Ronnie L. WHITE, United States District Judge.

This matter is before the Court on Defendant Mark Beckham's Motion to Stay Trial Due to Pending Supreme Court Case (ECF No. 83). The Government has filed a response in opposition. Defendant has not filed a reply, and the time for doing so has expired.

In his motion to stay, Defendant Mark Beckham ("Beckham") requests that the Court stay his trial pending the Supreme Court's decision in *United States v. Marinello*, 839 F.3d 209 (2d Cir. 2016), *cert. granted*, No. 16-1144, 2017 WL 1079367 (U.S. June 27, 2017). Beckham contends that the *Marinello* opinion will

directly impact the trial and the jury instructions. Beckham argues that, if he is convicted, a reversal of *Marinello* would require reversal of his case and a second trial. Specifically, Beckham claims that *Marinello* "will settle the precise question of whether an allegedly 'corrupt act' that occurs before a defendant is aware of a pending IRS action or proceeding is sufficient to sustain a conviction under Section 7212(a)'s 'omnibus clause.'" (Def.'s Mot. to Stay pp. 2-3) Beckham asserts that fairness and judicial economy weigh in favor of staying the trial.

The Government, on the other hand, argues that staying the case for an indefinite amount of time pending a Supreme Court decision in *Marinello* is not justified. The Government maintains, and the Court agrees, that the fact that the Supreme Court has granted certiorari does not necessarily mean that the Supreme Court will actually decide the case. Additionally, Beckham provides no indication when the Supreme Court may issue an opinion in *Marinello*, and such date is impossible to predict.

"'The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *SSDD, LLC v. Underwriters at Lloyd's, London*, No. 4:13-CV-258 CAS, 2013 WL 2420676, at *4 (E.D. Mo. June 3, 2013) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). "In determining whether to stay an action, a court must exercise its judgment to 'weigh competing interests and maintain an even balance.'" *Id.* (quoting *Landis*, 299 U.S. at 254-55). Courts weigh "the potential prejudice or hardship to the parties, as well as the interest of judicial economy."

Perrin v. Papa John's Int'l, Inc., No. 4:09-CV-01334-AGF, 2015 WL 3823142, at *4 (E.D. Mo. June 19, 2015) (citations omitted).

Here, the Court finds that the prejudice to the government in delaying prosecution of this case, as well as judicial economy warrants denial of Beckham's motion. As stated by the Government, a special verdict form will eliminate any need for retrial in this case. The jury will be asked whether Defendant committed at least one corrupt act after becoming aware of the IRS audit and what specific act he committed. Thus, no hardship will befall Defendant Beckham because the special verdict form will safeguard against the need for a second trial regardless of the Supreme Court's decision in *Marinello*. Indeed, Beckham has not contested the Government's assertion that a special verdict form eliminates the potential hardship to Beckham that forms the basis of his motion to stay. Therefore, the Court will deny Defendant's motion to stay.

Accordingly,

IT IS HEREBY ORDERED that Defendant Motion to Stay Trial Due to Pending Supreme Court Case (ECF No. 83) is DENIED.

Dated this 10th day of August, 2017.

/s/ Ronnie L. White
United States District Judge

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL, *UNITED STATES V. BECKHAM*, 4:16-CR-300-RLW (E.D. MO. NOVEMBER 7, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK A. BECKHAM,

Defendant.

No. 4:16CR300 RLW

Before: Ronnie L. WHITE, United States District Judge.

This matter is before the Court on Defendant Mark Beckham's Motion to for Judgment of Acquittal or, in the Alternative, Motion for a New Trial (ECF No. 135). The Government has filed a response in opposition, and Defendant has filed a reply.

