No. 21-______

IN THE

Supreme Court of the United States

SHELTON MARBURY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S APPENDIX

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791 F.3d 127
United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES of America, Appellee
v.
Bryan BOSTICK, Tommy Edelin, Earl Edelin, Shelton Marbury, and Henry Johnson, Appellants.

Nos. 04–3074, 05–3010, 05–3011, 05–3012, 05–3013.
|
June 26, 2015.
|
Rehearing En Banc Denied Feb. 3, 2016.

Synopsis
Background: Defendants were convicted in the United States District Court for the District of Columbia for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization, and were sentenced to life imprisonment. Defendants appealed.

Holdings: The Court of Appeals, Kavanaugh, Circuit Judge, held that:

[1] evidence supported defendants' convictions for participation in drug distribution conspiracy;

[2] evidence supported defendant's conviction for continuing criminal enterprise;

[3] jury instructions adequately conveyed defendant was required to join conspiracy, with specific intent, to be found guilty;

[4] statements made by confidential informant to defendant on audiotape and videotape did not violate defendant's right to confrontation;

[5] District Court did not abuse its discretion in excluding testimony of expert on gang culture and violence; and

[6] defendants were entitled to vacatur of their sentences and remand for resentencing under advisory sentencing guidelines.

Affirmed in part, vacated in part and remanded.

West Headnotes (58)

[1] **Criminal Law**Construction in favor of government, state, or prosecution
Criminal Law Reasonable doubt

When considering a challenge to the sufficiency of the evidence, the Court of Appeals upholds a guilty verdict where, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

3 Cases that cite this headnote

[2] **Criminal Law**Inferences or hypotheses from evidence
Criminal Law Circumstantial evidence

When considering a challenge to sufficiency of evidence supporting a conviction, the Court of Appeals does not distinguish between direct and circumstantial evidence in deciding whether any rational trier of fact could have found essential elements of crime beyond reasonable doubt; further, the evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt.

3 Cases that cite this headnote

[3] **Conspiracy**Single or Multiple Conspiracies
Criminal Law Particular offenses
Criminal Law Particular offenses and prosecutions

Whether evidence presented at trial proved a single drug conspiracy is primarily a question of fact for the jury; on appellate review, the relevant question is therefore whether there is sufficient evidence, when viewed in the light most favorable to the government, to support a jury finding of a single conspiracy agreed to by all of the defendants.

3 Cases that cite this headnote

[4] **Conspiracy**Wheel or chain conspiracy in general

The court considers three factors to determine whether the evidence supports a conclusion that the defendants belonged to a single conspiracy: whether the alleged participants had (1) a common goal; (2) interdependence; and (3) overlap, such as the presence of core participants linked to all the defendants.

1 Cases that cite this headnote

[5] **Conspiracy**Controlled Substances

Evidence that defendants shared single, chain-model drug organization's goal of selling drugs, that defendants were all interdependent on each other, and that there were overlapping core participants with ties to defendants on both ends of drug supply chain, was sufficient to show that defendants belonged to a single drug distribution conspiracy led by co-defendant who led organization, as required for defendants' convictions for crimes, including murders and other crimes, arising from operation of massive drug organization. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

[6] **Conspiracy**Liability for acts of coconspirators; Pinkerton doctrine

Defendant's murder of two people at a traffic light fell within scope of massive drug distribution conspiracy, where co-defendant, the head of the organization, authorized shooting and was pleased with defendant's demonstrated ability to kill, and after murder, co-defendant rewarded defendant with a car, a direct supply of drug, and a place in his inner circle. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

[7] **Conspiracy**Liability for acts of coconspirators; Pinkerton doctrine

Defendants' killings of members of rival drug group were committed in furtherance of massive drug distribution conspiracy, where co-defendant, the head of the organization, directed another co-conspirator to kill members, and another co-defendant taught defendants how to use firearms to kill rival group's members. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

[8] **Conspiracy**Knowledge, intent, and participation

To prove that a defendant entered into a narcotics conspiracy, the government must prove that he did so knowingly and with the specific intent to further the conspiracy's objective. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[9] **Conspiracy** Controlled Substances

Evidence that defendant sold his son's drugs to other dealers, recruited new mid-level distributors, provided firearms expertise and weapons to his son's associates during disputes with rival drug crews, warned son's group about police raids, suspected cooperators and enemy dealers, and gave out keys while employed at community recreation center so group had secure place to store contraband and sell drugs was sufficient to show that defendant had specific intent to further drug distribution scheme, as required for defendant's conviction for entry into narcotics conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

[10] **Conspiracy** Agreement; buyer-seller rule

A jury may properly find a drug conspiracy, rather than simply a buy-sell agreement, where the evidence shows that a buyer procured or a seller sold drugs with knowledge of the overall existence of the conspiracy, and factors demonstrating such knowledge are (1) the existence of repeated, regular deals; (2) drug quantities consistent with redistribution; and (3) the extension of credit to the buyer.

[11] **Controlled Substances** Continuing criminal enterprise; drug organizations

To convict defendant for continuing criminal enterprise, the jury must find the defendant guilty of: (1) a felony violation of the federal narcotics law; (2) as part of a continuing series of violations; (3) in concert with five or more persons; (4) for whom the defendant is an organizer or supervisor; (5) from which he derives substantial income or resources. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

[12] **Controlled Substances** Continuing criminal enterprise; drug organizations

A "continuing series of violations," as required for conviction for continuing criminal enterprise, consists of three or more predicate acts, which may include a drug conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 408(c), 21 U.S.C.A. §§ 846, 848(c).

[13] **Controlled Substances** Continuing criminal enterprise; drug organizations

One can organize events and supervise transitory subordinates without creating an organizational structure, as part of conviction for continuing criminal enterprise; the government must simply establish that the defendant exerted some type of influence over five other individuals in the course of the criminal enterprise, and need not prove that the defendant managed five people simultaneously. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408, 21 U.S.C.A. § 848.

[14] **Controlled Substances** Continuing criminal enterprise; drug organizations

Evidence that defendant organized or supervised five or more people in committing a series of underlying predicate acts, including conspiracy to distribute drugs for profit and drug-related murders, was sufficient to show that core structure of drug distribution scheme remained intact during relevant period, as required for defendant's conviction for continuing criminal enterprise. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(c), 21 U.S.C.A. § 848(c).

[15] **Weapons** Crimes of violence
Weapons Underlying crime

Under District of Columbia law, a jury may find defendant guilty of possessing a firearm during a crime of violence without convicting him of the underlying offense, so long as there is evidence in the record to support a conviction of the compound offense.

[16] **Weapons** Underlying crime

Evidence of defendant's role in shootings directed at rival drug group, including defendant's request for help in covering up defendant's role in shooting, and defendant's request to trade guns because his gun had a victim's "body" on it, and that defendant carried a firearm during each assault was sufficient to show that defendant participated in each underlying assault, as required for defendant's convictions, under District of Columbia law, for possession of a firearm during crime of violence. D.C. Official Code, 2001 Ed. § 22–3204(b).

[17] **Criminal Law** Sufficiency of evidence

When reviewing a sufficiency of the evidence challenge for plain error, the Court of Appeals reverses only to prevent a manifest miscarriage of justice, which exists if the record is devoid of evidence pointing to guilty, or evidence on key element of offense was so tenuous that a conviction would be shocking.

[18] **Racketeer Influenced and Corrupt Organizations** Presumptions and burden of proof

The motive of maintaining or increasing one's position in an enterprise may be reasonably inferred, as required for conviction for violent crime in aid of racketeering activity, where the defendant commits the crime in furtherance of enterprise membership or where the defendant knew it was expected of him by reason of his membership in the enterprise, and may be found, for example, where the defendant murdered individuals to maintain or increase his own reputation as an enforcer in the enterprise. 18 U.S.C.A. § 1959(a).

[19] **Criminal Law** Issues related to jury trial

A district court's decision to limit its response to answering the jury's question about a jury instruction should be reversed only if it is an abuse of discretion.

1 Cases that cite this headnote

[20] **Conspiracy** Withdrawal, Abandonment, or Renunciation

To withdraw from a conspiracy, an individual must come clean to the authorities or communicate his or her abandonment in a manner reasonably calculated to reach co-conspirators.

1 Cases that cite this headnote

[21] **Criminal Law** Necessity of Objections in

General

Under plain error standard of review, defendant must show: (1) there was an error; (2) the error was clear or obvious; (3) it affected the appellant's substantial rights; and (4) it seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

1 Cases that cite this headnote

[22] **Conspiracy** Controlled substances and intoxicating liquors

Although District Court inadvertently omitted sentence that parties had agreed to include in instructions relating to conspiracy to distribute narcotics charge, instructions adequately conveyed that individual defendant was required to join the conspiracy, with specific intent to further its objectives, to be found guilty. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

[23] **Criminal Law** Review De Novo

The Court of Appeals reviews a claim of improper joinder of criminal offenses de novo. Fed.Rules Cr.Proc.Rule 8, 18 U.S.C.A.