I. Background

On February 22, 2017, Defendant Mark Beckham ("Beckham") was charged in a four-count superseding indictment ("SI") alleging three counts of willfully aiding

and assisting in the preparation and presentation of a false income tax return in violation of 26 U.S.C. § 7206(2) (Counts 2 through 4) and one count of corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws in violation of 26 U.S.C. § 7212(a) (Count 1). (ECF No. 59) On September 13, 2017, the jury returned a verdict finding Beckham not guilty on Counts 2 through 4 and guilty on Count 1. The jury found that Beckham corruptly endeavored to obstruct or impede the due administration of the internal revenue laws and that one of these acts was committed after becoming aware of the existence of an Internal Revenue Service audit, namely causing JH's dayplanner calendar which contained false entries relating to Arbor Homes, Inc. to be submitted to the Internal Revenue Service as set forth in paragraph 10 of the SI.

Prior to the trial, Beckham raised an issue currently pending before the United States Supreme Court in *Marinello v. United States*, 137 S.Ct. 2327 (2017). A conflict exists among circuit courts of appeals. The Sixth Circuit has held that a defendant could not be found guilty of corruptly obstructing or impeding the administration of the internal revenue laws in violation of § 7212(a) for conduct which occurred before the defendant became aware of an IRS audit or proceeding. *See United States v. Miner*, 774 F.3d 336, 345 (6th Cir. 2014) and *United States v. Kassouf*, 144 F.3d 952, 957 (6th Cir. 1998). The First, Second, Fifth, Ninth, and Tenth Circuits have held that a defendant does not need to be aware of a pending IRS action. *See United States v. Westbrooks*, 858 F.3d 317, 322-24 (5th Cir. 2017); *United States v. Marinello*, 839 F.3d 209, 217-23 (2d Cir. 2016); *United States v. Sorensen*,

801 F.3d 1217, 1232 (10th Cir. 2015); *United States v. Floyd*, 740 F.3d 22, 31-32 n.4 (1st Cir. 2014); *United States v. Massey*, 419 F.3d 1008, 1010 (9th Cir. 2005). The Eighth Circuit has not addressed the issue.

Beckham previously filed a motion to strike surplusage, seeking to strike paragraphs 1-8 of the SI because the acts occurred before he became aware of a pending IRS action or proceeding. (ECF No. 65) Magistrate Judge Shirley P. Mensah issued a Report and Recommendation, recommending that Beckham's motion be denied, and this Court adopted said Report and Recommendation and denied the motion to strike surplusage. (ECF Nos. 75, 82) The Court agreed with Judge Mensah that a limiting instruction at trial would ameliorate any potential prejudice stemming from paragraphs 1-8. (ECF No. 75 p. 5)

Beckham also filed a motion to stay the trial pending the Supreme Court's determination in *Marinello*. (ECF No. 83) The Court denied the motion, finding that a special verdict form would safeguard against the need for a second trial regardless of the Supreme Court's decision in *Marinello* because the jury would be asked whether Beckham committed at least one corrupt act after becoming aware of the IRS audit and what specific act he committed. (ECF No. 86 p. 2) On September 13, 2017, after a six-day jury trial, the jury unanimously agreed that Beckham was guilty on Count 1 and found that he was aware of the existence of an IRS audit or proceeding when he caused JH's dayplanner calendar which contained false entries relating to Arbor Homes, Inc. to be submitted to the IRS as set forth in paragraph 10 of the SI.

On September 27, 2017, Beckham filed the present Motion to for Judgment of Acquittal or, in the

Alternative, Motion for a New Trial. (ECF No. 135) Beckham argues that the Court should enter a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure because the evidence was insufficient to support a conviction of Count 1 based on the single alleged corrupt act charged in paragraph 10 because delivery of the dayplanner containing false entries is not legally sufficient to constitute the charged felony. In the alternative, Beckham requests a new trial arguing that the evidence is insufficient to sustain a conviction on Count 1; the Court improperly instructed the jury on Count 1 because the instruction was inconsistent with the Sixth Circuit's scope of § 7212(a); the Court improperly permitted the Government's expert witness to testify as to the law over Beckham's objections; the Court improperly prohibited Beckham from cross-examining the lead special agent on alleged criminal conduct in 2005; and the Court improperly denied Beckham's motion for a mistrial.