[24] **Indictments and Charging Instruments** Same transaction or series of transactions

A "series of acts or transactions," under Federal Rule of Criminal Procedure providing that indictment may charge two or more defendants if they are alleged to have participated in same act or transaction constituting offense or offenses, is two or more acts or transactions connected together or constituting parts of a common scheme or plan. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

2 Cases that cite this headnote

[25] **Indictments and Charging Instruments** Extrinsic evidence

Joinder analysis, under Federal Rule of Criminal Procedure, does not take into account the evidence presented at trial, but rather focuses solely on the indictment and pre-trial submissions; the government, therefore, need merely allege, not prove, the facts necessary to sustain joinder. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

2 Cases that cite this headnote

[26] **Indictments and Charging Instruments** Extrinsic evidence

If the indictment satisfies the joinder requirements of Federal Rule of Criminal Procedure, trial evidence cannot render joinder impermissible and is thus irrelevant to the court's inquiry. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

[27] **Criminal Law** Offenses against United States and state or territory

Offenses violative of District of Columbia law arising from massive drug distribution conspiracy were committed in furtherance of charged conspiracy or were predicate acts committed in furtherance of charged Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy, or both, thereby making them part of common scheme or plan and properly joined, and, thus, District Court properly exercised jurisdiction over District of Columbia offenses. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846; 18 U.S.C.A. § 1962(d); Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.; D.C. Official Code, 2001 Ed. § 11–502(3).

[28] **Criminal Law** Opinion evidence

Trial court's error in admitting all of overview testimony of Federal Bureau of Investigation (FBI) agent, where some aspects of testimony exceeded permissible uses of overview testimony, was harmless in defendants' prosecution for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization; although agent first testified as lay witness about general investigative techniques, he was later qualified as expert witness in investigation of drug trafficking and would have qualified as expert for purposes of lay testimony, although agent's statement linking violence to drug trafficking was inadmissible, there was overwhelming evidence the defendants committed violence in furtherance of conspiracy, and although agent vouched for government's use of cooperating witnesses, court provided instruction which mitigated any prejudice. Fed.Rules Cr.Proc.Rule 52(a), 18 U.S.C.A.; Fed.Rules Evid.Rules 403, 602, 608(a), 701, 802, 28 U.S.C.A.

1 Cases that cite this headnote

[29] **Criminal Law** Availability of declarant

The Sixth Amendment's Confrontation Clause generally bars the introduction of testimonial statements of a witness absent from trial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. U.S.C.A. Const.Amend. 6.

[30] **Criminal Law** Out-of-court statements and hearsay in general

The Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. U.S.C.A. Const.Amend. 6.

[31] **Criminal Law** Use of documentary evidence

Statements made by confidential informant to defendant on audiotape and videotape relating to a drug transaction were not offered for their truth, but rather to provide context for defendant's statements regarding transaction and, thus, did not violate defendant's right to confrontation in prosecution for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization. U.S.C.A. Const.Amend. 6.

[32] **Criminal Law** Opinion evidence

Assuming testimony of Federal Bureau of Investigation (FBI) agent exceeded proper expert testimony by improperly translating recorded conversations between defendant and confidential informant relating to drug transaction, such error was harmless in prosecution for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization, given the overwhelming evidence against defendant.

[33] **Criminal Law** Necessity of Objections in

General

Substantial rights were affected, as required for reversal due to plain error, if the error was prejudicial and actually affected the outcome below.

[34] **Criminal Law**Necessity of Objections in General

The "plainness" of an error, as part of plain error review, is evaluated at the time of appellate review, not at the time of the district court's decision.

2 Cases that cite this headnote

[35] **Criminal Law**Reception of evidence

Any violation of Confrontation Clause arising from admission of autopsy reports of 10 homicide victims and related expert testimony did not affect defendants' substantial rights, as required to reverse defendants' convictions, due to plain error, for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization, given defendants' overwhelming evidence of guilt. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[36] **Criminal Law**Discretion
Criminal Law Admissibility

A district court has broad discretion regarding the admission or exclusion of expert testimony, and reversal of a decision on these matters is appropriate only when discretion has been abused. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

1 Cases that cite this headnote

[37] **Criminal Law**Practices or modus operandi of offenders

District Court did not abuse its discretion in excluding testimony of expert on gang culture and violence in defendants' prosecution for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization; defendants did not show how gang formation was relevant to charged drug and racketeering conspiracies, as elements of those offenses did not include gang membership, and government made no attempt to prove the defendants were gang members. 18 U.S.C.A. § 1962(d); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; Fed.Rules Evid.Rule 702, 28 U.S.C.A.; .

2 Cases that cite this headnote

[38] **Criminal Law**Rebuttal

District Court did not abuse its discretion in excluding rebuttal testimony of former Federal Bureau of Investigation (FBI) special agent in defendants' prosecution for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization; defendant's proffer failed to clarify the basis for and reliability of special agent's testimony regarding perceived error's in government's investigation, in which he took no part, nor did defendant explain how testimony would help jury to understand evidence or determine a fact in issue. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[39] **Criminal Law**Objections and disposition thereof

The Court of Appeals affords the district court especially broad discretion to determine what manner of hearing, if any, is warranted about intra-jury misconduct.

1 Cases that cite this headnote

[40] **Criminal Law** Denying or explaining assent to verdict

Unlike external influences on a jury, evidence of intra-jury communications and influences is not competent to impeach a verdict.

[41] **Jury** Re-examination

District Court did not abuse its discretion in declining to conduct mid-trial voir dire of jury in defendants' prosecution for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization; all of the defendants other than defendant who requested voir dire opposed it on ground that it would alienate jury and would not produce useful information.

[42] **Criminal Law** Prejudice; fair trial

In order to sever a joint trial, there must be a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

1 Cases that cite this headnote

[43] **Criminal Law** Issues related to jury trial
Criminal Law Issues related to jury trial

The Court of Appeals reviews the District Court's choice of procedures to investigate the alleged juror misconduct for abuse of discretion; in connection with such investigation, the district court's factual findings are entitled to great weight, and in the absence of new facts ought not to be disturbed unless manifestly unreasonable.

[44] **Criminal Law** Objections and disposition thereof

District Court did not abuse its discretion by denying further investigation into allegations of juror misconduct in defendants' prosecution for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization, as it conducted two hearings, carefully analyzed jurors' testimony, made detailed credibility assessments, and set forth factual findings supported by record; alternate juror had incentive to discredit marshals, with whom she had not had a good relationship during the trial, court found no evidence juror had improper relationship with marshal in question, alternate juror's allegation that marshal told her one of defendants confessed to a murder was not credible, and even if comment was made, it did not contaminate the jury.

[45] **Criminal Law** Preliminary proceedings

The Court of Appeals reviews a district court judge's refusal to recuse for abuse of discretion. 28 U.S.C.A. § 455.

1 Cases that cite this headnote

[46] **Judges** Bias and Prejudice

Under provision requiring judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, a showing of an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality is all that must be demonstrated to compel recusal. 28 U.S.C.A. § 455(a).

2 Cases that cite this headnote

[47] **Judges**—Determination of objections

District Court did not abuse its discretion in refusing to recuse himself from adjudication of juror misconduct allegations in prosecution for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization; lack of corroboration of allegation that judge was leading juror through body language was significant, given that numerous attorneys and defendants were present, and judge's longstanding relationship with marshal did not amount to anything more than ordinary contact incident to their respective courtroom roles. 28 U.S.C.A. § 455(a), (b)(1).

[48] **Criminal Law**—Right of defendant to counsel

The Court of Appeals reviews the denial of a motion to replace court-appointed counsel for abuse of discretion.

[49] **Criminal Law**—Indigence
Criminal Law—Choice of appointed counsel

An indigent criminal defendant who seeks court-appointed counsel does not have a constitutional right to choose his attorney; he has only the right to effective representation. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

[50] **Criminal Law**—Particular Cases or Situations

Effective representation for defendant, as required under Sixth Amendment, may be endangered in criminal proceeding if the attorney-client relationship is bad enough. U.S.C.A. Const.Amend. 6.

[51] **Criminal Law**—Procedure

When a defendant asks the district court to replace appointed counsel, the court generally has an obligation to engage the defendant in a colloquy on the record concerning the cause of the defendant's dissatisfaction with his representation. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[52] **Criminal Law**—Discharge by Accused
Criminal Law—Procedure

The defendant bears the burden of showing good cause to replace appointed counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. U.S.C.A. Const.Amend. 6.

[53] **Criminal Law**—Particular Cases
Criminal Law—Procedure

District Court did not abuse its discretion in denying defendant's motion for replace court-appointed counsel in prosecution for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization; court held multiple colloquies on record in order to determine reasons for defendant's dissatisfaction with one of his three appointed attorneys, and attorney-client relationship had not deteriorated to point where counsel could not provide effective assistance. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[54] **Criminal Law**—Sentence
Criminal Law—Mandate and proceedings in lower court

Defendants, who were sentenced under pre-*Booker* mandatory sentencing guidelines upon their convictions for crimes, including murders and other violent crimes, arising from operation of massive drug operation organization were entitled to vacatur of their sentences and remand for resentencing under advisory sentencing guidelines. U.S.C.A. Const.Amend. 6.

[55] **Sentencing and Punishment**—Conspiracy and racketeering

District Court properly calculated each of defendant's guidelines offense level when sentencing them upon their convictions for participation in drug distribution conspiracy, where court found each of defendants responsible for several murders committed in furtherance of conspiracy, thereby maximizing each defendant's offense level under guidelines for conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A), 406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846; U.S.S.G. § 2D1.1(d)(1), 18 U.S.C.A.

1 Cases that cite this headnote

[56] **Criminal Law**—Merger of offenses

Under District of Columbia law, the merger of multiple convictions for possession of a firearm during a crime of violence is proper if they arose out of a defendant's uninterrupted possession of a single weapon during a single act of violence. D.C. Official Code, 2001 Ed. § 22–4504(b).

[57] **Criminal Law**—Merger of offenses

Merger is appropriate where multiple convictions under statute prohibiting use of a firearm during and in relation to a crime of violence or a drug trafficking crime arise from only one use of the firearm. 18 U.S.C.A. § 924(c).

[58] **Indictments and Charging Instruments**—Conspiracy, racketeering, and money laundering

A drug conspiracy violative of federal law is a lesser included offense of continuing criminal enterprise. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 406, 408, 21 U.S.C.A. §§ 846, 848.

***134** Appeals from the United States District Court for the District of Columbia (No. 98cr00264–01) (No. 98cr00264–06) (No. ***135** 98cr00264–07) (No. 98cr00264–08) (No. 98cr00264–16).

Attorneys and Law Firms

Tony Axam, Jr., Assistant Federal Public Defender, Sebastian K.D. Graber, Joseph Virgilio, Jenifer Wicks, and Ernest W. McIntosh, Jr., all appointed by the court, argued the causes for appellants. With them on the joint briefs was A.J. Kramer, Federal Public Defender.

Suzanne C. Nyland, Special Assistant U.S. Attorney, argued the cause for appellee. With her on the brief were Ronald C. Machen Jr., U.S. Attorney, and Elizabeth Trosman and John P. Mannarino, Assistant U.S. Attorneys.

Before: KAVANAUGH and WILKINS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion

Opinion for the Court filed by Circuit Judge KAVANAUGH.

KAVANAUGH, Circuit Judge:

****312** From 1985 to 1998, Tommy Edelin ran a massive drug distribution organization in Southeast Washington, D.C. The organization sold crack cocaine and other drugs, and committed numerous murders and other violent crimes. After an intensive law enforcement investigation of the organization, six defendants were indicted for violations of federal and D.C. law. After a lengthy and complicated trial, five of those defendants—Tommy Edelin, Earl Edelin, Bryan Bostick, Henry Johnson, and Shelton Marbury—were convicted by a jury and sentenced to life imprisonment. They now appeal. (The sixth defendant was also convicted but died after trial.)

On appeal, the defendants contest their convictions by challenging, among other things, the sufficiency of the evidence, the jury instructions, various evidentiary rulings, and alleged juror misconduct. We affirm the judgments of conviction.

The defendants also challenge their sentences. They were sentenced to life imprisonment under the mandatory Sentencing Guidelines that were in effect before the Supreme Court's landmark Sixth Amendment decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Under *Booker,* the Guidelines are now advisory. Two of the defendants (Earl Edelin and Henry Johnson) raised Sixth Amendment objections in the District Court. Under *Booker,* they are entitled to vacatur of their sentences and resentencing under the advisory Sentencing Guidelines. Two of the defendants (Bryan Bostick and Shelton Marbury) did not raise the Sixth Amendment issue in the District Court. But on plain error review, they are still entitled to what our cases have termed a *Booker* remand of the record to determine whether the District Court would impose different sentences, more favorable to the defendants, under the advisory Guidelines. *See* *United States v. Coles,* 403 F.3d 764, 770 (D.C.Cir.2005). The sentence of the remaining defendant, Tommy Edelin, is affirmed. Based on his conviction for continuing criminal enterprise, which we affirm, Tommy Edelin received a statutorily mandated life sentence, which did not depend on the Sentencing Guidelines. *Booker* does not affect his sentence, as he has expressly conceded on appeal.

In their appeal, the defendants have raised a great number and variety of arguments. Those arguments are not amenable to easy categorization, so we will just address them one after the other.

I

We first provide the factual and procedural background. Because we are reviewing a jury verdict of guilt, we recount the evidence in the light most favorable to the Government.

***136 **313** In 1996, the Federal Bureau of Investigation and the D.C. Metropolitan Police Department started a joint investigation into the activities of Tommy Edelin's drug distribution organization. By that time, Tommy Edelin was leading a large-scale drug ring that distributed massive quantities of crack cocaine, powder cocaine, and heroin in the Washington, D.C., area.

During the 1980s and 1990s, Tommy Edelin purchased large quantities of drugs from wholesale suppliers in New York. In Washington, D.C., he provided the drugs to a group of mid-level distributors. Those mid-level distributors in turn sold the drugs to street-level dealers, who then sold to retail customers primarily in the Stanton Dwellings and Congress Park neighborhoods of Southeast Washington, D.C. Edelin distributed drugs through a credit arrangement called "fronting," whereby Edelin fronted the drugs to his dealers, who paid him only after making their sales. Edelin used his profits to finance larger drug purchases and expand his distribution network.

In the course of their activities, Tommy Edelin and his associates committed numerous murders and shootings, often during clashes with rival drug crews. Those conflicts frequently followed a pattern: A dealer from a rival group would rob or attack one of Edelin's associates. Edelin would respond by ordering his associates to kill the attacker as well as members of the attacker's crew. Throughout the 1990s, several of Edelin's distributors and dealers, including the defendants here, participated in such violence.

Tommy Edelin's father is Earl Edelin. Earl Edelin served as a top lieutenant in his son's drug distribution network. The elder Edelin worked as a mid-level distributor, supplying his son's drugs to other mid-level and street-level dealers. In the 1990s, Earl Edelin worked at the Stanton Dwellings community recreation center. He gave members of the organization access to the recreation center, where they could cook cocaine powder into crack, sell drugs, and store guns, money, and drugs. He also taught his son's associates how to shoot to kill, and he provided weapons to them. Finally, Earl Edelin warned others in the organization about planned police raids and suspected confidential informants.

In the early 1990s, Bryan Bostick worked for Tommy Edelin as a mid-level distributor and hitman. Although Tommy Edelin initially declined to supply Bostick with drugs, he changed his mind after witnessing Bostick murder two people at a traffic light. Acting on Tommy Edelin's orders, Bostick also attacked several individuals in the course of a dispute with a rival drug crew.

Like Bostick, Henry Johnson was a mid-level distributor of crack cocaine and a hitman in Tommy Edelin's organization. During the 1990s, he purchased crack cocaine from other mid-level distributors, including Earl Edelin, and resold it to street-level dealers. In addition, Johnson committed at least one murder during a conflict with the Stanton Terrace Crew, a rival drug group, in 1996.

Shelton Marbury was a street-level dealer of crack cocaine. He operated at the lowest level of Tommy Edelin's distribution network. He committed two murders and participated in several shootings during the conflict with the Stanton Terrace Crew in 1996.

In 1996, the Stanton Terrace violence caught the attention of law enforcement and prompted the investigation into Tommy Edelin's organization. Two years later, Tommy Edelin was arrested after purchasing wholesale quantities of cocaine and heroin in a government sting operation.

***137 **314** Six defendants were later indicted in a 90–count indictment that charged offenses under federal law and the D.C.Code. The charges included conspiracy to distribute narcotics in violation of 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(A) (Count One), conspiracy to participate in a racketeer-influenced corrupt organization in violation of 18 U.S.C. § 1962(d) (Count Three), and numerous counts of murder, assault with intent to murder while armed, violent crime in aid of racketeering activity, and various firearm offenses. Tommy Edelin was also charged with engaging in a continuing criminal enterprise in violation of 21 U.S.C. §§ 848(a) and (b) (Count Two), unlawful use of a communication facility (Counts 86–88), and possession with intent to distribute one kilogram or more of heroin and five kilograms or more of cocaine (Counts 89–90). The prosecution's case featured extensive testimony from many cooperating witnesses who had been involved in Tommy Edelin's organization. The jury found the defendants guilty on numerous counts. Applying the then-mandatory Sentencing Guidelines, the District Court sentenced the defendants to life imprisonment. One of the defendants, Marwin Mosley, was convicted, but he died in 2006 and his appeal was subsequently dismissed.

II

[1] [2] The defendants raise several sufficiency of the evidence arguments. When considering a challenge to the sufficiency of the evidence, we uphold a guilty verdict where, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gaskins,* 690 F.3d 569, 576 (D.C.Cir.2012) (internal quotation marks omitted). We do not distinguish between direct and circumstantial evidence in making that assessment. *Id.* at 577. The "evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." *United States v. Kwong–Wah,* 924 F.2d 298, 302 (D.C.Cir.1991) (internal quotation marks omitted). Under that deferential standard of review, the evidence in this case easily suffices to sustain the guilty verdicts.

A

Count One of the indictment alleged that the defendants participated in a single drug conspiracy led by Tommy Edelin. All five defendants contend that the evidence at trial showed multiple conspiracies rather than the single drug conspiracy charged in Count One.

[3] Whether the evidence proved a single conspiracy "is primarily a question of fact for the jury." *United States v. Childress,* 58 F.3d 693, 709 (D.C.Cir.1995) (internal quotation marks omitted). On appellate review, the relevant question is therefore "whether there is sufficient evidence—when viewed in the light most favorable to the government—to support a jury finding of a single conspiracy agreed to" by all of the defendants. *Id.*

The Government's theory at trial was that Tommy Edelin headed a single, chain-model narcotics distribution and racketeering organization, through which he directly supplied some mid-level dealers, such as Earl Edelin and Bryan Bostick, and indirectly supplied other mid- and street-level dealers, such as Henry Johnson and Shelton Marbury, respectively. In addition to distributing drugs, Bostick, Johnson, and Marbury carried out murders and other violent acts in support of the conspiracy.