II. Discussion

A. Motion for Judgment of Acquittal

"When reviewing the sufficiency of the evidence for a judgment of acquittal, [courts] 'view[ ] the evidence in the light most favorable to the guilty verdict, resolving all evidentiary conflicts in favor of the government, and accepting all reasonable inferences supported by the evidence.'" *United States v. Gonzales*, 826 F.3d 1122, 1125-26 (8th Cir. 2016) (quoting *United States v. No Neck*, 472 F.3d 1048, 1052 (8th Cir. 2007)). "A motion for judgment of acquittal should be granted only 'if there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt.'" *United States v.*

Cacioppo, 460 F.3d 1012, 1021 (8th Cir. 2006) (quoting *United States v. Gomez*, 165 F.3d 650, 654 (8th Cir. 1999)). "When 'considering a motion for judgment of acquittal, a district court has very limited latitude.' . . . The district court does not 'weigh the evidence or assess the credibility of the witnesses.'" *United States v. Thompson*, 285 F.3d 731, 733 (8th Cir. 2002) (quoting *United States v. Robbins*, 21 F.3d 297, 298-99)).

Count I of the SI charged Defendant Beckham with violating 26 U.S.C. § 7212(a), which provides:

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both . . . .

26 U.S.C, § 7212(a). Jury Instruction 9, which Beckham acknowledges set forth the elements required to sustain a conviction under § 7212(a), stated that to find Beckham guilty, the Government must prove beyond a reasonable doubt:

> *One*, beginning on or about July 1, 2009, and continuing up to and including on or about October 19, 2012, the defendant acted with purpose to obstruct or impede the due admin-

> istration of the internal revenue laws by committing one or more of the acts alleged in Count I.
>
> *Two*, the defendant's act had a reasonable tendency to obstruct or impede the due administration of the internal revenue laws. The effort need not be successful; and
>
> *Three*, the defendant acted corruptly, that is with the intent to secure an unlawful benefit either for himself or for another.

(ECF No. 132 p. 9)

By its guilty verdict, the jury determined that all three elements were proven beyond a reasonable doubt. However, Beckham argues that the Government failed to prove that that he did something that had the intended purpose of obstructing or impeding the IRS. (ECF No. 135 p. 4) Specifically, Beckham asserts that the jury was never asked to determine whether he knew the dayplanner contained false entries.

The Government correctly states that knowledge is not an element of § 7212(a). Instead, the statute requires the government to prove that Beckham acted corruptly, that is with the intent to secure an unlawful benefit either for himself or for another. The Court finds that the evidence was sufficient for the jury to find that Beckham sought to secure an unlawful benefit for J.H., which was a substantial reduction in the amount of federal income taxes J.H. owed the IRS for 2009 and 2010. A jury determined Beckham acted corruptly under the statute. The jury further found that one of these acts, causing JH's dayplanner calendar which contained false entries relating to Arbor Homes, Inc. to be submitted to the IRS, occurred after Beckham

became aware of an IRS audit or proceeding. Viewing the evidence in the light most favorable to the verdict and drawing all reasonable inference in its favor, the Court will deny Beckham's motion for judgment of acquittal on Count 1. *United States v. Wright*, 739 F.3d 1160, 1168-69 (8th Cir. 2014).

B. Motion for a New Trial

In the alternative, Beckham requests a new trial under Rule 33 of the Federal Rules of Criminal Procedure as to Count 1. "Rule 33(a) grants a district court discretion to 'vacate any judgment and grant a new trial if the interest of justice so requires.'" *United States v. Schropp*, 829 F.3d 998, 1005 (8th Cir. 2016) (quoting Fed. R. Civ. P. 33(a)). In considering a motion for new trial, a district court may "'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.'" *Id.* (quoting *United States v. Campos*, 306 F.3d 577, 579 (8th Cir. 2002)). However, "this broad discretion should be exercised 'sparingly and with caution.'" *Id.* (quoting *Campos*, 306 F.3d at 579 (8th Cir. 2002) (internal quotation and citation omitted)).