[4] We consider three factors to determine whether the evidence supports a conclusion ****315 *138** that the defendants belonged to a single conspiracy: whether the alleged participants had (1) a common goal, (2) interdependence, and (3) overlap, "such as the presence of core participants linked to all the defendants." *United States v. Gatling,* 96 F.3d 1511, 1520 (D.C.Cir.1996).

[5] This sufficiency of the evidence issue is not close, especially given our deferential standard of review. The Government overwhelmingly established each defendant's membership in the single charged conspiracy. The massive evidence regarding the defendants' significant drug distribution activities plainly demonstrates that they shared the organization's goal of selling drugs. The evidence establishes interdependence among the participants: For example, Marbury depended on mid-level distributors in Tommy Edelin's network, like Earl Edelin and Johnson. Mid-level distributors like Earl Edelin, Johnson, and Bostick in turn relied on other mid-level distributors in the organization or directly on Tommy Edelin. And Tommy Edelin relied on the others to distribute and sell the drugs. And the evidence indicates that there were overlapping core participants—such as Earl Edelin—with ties to defendants on both ends of the supply chain.

We need not spend long on this point. From the overwhelming evidence of the defendants' common goal, interdependence, and overlapping core of participants, a reasonable jury could easily conclude that the defendants were part of a single drug distribution conspiracy.

B

Even if all of the defendants belonged to a single drug conspiracy, they say that "certain actions were outside the chain and formed a separate conspiracy." *United States v. Tarantino,* 846 F.2d 1384, 1393 (D.C.Cir.1988).

[6] First, the defendants argue that Bostick's murder of two people at a traffic light fell outside the scope of the charged conspiracy. They claim that they were prejudiced by the Government's inflammatory presentation of those allegedly unrelated murders.

Bostick was riding with Tommy Edelin in Edelin's car when Bostick spotted a vehicle that he thought belonged to one of his rivals. With Tommy Edelin's permission, Bostick exited the car at a traffic light and shot the two occupants of the other vehicle, killing both. The victims turned out to be innocent teenage siblings Rodney and Volante Smith, not Bostick's rivals.

The defendants maintain that Bostick committed those murders as part of a feud that was unrelated to Tommy Edelin's organization. But the record indicates that Tommy Edelin authorized the shooting and was pleased with Bostick's demonstrated ability to kill. Witnesses testified that after the murder, Tommy Edelin rewarded Bostick with a car, a direct supply of drugs, and a place in his inner circle. Based on that evidence, a rational jury could find that Bostick committed those murders in part to enhance his status and role within Tommy Edelin's drug organization and that the murders were therefore within the scope of the drug distribution conspiracy. *Cf. United States v. Carson,* 455 F.3d 336, 370 (D.C.Cir.2006) (jury could find that shooting was in aid of racketeering and drug distribution enterprise where defendant shot rival in part "to maintain or increase his own reputation as an enforcer in the enterprise").

[7] Second, Earl Edelin, Johnson, and Marbury claim that the Stanton Terrace Crew killings were committed in retaliation ****316 *139** for the Crew's assault and robbery of Marbury's relatives, not as part of the conspiracy to distribute drugs for profit.

We reject that argument because the evidence adequately supports the conclusion that the violence was committed in furtherance of the drug distribution conspiracy. When the Stanton Terrace conflict began, Tommy Edelin told co-conspirator Thomas Sims: "Take care of these people quick before it affect the money." July 2, 2001 Trial Tr. at 12071 (Thomas Sims). Tommy Edelin directed Sims to kill Stanton Terrace Crew members. *Id.* Later in the conflict, Tommy Edelin ordered the murder of a Stanton Terrace Crew affiliate who had shot at one of his top lieutenants. Johnson helped carry out that murder.

Earl Edelin taught Sims, Johnson, Marbury, and others how to use firearms to kill Stanton Terrace Crew members. He gave Marbury a gun to use in the shootings. In addition, Earl Edelin communicated with Sims during the dispute and passed along information about where Stanton Terrace Crew members could be found.

That evidence indicates that the Stanton Terrace murders were committed, at least in part, to protect the profits and operations of Tommy Edelin's drug distribution enterprise. The dispute threatened Tommy Edelin's distributors and their drug sales. Killing Stanton Terrace Crew members neutralized that threat and ensured that distribution continued smoothly. Tommy Edelin's direct involvement in the dispute further indicates that the murders were committed in furtherance of the drug conspiracy, even if there also were other motives.

C

[8] Defendants Earl Edelin, Johnson, and Marbury argue that the Government failed to produce sufficient evidence of their specific intent to further Tommy Edelin's drug distribution scheme. "To prove that a defendant entered into a narcotics conspiracy under 21 U.S.C. § 846, the government must prove that he did so knowingly" and with "the specific intent to further the conspiracy's objective." *Gaskins,* 690 F.3d at 577 (internal quotation marks omitted).

[9] The Government introduced abundant evidence about Earl Edelin's central role in the drug conspiracy. He not only sold his son's crack to other dealers but also recruited new mid-level distributors. During disputes with rival drug crews, Earl Edelin provided firearms expertise and weapons to his son's associates. He also warned the group about police raids, suspected cooperators, and enemy dealers. While employed at a community recreation center, Earl Edelin gave out keys to the facility so that the group would have a secure place to store contraband and sell drugs. That evidence easily supports the conclusion that Earl Edelin specifically intended to further the conspiracy's aim of distributing drugs for profit.

[10] Johnson and Marbury argue that there is insufficient evidence showing that they knew that Tommy Edelin supplied their suppliers or were otherwise aware of a larger conspiracy. At most, they contend, the evidence shows that they were engaged in independent buyer-seller relationships. But we have stated that "a jury may properly find a conspiracy, rather than a buy-sell agreement, where the evidence shows that a buyer procured [or a seller sold] drugs with knowledge of the overall existence of the conspiracy." *United States v. Sanders,* 778 F.3d 1042, 1053 (D.C.Cir.2015) (quoting *United States v. Thomas,* 114 F.3d 228, 241 (D.C.Cir.1997)) (internal quotation marks omitted). ***140 **317** "Among the factors demonstrating such knowledge are the existence of repeated, regular deals; drug quantities consistent with redistribution; and the extension of credit to the buyer." *Id.*

Johnson and Marbury regularly purchased resale quantities of crack cocaine from mid-level members of Tommy Edelin's organization, and they then redistributed those drugs. Johnson also regularly supplied street-level dealers in Tommy Edelin's organization. Credit arrangements were a common feature of their transactions. A reasonable jury could therefore conclude that Johnson and Marbury entered the conspiracy with the specific intent to further its objective.

To be sure, we have cautioned that "[c]hain analysis must be used with care." *Tarantino,* 846 F.2d at 1393. Accordingly, we have found sufficient evidence of the "knowledge" element of conspiracy not just where the defendant had vague knowledge that the person with whom he or she dealt also worked with unknown others in some fashion to sell drugs, but where the evidence showed that the defendant was "aware of the structure of the enterprise," *United States v. Sobamowo,* 892 F.2d 90, 94 (D.C.Cir.1989), such as where the defendant "played other roles in the conspiracy" and "knew of the collaboration of others," *Tarantino,* 846 F.2d at 1393–94. A reasonable jury could conclude that the evidence against Johnson and Marbury in this case satisfied those standards.

D

Defendant Earl Edelin argues that the evidence is insufficient to support his conviction for conspiracy to participate in a racketeer-influenced corrupt organization in violation of 18 U.S.C. § 1962(d). As predicate racketeering acts, the jury found that Earl Edelin had conspired to distribute drugs and to murder members of the Stanton Terrace Crew. Earl Edelin contends that the Government failed to prove his involvement in those activities. As we have discussed, the record contains plentiful evidence that was more than sufficient for a jury to find that Earl Edelin committed both predicate racketeering acts. We therefore affirm his conviction on the RICO conspiracy charge.

E

[11] [12] Defendant Tommy Edelin challenges his conviction for continuing criminal enterprise in violation of 21 U.S.C. § 848(c). To convict under Section 848, the jury must find the defendant guilty of "1) a felony violation of the federal narcotics law; 2) as part of a continuing series of violations; 3) in concert with five or more persons; 4) for whom the defendant is an organizer or supervisor; 5) from which he derives substantial income or resources." *United States v. Moore,* 651 F.3d 30, 80 (D.C.Cir.2011) (internal quotation marks omitted). A "continuing series of violations" consists of three or more predicate acts, which may include a drug conspiracy under 21 U.S.C. § 846. *Id.*

Tommy Edelin disputes the sufficiency of the evidence supporting his continuing criminal enterprise conviction on two grounds. First, he raises a statute of limitations argument and contends that the evidence is insufficient to establish that the continuing criminal enterprise continued into the limitations period—that is, continued beyond July 1993. (The original indictment was filed on July 30, 1998, and the offense has a five-year statute of limitations. *See* 18 U.S.C. § 3282(a).) That argument fails because the prosecution had the burden of proving only three or more predicate acts, at least one of which occurred after July 1993. *See* *United States v. Soto–Beniquez,* 356 F.3d 1, 28 (1st Cir.2003). The jury found 11 predicate ****318** ***141** acts proved, 10 of which occurred after July 1993. The Government plainly met its burden.

[13] Second, Tommy Edelin contends that the evidence fails to show that "the core structure of the alleged enterprise remained intact during the period charged." Defs.' Br. 202. That argument also fails. We have previously rejected the claim that Section 848 requires the Government to prove "the structure of a continuing organization equivalent to a RICO 'enterprise.' " *United States v. Hoyle,* 122 F.3d 48, 51 (D.C.Cir.1997). Rather, we have recognized that "one can organize events and supervise transitory subordinates without creating an organizational structure." *Id.* The Government must simply "establish that the defendant exerted some type of influence over five other individuals in the course of the criminal enterprise"; it "need not prove that the defendant managed five people simultaneously." *United States v. Rea,* 621 F.3d 595, 602 (7th Cir.2010) (internal quotation marks omitted); *see also* *United States v. Almaraz,* 306 F.3d 1031, 1040 (10th Cir.2002); *Santana–Madera v. United States,* 260 F.3d 133, 140 n. 3 (2d Cir.2001).

[14] The Government presented overwhelming evidence that Tommy Edelin organized or supervised five or more people in committing a series of underlying predicate acts, including his conspiracy to distribute drugs for profit. That evidence includes extensive testimony from cooperating witnesses whom Edelin organized, along with others, for purposes of drug distribution and drug-related murders. Viewed in the light most favorable to the Government, a rational jury could easily have found the essential elements of continuing criminal enterprise beyond a reasonable doubt. We therefore affirm Tommy Edelin's continuing criminal enterprise conviction.

F

Defendant Marbury challenges the sufficiency of the evidence supporting his convictions under D.C. law for possession of a firearm during a crime of violence, as charged in Counts 70–73. The jury acquitted Marbury of the underlying assaults but convicted him of the firearm charges.

[15] Marbury concedes, as he must, that a jury may find him guilty of possessing a firearm during a crime of violence without convicting him of the underlying offense, "so long as there is evidence in the record to support a conviction of the compound offense." *Ransom v. United States,* 630 A.2d 170, 172 (D.C.1993). He argues that the evidence is insufficient to prove that he committed the offense of possessing a firearm during a crime of violence.

[16] Multiple cooperating witnesses provided detailed testimony about Marbury's role in the charged assaults, all of which involved shootings directed at the Stanton Terrace Crew. In all but one of the attacks, one of the testifying witnesses had participated in the crime with Marbury. In the remaining instance, that witness testified that Marbury had asked him for help in covering up Marbury's role in the shooting. Another Government witness testified that after that assault, Marbury had asked to trade guns because his gun had a victim's "body" on it. July 2, 2001 Trial Tr. at 12065 (Thomas Sims). According to the witnesses, Marbury carried a firearm during each assault.

Based on that testimony, a rational jury could readily find that Marbury participated in each underlying assault. We therefore affirm his convictions for possession of a firearm during a crime of violence.

**319 *142 III

The jury convicted defendant Henry Johnson of violent crime in aid of racketeering activity under 18 U.S.C. § 1959. At trial, the Government presented evidence that Tommy Edelin had ordered one of his lieutenants to kill Stanton Terrace Crew affiliate Edgar Watson. That lieutenant and Johnson shot at Watson and Watson's date, Dionne Johnson, as they were leaving a high school prom. Watson died in the attack. The jury found Johnson guilty of violent crime in aid of racketeering activity against Dionne Johnson but acquitted him of the same charge against Watson.

[17] First, Johnson argues that the evidence is insufficient to support the conviction for violent crime in aid of racketeering activity. Because Johnson did not raise that argument in the District Court, our review is for plain error. "When reviewing a sufficiency-of-the-evidence challenge for plain error, we reverse only to prevent a manifest miscarriage of justice." *United States v. Spinner,* 152 F.3d 950, 956 (D.C.Cir.1998) (internal quotation marks omitted). A manifest miscarriage of justice exists "if the record is devoid of evidence pointing to guilt" or "the evidence on a key element of the offense was so tenuous that a conviction would be shocking." *Id.* (internal quotation marks omitted).

[18] To convict for violent crime in aid of racketeering activity, the Government must prove that the defendant committed a violent crime "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." 18 U.S.C. § 1959(a). We have stated that the "motive of maintaining or increasing one's position in an enterprise may be reasonably inferred where the defendant commits the crime in furtherance of enterprise membership or where the defendant knew it was expected of him by reason of his membership in the enterprise." *United States v. Gooch,* 665 F.3d 1318, 1337–38 (D.C.Cir.2012) (internal quotation marks omitted). That motive may be found, for example, where the defendant "murdered individuals to maintain or increase his own reputation as an enforcer in the enterprise." *Id.* at 1338 (internal quotation marks omitted).

Johnson contends that the Government failed to prove that he received anything of pecuniary value for his assault of Dionne. That argument fails because the evidence is sufficient to show that Johnson sought to achieve a higher position in Tommy Edelin's racketeering organization. A Government witness testified that Tommy Edelin had ordered Watson's murder because Watson had shot at Edelin's lieutenant. Edelin was concerned that if they failed to retaliate, "that would make them look weak" and "would reflect on him." Aug. 1, 2001 Trial Tr. at 16344 (Eric Jones). That testimony indicates that Tommy Edelin expected his associates to violently retaliate against individuals who threatened them, lest their weakness reflect on the entire group. Based on that evidence, a jury could reasonably infer that Johnson hoped to improve his status in the enterprise by assisting with Watson's murder and assaulting Dionne in the process.

Second, Johnson argues that, in any event, he should receive a new trial on the violent crime in aid of racketeering activity and related firearm charges because, he says, his conviction resulted from jury confusion. The jury asked the District Court whether it must find Johnson guilty of **320 *143 RICO conspiracy in order to convict him of violent crime in aid of racketeering activity. The District Court responded that the "answer to that question is no." Supp. Jury Instructions, No. 98–264 (D.D.C. filed Sept. 21, 2001). Johnson contends that the District Court's answer was too cursory to adequately resolve the jury's confusion.

[19] We have held that if the jury expresses confusion about a jury instruction, the district court "should reinstruct the jury to clear away the confusion." *United States v. Laing,* 889 F.2d 281, 290 (D.C.Cir.1989). A district court's decision "to limit its response to answering the jury's question, however, should be reversed only if it is an abuse of discretion." *Id.* We find no abuse of discretion where, as here, the initial instructions were correct and the District Court's "response was limited to answering the jury's query and was entirely accurate." *Id.*

IV

Defendant Bryan Bostick appeals his convictions for the Count One drug conspiracy and the Count Three RICO conspiracy. Bostick contends that there is insufficient evidence that he participated in those conspiracies within the five-year statute-of-limitations period—that is, after August 1994. He also argues that the District Court erred by failing to instruct the jury on withdrawal and limitations defenses. We disagree.

Conspiracy has a five-year statute of limitations. *See* 18 U.S.C. § 3282(a). Bostick claims that he withdrew from the charged conspiracies in April 1994, more than five years before the Government obtained an indictment against him on August 5, 1999.

[20] The Supreme Court considered "the intersection of a withdrawal defense and a statute-of-limitations defense" in *Smith v. United States,* ––U.S. ––, 133 S.Ct. 714, 718, 184 L.Ed.2d 570 (2013). The Court stated that participation in a conspiracy "*within the statute-of-limitations period* is not an element of the conspiracy offense" that requires proof beyond a reasonable doubt. *Id.* at 720. Rather, "a defendant's membership in the conspiracy, and his responsibility for its acts, endures even if he is entirely *inactive* after joining it." *Id.* at 721. The defendant has the burden of establishing his or her withdrawal. *Id.* at 719. To withdraw from a conspiracy, an individual must come clean to the authorities or communicate his or her abandonment "in a manner reasonably calculated to reach co-conspirators." *United States v. Thomas,* 114 F.3d 228, 267 (D.C.Cir.1997) (internal quotation marks omitted).

Bostick did not present sufficient evidence of withdrawal. A Government witness testified in passing that Bostick had worked with one of Tommy Edelin's rivals. But the witness did not suggest that working with Tommy Edelin's rival required Bostick to withdraw from the Edelin conspiracy. Moreover, when the witness made that comment, Bostick made no attempt to develop a withdrawal defense. Rather, Bostick's attorney chastised the witness for "blurting out" irrelevant information about his client. May 23, 2001 Trial Tr. at 6051 (Cary Clennon).

[21] Bostick also contends that his conspiracy convictions must be reversed because the District Court failed to instruct the jury on Bostick's supposed withdrawal from the conspiracy in 1994. Because Bostick did not request such an instruction at trial, we review for plain error. *United States v. Gatling,* 96 F.3d 1511, 1524–25 (D.C.Cir.1996). Under that standard, Bostick must show "(1) that there was an error, (2) that the error was clear or obvious, (3) that it affected the appellant's **321 *144 substantial rights, and (4) that it seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Gooch,* 665 F.3d 1318, 1332 (D.C.Cir.2012). The District Court did not err, let alone plainly err, by failing to instruct the jury on withdrawal. As we have discussed, Bostick did not produce evidence substantiating his claim of withdrawal at any point, let alone in or before 1994.

V

All of the defendants challenge the District Court's jury instructions on the Count One drug conspiracy. The District Court inadvertently omitted a sentence that the parties had agreed to include in the instructions. That sentence, in the defendants' view, would have underscored that the Government must prove each individual defendant's involvement in the conspiracy. At the time, no one objected to the omitted sentence. On appeal, the defendants maintain that without that sentence, the instructions permitted the jury to convict all of the defendants on Count One as long as the jury found that any two of the defendants had participated in the conspiracy.