1. Sufficiency of the Evidence

Beckham raises the same arguments as raised in the motion for judgment of acquittal. Beckham argues that the Court should grant a new trial and require the jury to find that he knew the dayplanner contained false entries. For the reasons stated above, the Court will deny Beckham's motion.

2. Jury Instructions and Verdict Form

Next, Beckham argues that he should be granted a new trial because the jury instruction on § 7212(a) was improper in that it was inconsistent the Sixth Circuit in *Kassouf*. The Court acknowledges that the split in the circuits may be resolved by the Supreme Court in *Marinello*. However, the Court submitted a special verdict form to allow the jury to consider whether Beckham violated § 7212(a) after he became aware of the existence of an IRS audit or proceeding.[1]

While the use of a special verdict form in criminal cases is generally disfavored, such special verdict forms "are appropriate and effective in some circumstances." *United States v. Stegmeier*, 701 F.3d 574, 581 (8th Cir. 2012) (citations omitted). The Court finds that the use of the special verdict form was appropriate in this case where there was uncertainty regarding the scope of § 7212. Indeed, Beckham argued that the Court should follow the Sixth Circuit. To eliminate any uncertainty and prevent a retrial, the Court allowed the jury to consider at what point Beckham violated the statute after he was aware of the existence of an IRS investigation. *See United States v. Ryan*, 9 F.3d 660, 671 (8th Cir. 1993), *reh'g granted and opinion vacated* (Jan. 5, 1994), *opinion reinstated as to special verdict form on reh'g*, 41 F.3d 361, 362 (8th Cir. 1994) (finding use of special interrogatories did not abridge defendant's rights to a fair trial or due process where questions posed by the judge were in the interest of "clarity, completeness, and avoidance of the retrial of a lengthy case" and recognizing "that the use of special

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[1] The Court notes that at trial Beckham objected to Instruction 9 but not the verdict form.

verdict forms, closely crafted and carefully scrutinized, may be appropriate" where the criminal statute was as yet undefined).

After thoughtful deliberation, the jury unanimously found that all three elements of § 7212(a) were met, and the timing of specific occurrences set forth in the verdict form did not further guide the jury as to those elements, nor was it inconsistent with the finding of guilt. *See United States v. Weaver*, 554 F.3d 718, 722-23 (8th Cir. 2009) (finding no inconsistency between the instruction explaining whether defendant was guilty of conspiracy to distribute and possession with intent to distribute crack cocaine and the verdict form requiring jury to check the range within which the total quantity of cocaine fell). Further, there is no indication that the jury was confused about the jury instructions or the verdict form. *Id.* Therefore, the Court will deny Beckham's motion for a new trial based on the jury instruction for Count 1.

3. Testimony of the Government's Expert

Beckham also argues that the Court improperly permitted the Government's expert to testify as to what the law is, and thus a new trial is warranted. Beckham contends that the Court allowed "IRS Revenue Agent Sarah Parman to testify as to the contours of material participation . . . and permitted IRS Revenue Agent John Shake to testify as to the contours of material participation . . . ." (ECF No. 135 p. 8)

Courts of Appeals in other circuits have held that an expert may refer to the law when expressing his or her opinion; however, the expert may not testify as to intent. *See United States v. Stadtmauer*, 620 F.3d 238, 269-70 (3d Cir. 2010) (stating primary

limitation on expert testimony by an IRS agent is that the expert may not testify as to defendant's state of mind); *United States v. Bedford*, 536 F.3d 1148, 1158 (10th Cir. 2008) (finding expert testimony by an IRS agent expressing an opinion as to the proper tax consequences of a transaction is admissible so long as the expert does not discuss the ultimate question as to whether defendant intended to violate the law); *United States v. Mikutowicz*, 365 F.3d 65, 71-72 (1st Cir. 2004) (allowing IRS agent to testify as an expert witness as to the audit and the rationale which led the IRS to reach its conclusion that the deductions were improper).