[22] Because the defendants did not object to the District Court's omission, our review is for plain error. *United States v. Gaviria,* 116 F.3d 1498, 1509 (D.C.Cir.1997). Under that standard, we reverse only if the defendants show "(1) that there was an error, (2) that the error was clear or obvious, (3) that it affected the appellant's substantial rights, and (4) that it seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Gooch,* 665 F.3d 1318, 1332 (D.C.Cir.2012). We conclude that the instructions adequately conveyed that an individual defendant must join the conspiracy to be found guilty under 21 U.S.C. § 846. There was no error, much less plain error.

The District Court instructed the jury that it "must consider separately the issue of each defendant's participation." Sept. 13, 2001 Trial Tr. at 21521. According to the instructions, the elements of the conspiracy require "that the government prove beyond a reasonable doubt that a particular defendant was aware of the common purpose, had knowledge that the conspiracy existed, and was a willing participant with the intent to advance the purposes of the conspiracy." *Id.* at 21523. It further cautioned the jury that before determining "that a defendant has become a member of a conspiracy, the evidence in the case must prove to you beyond a reasonable doubt that the defendant knowingly participated in the unlawful plan with the intent to advance or further some objective or purpose of the conspiracy." *Id.* The court added that "a person who has no knowledge of or intent to join the conspiracy, but just happens to act in a way that is of benefit to the conspiracy, or to a conspirator, does not thereby himself become a conspirator." *Id.* at 21523–24.

The District Court's instructions repeatedly emphasized that to convict a particular defendant of Count One, the jury must find that the individual defendant knowingly participated in the conspiracy with the specific intent to further its objectives. The omitted sentence would have underscored the point, but the omission of the sentence did not render the instructions erroneous.

VI

Defendants Bryan Bostick, Henry Johnson, and Shelton Marbury contend that a number of D.C.Code charges were improperly joined to the federal indictment. As a result of the allegedly improper joinder, ****322 *145** those defendants argue that the District Court lacked subject matter jurisdiction over the D.C. offenses pursuant to D.C.Code § 11–502(3).

[23] Section 11–502(3) provides that "the United States District Court for the District of Columbia has jurisdiction" of any "offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense." We have interpreted "joined" in that context to mean "properly joined" under Federal Rule of Criminal Procedure 8. *United States v. Gooch,* 665 F.3d 1318, 1334 (D.C.Cir.2012). We review a claim of improper joinder de novo. *See id.* at 1335.

[24] Federal Rule of Criminal Procedure 8(b) provides that an indictment "may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." The D.C. offenses, therefore, were properly joined as long as the federal and D.C. law offenses formed part of the same "series of acts or transactions." A "series of acts or transactions" is "two or more acts or transactions connected together or constituting parts of a common scheme or plan." *United States v. Moore,* 651 F.3d 30, 69 (D.C.Cir.2011) (internal quotation marks omitted).

[25] [26] Joinder analysis "does *not* take into account the evidence presented at trial," but rather "focuses solely on the indictment and pre-trial submissions." *Gooch,* 665 F.3d at 1334. The Government, therefore, "need merely allege, not prove, the facts necessary to sustain joinder." *Id.* If the indictment satisfies the requirements of Rule 8(b), "trial evidence cannot render joinder impermissible and is thus irrelevant to our inquiry." *Moore,* 651 F.3d at 69.

[27] In this case, the superseding indictment alleged that the D.C. offenses were committed in furtherance of the charged drug conspiracy or were predicate acts committed in furtherance of the charged RICO conspiracy, or both. We have held that when an indictment alleges that local offenses were committed in furtherance of a federal drug conspiracy or as predicate acts in a federal RICO conspiracy, the local and federal offenses were "part of a common scheme or plan" and thus were properly joined under Rule 8(b). *Id.* The defendants contend that the evidentiary record disproves any connection between the local offenses and the federal conspiracies. We reject that contention. But even if the defendants were correct, the

evidence presented at trial is irrelevant to a determination of proper joinder. *See id.; Gooch,* 665 F.3d at 1334.

Because the indictment alleged that the local and federal offenses were committed as part of a common scheme or plan, the District Court properly exercised jurisdiction pursuant to Section 11–502(3).

VII

The defendants raise two main issues concerning the testimony of FBI Agent Dan Sparks.

A

The Government called FBI Agent Sparks as its first witness at trial. Agent Sparks provided overview testimony about the law enforcement investigation of the defendants. That testimony lasted only about an hour, in a trial that lasted five months and had dozens of witnesses testify, including numerous cooperators who testified about their involvement in the organization.

The defendants contend that the District Court erred by admitting Agent Sparks's ****323 *146** overview testimony. Based on decisions of this Circuit that came down after the trial, the Government concedes that some aspects of Agent Sparks's testimony exceeded the permissible uses of overview testimony. The Government argues, however, that the admission of Agent Sparks's testimony was harmless error under Rule 52(a) of the Federal Rules of Criminal Procedure. We agree.

[28] First, Agent Sparks testified as a lay witness about general investigative techniques. He discussed the use of controlled buys, search warrants, and cooperating witnesses as general techniques for infiltrating drug organizations. Agent Sparks also described the difficulty of conducting surveillance on criminals who conceal their illegal activities. Based on our recent precedents, admission of those statements as lay opinion testimony was error. *See United States v. Moore,* 651 F.3d 30, 61 (D.C.Cir.2011); *see also* Fed.R.Evid. 701. However, the District Court later qualified Agent Sparks as an expert in the investigation of drug trafficking based on his "training and experience on hundreds of investigations." Aug. 13, 2001 Trial Tr. at 17649. Because Agent Sparks would have qualified as an expert for purposes of the challenged testimony, there was no prejudice from that particular error. *See Moore,* 651 F.3d at 61 (that Agent Sparks "might have qualified as an expert" ameliorated prejudice from improper opinion testimony); *see also United States v. Smith,* 640 F.3d 358, 366 (D.C.Cir.2011) (agent's improper lay testimony was harmless error where agent would have qualified as an expert).

Second, Agent Sparks testified that violence in the Stanton Dwellings neighborhood had prompted the investigation in this case. When asked about the cause of the violence, Agent Sparks testified: "They were predominantly selling narcotics, and the narcotics was fueling the violence." May 9, 2001 Trial Tr. at 4179. The Government concedes that Agent Sparks's statement linking the violence to drug trafficking was inadmissible. *See* Fed.R.Evid. 403, 602, 701, 802. Though inadmissible, the challenged testimony was harmless error in this case. There was overwhelming evidence that the defendants committed violence, including numerous murders, in furtherance of the drug distribution conspiracy.

Third, Agent Sparks testified about the Government's use of cooperating witnesses. Agent Sparks repeatedly asserted that law enforcement verifies the information cooperators provide and requires truthful testimony as a condition of their plea agreements. As the Government concedes, Agent Sparks's testimony impermissibly suggested "that the government had selected only truthful co-conspirator witnesses for the pre-indictment investigation, from whom the jury would hear during the trial." *Moore,* 651 F.3d at 59–60. Such vouching testimony "is impermissible because it manifests the obvious danger that a jury will treat a summary witness, particularly a government agent," as "additional evidence or as corroborative of the truth of the underlying testimony." *United States v. Miller,* 738 F.3d 361, 372 (D.C.Cir.2013) (quoting *United States v. Lemire,* 720 F.2d 1327, 1348 (D.C.Cir.1983)) (internal quotation marks omitted); *see also Moore,* 651 F.3d at 59–60; Fed.R.Evid. 403, 608(a).

Under our precedents, however, that testimony was harmless error. At the close of trial, the District Court instructed the jury: "You are the sole judge of the credibility of the witnesses. In other words, you alone are to determine whether to believe any witness and the extent to which any witness should be believed." Sept. 13, 2001 Trial Tr. at 21499. In *United* ****324 *147** *States v. Miller,* we held that an identical jury instruction mitigated prejudice from improper vouching testimony. 738 F.3d at 372. In addition, the defendants here cross-examined Agent Sparks, and he acknowledged the limits on verifying cooperator testimony. Agent Sparks agreed, for example, that cooperating co-conspirators had "flat out lied" to law enforcement in the past. May 9, 2001 Trial Tr. at 4421–22. He also agreed that law enforcement cannot always verify cooperators' information. *Cf.* *Miller,* 738 F.3d at 372 (impeachment of cooperating witnesses on cross-examination mitigated prejudice from vouching testimony). The well-rounded picture that Agent Sparks ultimately presented about cooperating witnesses mitigated any risk of prejudice from his initial testimony on that point.

Fourth, Agent Sparks discussed some of the evidence that was later admitted at trial. Some of that testimony violated the hearsay rule. *See* Fed.R.Evid. 602, 701, 802. But the error was harmless because that testimony—to the extent it related to charged offenses—was confirmed through several months of testimony from dozens of witnesses, including numerous cooperating witnesses.

As this Court has stated before, aspects of overview testimony can be problematic under the Federal Rules of Evidence. But in the big picture of this trial—which lasted many months and included massive amounts of testimonial evidence—the overview testimony was relatively minor. To the extent it exceeded the bounds of the Federal Rules of Evidence, Agent Sparks's overview testimony was harmless error. It did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); *see also* *Smith,* 640 F.3d at 366, 368.

B

During the trial, the District Court admitted several audiotapes and videotapes of conversations between Tommy Edelin and Kenneth Daniels, a confidential informant. The conversations concerned a drug transaction. Daniels sold Edelin heroin and cocaine in a government sting operation. But the Government did not call Daniels as a witness at trial. Instead, the Government introduced audiotapes and videotapes of the conversations between Edelin and Daniels, and Agent Sparks testified about those recorded conversations. Edelin challenges the admission of the audiotape and videotape evidence on Confrontation Clause grounds. He also argues that Agent Sparks's testimony about the recorded conversations violated the Federal Rules of Evidence.

[29] [30] [31] First, Tommy Edelin contends that the admission of Daniels's statements on the tapes violated the Confrontation Clause of the Sixth Amendment because Edelin was not able to cross-examine Daniels. The Sixth Amendment's Confrontation Clause generally bars the introduction of testimonial statements of a witness absent from trial unless the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *See* *Crawford v. Washington,* 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Supreme Court has stated, however, that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 60 n. 9, 124 S.Ct. 1354. Daniels's recorded statements were not introduced for their truth but rather to provide context for Edelin's statements regarding the transaction. The Government could not have introduced Daniels's statements for their truth because, as Agent Sparks confirmed, Daniels ****325 *148** "was lying to Mr. Edelin during these conversations." Aug. 13, 2001 Trial Tr. at 17729. As the Government points out, "Daniels was not, as he represented on the tapes, actually arranging to sell drugs to [Edelin] obtained from a New York drug supplier, but rather acting as a [confidential informant] offering drugs actually supplied by law enforcement agents in a government sting operation." Gov't Br. 115–16. Because Daniels's statements were not offered for their truth, the admission of the tapes did not violate the Confrontation Clause.

[32] Second, Tommy Edelin argues that Agent Sparks's expert testimony about the recorded conversations contravened the Federal Rules of Evidence. Agent Sparks testified as an expert about Edelin and Daniels's negotiations over the sale of drugs. Edelin's basic claim is that Agent Sparks improperly translated the recorded conversations by interpreting ambiguous statements in an incriminating light. He argues that, as a result, Agent Sparks's testimony went beyond the scope of proper expert testimony and greatly prejudiced Edelin.

Assuming for the sake of argument that Agent Sparks's testimony exceeded proper expert testimony, any error was harmless, especially given the overwhelming evidence against Tommy Edelin.

The only close call with respect to harmless error concerns Tommy Edelin's convictions on Counts 86–88 for using a communication device (i.e., a phone or pager) to facilitate the Count One conspiracy to distribute drugs. There is no question that Edelin used a phone or pager to communicate with Daniels about the drug deal. The only issue is whether he did so in furtherance of the drug conspiracy charged in Count One. Put simply, Agent Sparks's testimony could not have meaningfully influenced the jury's thinking on that question, because Agent Sparks mentioned the Count One drug conspiracy only in passing in response to a question on cross-examination.

The record, moreover, contains plentiful evidence that Tommy Edelin was acting in furtherance of the drug conspiracy charged in Count One when he used a communication device to communicate with Daniels. On their face, the recorded conversations refer to the group that had been distributing drugs for Edelin. In one call, for example, Edelin told Daniels that he could sell drugs through "10 dudes" that "I trust and that I grew up with that I kicked keys to and still be kicking keys." July 7, 1998 Call Tr. at 6, Joint Appendix at 1315. There was no evidence to support an inference that Edelin had developed some new or different drug distribution network through which he planned to sell the large quantity of drugs purchased from Daniels. Rather, Edelin's reference to a group of "dudes" with whom he grew up selling drugs and with whom he continued to sell drugs was very likely (if not certainly) a reference to his longstanding organization, members of whom had provided months of testimony about the years they spent distributing drugs for Edelin.

Nor does the record suggest that Tommy Edelin had ended the organization charged in the Count One conspiracy—and started a new one—before his conversations with Daniels. Witnesses testified that as of 1996, Edelin was still directly supplying some mid-level dealers like Thomas Sims and indirectly supplying other mid-level dealers like Henry Johnson in the Stanton Dwellings and Congress Park neighborhoods of Southeast Washington, D.C. Edelin's brother testified that he traveled to New York twice a month during 1997 to purchase large quantities of powder cocaine on Edelin's behalf. He would deliver the drugs to Edelin's recording ****326 *149** studio, where Edelin would cook the powder into crack cocaine. When officers searched Tommy Edelin's house the day of his arrest, they found an eighth of a kilogram of powder cocaine and an eighth of a kilogram of crack cocaine.

In short, Tommy Edelin maintains that, absent Agent Sparks's testimony, a jury could have concluded that the conversations with Daniels related to some unknown drug organization distinct from the Count One conspiracy. But there is simply no evidence to support that theory and no reason to believe that the jury would have so concluded had Agent Sparks not testified. And we see no indication that Agent Sparks's testimony had a "substantial and injurious effect" on the jury's conclusion that the Daniels conversations were in furtherance of the Count One conspiracy. *See* *Kotteakos,* 328 U.S. at 776, 66 S.Ct. 1239. Any error with regard to admission of Agent Sparks's testimony about the Daniels tapes was harmless.

VIII

At trial, the Government presented expert testimony about the autopsies of 10 homicide victims. The experts included two medical examiners for the District of Columbia and a forensic pathologist for North Carolina. Two of the experts testified about autopsies that they had observed but had not performed. The remaining expert testified about eight autopsies that he had neither performed nor observed. The experts discussed information in the victims' autopsy reports and opined on the manner of the victims' deaths.[1]

The defendants contend that the Confrontation Clause of the Sixth Amendment barred the admission of the autopsy reports and accompanying expert testimony. The Sixth Amendment bars the introduction of testimonial statements of a witness absent from trial unless the witness is unavailable, and the defendant has had a prior opportunity to cross-examine the witness. *See* *Crawford v. Washington,* 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The defendants argue that the autopsy reports were testimonial statements under the Confrontation Clause. They maintain that the introduction of those statements violated the Confrontation Clause because the defendants did not have an opportunity to cross-examine the medical examiners who actually performed the autopsies and authored the reports.

[33] [34] Because the defendants did not preserve their constitutional objection at trial, our review is for plain error. Under that standard, the defendants must show "(1) that there was an error, (2) that the error was clear or obvious, (3) that it affected the appellant's substantial rights, and (4) that it seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Gooch,* 665 F.3d 1318, 1332 (D.C.Cir.2012). Substantial rights were affected if "the error was prejudicial and actually affected the outcome

below.” *United States v. Gatling,* 96 F.3d 1511, 1525 (D.C.Cir.1996). The “plainness” of an error is evaluated at the time of appellate review, not at the time of the district court’s decision. *See* *Henderson v. United States,* ––– U.S. ––––, 133 S.Ct. 1121, 1129, 185 L.Ed.2d 85 (2013).

[35] Based on Supreme Court decisions issued after the trial in this case, we will assume without deciding that the autopsy ****327 *150** reports were “testimonial” for purposes of the Confrontation Clause. *See* *Bullcoming v. New Mexico,* ––– U.S. ––––, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011); *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).[2] However, any error arising from their admission did not affect the defendants’ substantial rights in light of the overwhelming evidence against them. Put simply, the autopsy reports did not play an important role in the trial. The Government presented other evidence at trial, including testimony from cooperating witnesses, that nine of the ten homicides resulted from gunshot wounds inflicted by members of the charged conspiracy, and that Tommy Edelin hired hitmen to carry out the tenth murder. Moreover, there was no dispute at trial that gunshots killed each victim. As the Government aptly stated in its brief, the “issue that was in material dispute—who pulled the trigger(s)—was not addressed by any of the testifying medical examiners.” Gov’t Br. 158. There was no plain error in admitting the autopsy reports.

IX

Defendants Bryan Bostick and Tommy Edelin attempted to introduce expert testimony at trial. Bostick sought to present testimony from a gang expert, and Tommy Edelin sought to present testimony from an expert in FBI investigative techniques. The District Court excluded that testimony. The defendants now appeal the District Court’s rulings.

Federal Rule of Evidence 702 governs the admissibility of expert testimony. The rule provides that a “witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise” if four conditions are met: First, “the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.” Second, “the testimony is based on sufficient facts or data.” Third, “the testimony is the product of reliable principles and methods.” And fourth, “the expert has reliably applied the principles and methods to the facts of the case.”

[36] We have stated that a “district court has broad discretion regarding the admission or exclusion of expert testimony, and reversal of a decision on these matters is appropriate only when discretion has been abused.” *United States v. Clarke,* 24 F.3d 257, 268 (D.C.Cir.1994) (internal quotation marks omitted). The District Court did not abuse its discretion here.

A

[37] Bostick proffered testimony from Lisa Taylor–Austin, “an expert on gang culture and violence.” Aug. 28, 2001 Trial Tr. at 20173. Taylor–Austin would have opined “that the so-called gangs referenced in the government case do not fit the typical profile or operational structure of gangs as they are typically understood by the law enforcement community.” *Id.* Defendants Henry Johnson and Tommy Edelin joined Bostick’s request to admit the expert. They argued that the prosecution ****328 *151** had attempted to portray Tommy Edelin’s criminal organization as a “crew” or “gang,” and that information on gang formation was therefore relevant. *Id.* at 20179–80.

The Government objected on the ground that it was irrelevant whether Tommy Edelin’s organization constituted a gang. None of the charges involved gang membership, and the Government was not arguing that the defendants belonged to a gang. Rather, the question for the jury was whether the defendants had participated in drug and racketeering conspiracies. The District Court found the proffer “inadequate” and sustained the Government’s objection. *Id.* at 20180.