Here, Agent Parman explained to the jury why the amounts of nonpassive and passthrough losses claimed on tax returns were improper. Agent Parman did not offer any testimony as to Beckham's state of mind. Thus, the Court finds that a new trial is not warranted on the basis Agent Parman's testimony.

Likewise, the Court finds that Agent Shake did not testify as an expert but merely testified as to his examination of the tax returns and his interactions with Beckham. Agent Shake did not refer to the law or otherwise express an opinion as to the proper tax consequences of the returns at issue. Thus, Beckham is not entitled to a new trial on this ground.

4. Cross-examination of Agent Murray

Next, Beckham argues that he is entitled to a new trial because the Court improperly precluded counsel from cross-examining government witness IRS Special Agent Patric Murray about his 2005 unauthorized access to accounts in a government database regarding himself, his spouse, and his brother, and the

U.S. Attorney's Office's refusal to prosecute Agent Murray. Beckham contends that this information went to Agent Murray's credibility, and Beckham should have been able to use this information to impeach Agent Murray. Prior to trial, the Government filed a motion in limine to prevent Beckham from impeaching Agent Murray with evidence of previous misconduct. The Court granted the Government's motion in limine.

The Court finds that Agent Murray's prior misconduct is unrelated to the issues involved in Beckham's trial and is not probative of Agent Murray's character for truthfulness. "The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront the witnesses against him. *United States v. Walker*, 840 F.3d 477, 486 (8th Cir. 2016) (citation omitted). "However, trial judges retain 'wide latitude' to impose reasonable limits on cross-examination based on concerns about, inter alia, confusion of the issues or interrogation that is only marginally relevant. *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)). Further, "[a]dmissibility of prior misconduct which is probative of a witness' truthfulness is expressly entrusted to the trial court's discretion by Rule 608(b)." *United States v. Alston*, 626 F.3d 397, 403 (8th Cir. 2010) (quoting *United States v. McClintic*, 570 F.2d 685, 690-91 (8th Cir. 1978)).

The Court finds that the unauthorized access to accounts in a government database from 12 years ago is unrelated to Agent Murray's investigation of and testimony regarding statements Beckham made during an interview and is not probative of Agent Murray's character for truthfulness. Allowing Beckham to cross-

examine Agent Murray on his prior misconduct would have resulted in holding a mini-trial on irrelevant matters. "[W]hen the previous allegations of misconduct leveled against a witness resulted in no sanctions or sanctions completely unrelated to the witness' character for truthfulness, the danger is great that a jury will infer more from the previous investigation than is fairly inferable." *Id.* at 404 (citation omitted). In addition, Agent Murray's prior misconduct in a database search was only minimally relevant for purposes of impeaching his testimony regarding incriminating statements Beckham made during the investigation. *See Walker*, 840 F.3d at 486 (finding district court did not abuse its discretion in limited defendant's cross-examination regarding an internal affairs investigation where the cross-examination would have diverted the jury's attention to a collateral matter with marginal relevance). Therefore, the Court will deny Beckham's motion for a new trial based on the Court's denial of cross-examination regarding Agent Murray's misconduct.

5. Denial of Defendant's Motion for Mistrial

Last, Beckham argues that he is entitled to a new trial because the Court improperly denied his motion for mistrial. During the trial, Beckham moved for a mistrial after Government witness John Horseman testified that he fired Beckham because a tax attorney advised him that the transactions at issue in the case were fraudulent. After Beckham objected and moved for a mistrial, the Court overruled the objection and motion. Instead, the Court offered to instruct the jury to disregard the statement, but Beckham declined the offer.

"The exposure of a jury to improper testimony ordinarily is cured by measures less drastic than a mistrial, such as an instruction to the jury to disregard the testimony." *United States v. Sherman*, 440 F.3d 982, 987 (8th Cir. 2006) (citation omitted). Because Beckham declined the Court's offer to instruct the jury to disregard the witness' statement, Beckham waived the issue. *United States v. Arceo*, 50 Fed. App'x 793, 795 (8th Cir. 2002).

Further, Beckham was found guilty of corruptly endeavoring to obstruct and impede the due administration of the internal revenue laws. The jury acquitted him of 3 counts of willfully aiding and assisting in the preparation of a false income tax return. Because the jury found Beckham not guilty on these counts, the Court finds that a single reference regarding fraud by the witness was not prejudicial to Beckham, and a new trial is not warranted on the ground that the Court erred in refusing to grant a mistrial.

Accordingly,

IT IS HEREBY ORDERED that Defendant Mark Beckham's Motion to for Judgment of Acquittal or, in the Alternative, Motion for a New Trial (ECF No. 135) is DENIED.

IT IS FURTHER ORDERED that no later than November 13, 2017, each party shall inform the Court in writing whether it intends to file a motion for interlocutory appeal.

Dated this 7th day of November, 2017.

/s/ Ronnie L. White
United States District Judge

ORDER OF THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING *EN BANC* (APRIL 15, 2019)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MARK A. BECKHAM,

Appellant.

No. 18-1406

Appeal from United States District Court
for the Eastern District of Missouri–St. Louis
(4:16-cr-00300-RLW-1)

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

April 15, 2019

JURY INSTRUCTION NO. 9

Count 1 of the indictment charges the defendant with corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws. In order for you to find the defendant guilty of this charge, the government must prove each of the following three elements beyond a reasonable doubt;

One, beginning on or about July 1, 2009, and continuing up to and including on or about October 19, 2012, the defendant acted with purpose to obstruct or impede the due administration of the internal revenue laws by committing one or more of the acts alleged in Count 1.

Two, the defendant's act had a reasonable tendency to obstruct or impede the due administration of the internal revenue laws. The effort need not be successful; and

Three, the defendant acted corruptly, that is with the intent to secure an unlawful benefit either for himself or for another.

If all of these elements have been proved beyond a reasonable doubt as to the defendant, then you must find the defendant guilty of the crime charged under Count 1; otherwise you must find the defendant not guilty of this crime under Count 1.

SPECIAL VERDICT FORM
(SEPTEMBER 13, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK A. BECKHAM,

Defendant.

No. 4:16 CR 00300 RLW

COUNT 1

We, the jury in the above titled cause, unanimously find the defendant, MARK A. BECKHAM Guilty of the crime of corruptly obstructing or impeding the administration of the internal revenue laws, as charged in Count 1.

If you find the defendant "guilty" of Count 1, you must answer the following:

Did the defendant commit at least one corrupt act after becoming aware of the existence of an Internal Revenue Service audit or proceeding?

- Yes

If your answer to the question is "yes," you must state which paragraph or paragraphs in Count 1 of the indictment describe acts which you agree occurred after the defendant became aware of the existence of an Internal Revenue Service audit or proceeding.

(Check each paragraph which describes acts which the jury unanimously agrees occurred after the defendant became aware of the existence of an Internal Revenue Service audit or proceeding).

- Paragraph 10

COUNT 2

We, the jury in the above titled cause, unanimously find the defendant, MARK A. BECKHAM Not Guilty of the crime of willfully aiding and assisting in the preparation of a false income tax return, as charged in Count 2.

COUNT 3

We, the jury in the above titled cause, unanimously find the defendant, MARK A. BECKHAM Not Guilty of the crime of willfully aiding and assisting in the preparation of a false income tax return, as charged in Count 3.

COUNT 4

We, the jury in the above titled cause, unanimously find the defendant, MARK A. BECKHAM Not Guilty of the crime of willfully aiding and assisting in the preparation of a false income tax return, as charged in Count 4.