The District Court did not abuse its discretion. The defendants failed to show how gang formation was relevant to the charged drug and racketeering conspiracies. The elements of those offenses do not include gang membership. *See* 21 U.S.C. § 846; 18 U.S.C. § 1962(d). The Government, moreover, made no attempt to prove that the defendants were gang members. The District Court therefore acted within its discretion by concluding that the proffered testimony would not “help the trier of fact to understand the evidence or to determine a fact in issue.” Fed.R.Evid. 702(a).

B

Tommy Edelin sought to present expert testimony from Dr. Tyrone Powers, a former FBI special agent. The proffer explained that Powers would "rebut" FBI Agent Dan Sparks's testimony regarding cooperating witnesses. Aug. 20, 2001 Trial Tr. at 18846. In particular, the expert would address departures from "standard FBI procedure with the handling of a number of co-conspirators in terms of the inducements that they were provided, the fact that they were permitted to continue to engage in criminal activity," and the level of surveillance over their activities. *Id.* The Government objected that it would be improper for an expert witness to opine "about how the FBI may have conducted or didn't conduct its investigation in this case." *Id.* at 18847. The District Court agreed with the Government and refused to admit the testimony.

[38] The District Court did not abuse its discretion in excluding Powers's testimony. Federal Rule of Evidence 702 provides that expert testimony must be "based on sufficient facts or data" and "the product of reliable principles and methods." Tommy Edelin's proffer failed to clarify the basis for and reliability of Powers's testimony regarding perceived errors in the Government's investigation, in which Powers took no part. Nor did Edelin explain how such testimony would help the jury "to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702(a). In short, Edelin failed to meet the basic requirements of Rule 702. The District Court did not abuse its discretion in excluding that testimony.

X

During and after the trial, the defendants alerted the District Court to the possibility of juror misconduct. In the first instance, the District Court instructed the jury regarding appropriate conduct for jurors. In the second instance, which the defendants brought to the court's attention after the trial, the District Court held two hearings in order to investigate the allegations of improper influence on the jury. On appeal, the defendants challenge how the District Court handled both matters.

A

Following the introduction of autopsy pictures, defendant Bryan Bostick's attorney ****329 *152** alerted the District Court that she had noticed a juror looking "repulsed" and communicating non-verbally with the juror next to her. July 25, 2001 Trial Tr. at 15175 (Diane Savage). The District Court instructed the members of the jury not to discuss the case with one another or to express views about the evidence in any way with one another. The next day, Bostick's attorney reported that she saw the jurors repeat their non-verbal exchange.

A few days later, the District Court informed counsel that some jurors had told the marshals that they were "nervous" because the defendants, and in particular Bostick, had been staring at the jurors. The marshals told the jurors that "if the defendant doesn't say anything or mouth anything, it doesn't mean anything, that different people just look differently." July 30, 2001 Trial Tr. at 15810–11. An alternate juror had also asked the marshals what to "do if one of the defendants looks like he's fallen in love with you," apparently in reference to Bostick. *Id.* at 15811. Using stronger language submitted by Bostick's counsel, the District Court again instructed the members of the jury to refrain from verbal or non-verbal discussion of the case with one another.

Several days later, the District Court notified counsel that the jury had complained to a marshal about that instruction. The District Court apologized to the jury for "any confusion" and explained that non-verbal communication refers to the expression of "opinion about the facts or the evidence in the case." Aug. 6, 2001 Trial Tr. at 16732.

Bostick asked the court to individually question all of the jurors to confirm their impartiality. Each of the other defendants opposed that request, and the court denied it. Bostick then moved to sever his trial from that of his codefendants. The District Court denied that motion. On appeal, Bostick maintains that the District Court erred by denying his request for a mid-trial voir dire and denying his motion for severance.

[39] [40] First, Bostick maintains that the District Court abused its discretion by refusing to conduct a voir dire of each juror to determine each juror's impartiality. We afford the District Court "especially broad discretion to determine what manner of hearing, if any, is warranted about intra-jury misconduct." *United States v.*

Williams–Davis, 90 F.3d 490, 505 (D.C.Cir.1996) (internal quotation marks omitted). Unlike external influences on a jury, evidence of intra-jury communications and influences "is not competent to impeach a verdict." *United States v. Wilson,* 534 F.2d 375, 379 (D.C.Cir.1976) (internal quotation marks omitted); *see also* *Williams–Davis,* 90 F.3d at 505 (When "there are premature deliberations among jurors with no allegations of external influence on the jury, the proper process for jury decisionmaking has been violated, but there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial.") (internal quotation marks omitted).

[41] Under the circumstances here, we see no basis for saying that the District Court had to do more. Indeed, all of the defendants except Bostick opposed a mid-trial voir dire on the ground that it would alienate the jury and would not produce useful information. The District Court did not abuse its discretion when it declined to conduct a mid-trial voir dire of the jury.

[42] Second, Bostick asserts that the District Court's denial of his motion for severance compromised his right to an unbiased jury. Federal Rule of Criminal Procedure 14 authorizes a court to sever a joint trial if joinder appears to prejudice a defendant or the Government. There ****330 *153** must be "a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States,* 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). There was no such serious risk here. We affirm the denial of Bostick's motion for severance.

B

Eleven months after the verdict, Alternate Juror 2 ran into defense counsel for Tommy Edelin and Bostick and informed them of alleged juror misconduct during the trial. Alternate Juror 2 claimed that a courtroom marshal had an inappropriate personal relationship with Juror 7. In addition, Alternate Juror 2 said that after her discharge, the marshal told her that Bostick had confessed to a charged murder. Alternate Juror 2 did not participate in the jury's deliberations, but she later stated that she believed she had shared the information about Bostick with deliberating Juror 2269 before the verdict was reached.

Defense counsel notified the District Court of Alternate Juror 2's allegations. The District Court then held two hearings. During those hearings, the District Court questioned Alternate Juror 2, Juror 7, and Juror 2269. Attorneys for the defendants attended and suggested questions for the District Court to ask. After the hearings, the defendants filed motions requesting the court to examine the marshal and the remaining jurors. In a detailed opinion, the District Court denied the motions for further investigation on the ground that Alternate Juror 2's allegations were not credible. *United States v. Edelin,* 283 F.Supp.2d 8 (D.D.C.2003). The defendants challenge that ruling.

[43] We review the District Court's "choice of procedures to investigate the alleged juror misconduct for abuse of discretion." *United States v. White,* 116 F.3d 903, 928 (D.C.Cir.1997). The District Court's factual findings "are entitled to great weight, and in the absence of new facts ought not to be disturbed unless manifestly unreasonable." *Id.* (internal quotation marks and alteration omitted).

[44] In its memorandum opinion denying the defendants' motions for further investigation, the District Court set forth detailed findings in support of its conclusion that Alternate Juror 2's allegations lacked credibility.

First, the District Court found that Alternate Juror 2 had "an incentive to discredit" the marshals, "with whom she had not had a good relationship" during the trial. *Edelin,* 283 F.Supp.2d at 16. Alternate Juror 2 believed that the marshals had criticized her conduct as a juror. She speculated in her testimony that their criticism was the reason she was not called back to deliberate with the jury. The District Court concluded that Alternate Juror 2's apparent "hostility toward the Marshals" gave her a reason "to seek to undermine the jury's verdict." *Id.*

Second, the District Court found no evidence supporting the allegation that Juror 7 had an improper relationship with the marshal in question. Alternate Juror 2 admitted during her testimony that she had "no real proof" supporting this allegation. *Id.* at 17 (quoting June 27, 2003 Hearing Tr. at 10) (internal quotation marks omitted). Moreover, Juror 7 emphatically denied having any kind of personal relationship with the marshal and testified that they never discussed the trial. Juror 2269 corroborated Juror 7's testimony, stating that she never witnessed any inappropriate contact between jurors and marshals. The District Court concluded that Alternate Juror 2 had based ****331 *154** her allegation on unsubstantiated "rumor, inference, and suspicion." *Id.*

Third, the District Court found Alternate Juror 2's second allegation—that the marshal told her that Bostick had confessed to a murder—similarly not credible. Alternate Juror 2 herself testified that "the Marshals didn't say a lot to us." *Id.* (quoting June 27, 2003 Hearing Tr. at 14) (internal quotation marks omitted). In addition, as noted above, Alternate Juror 2 indicated that she did not have a good relationship with the marshal during the trial. In light of this testimony, the District Court concluded that it was "unlikely that the Deputy Marshal would discuss the case in such an open and conversational manner with Alternate Juror 2 at any time." *Id.* at 18.

Moreover, even if the marshal made the alleged comment to Alternate Juror 2, the District Court concluded that there was no evidence that the comment contaminated the jury. Alternate Juror 2 alleged that the incident took place after her discharge, and she did not participate in the jury's deliberations. And the District Court found no evidence supporting Alternate Juror 2's claim that she may have repeated the alleged comment to Juror 2269 while the jury was deliberating. Juror 2269 emphasized that she had not spoken with Alternate Juror 2 at any point during the jury's deliberations. Juror 2269 also "testified emphatically" that Alternate Juror 2 had never informed her of Bostick's alleged confession. *Id.* at 19. The District Court compared Juror 2269's consistent testimony with Alternate Juror 2's testimony and concluded that "Juror 2269 is the more credible witness on this point." *Id.*

The defendants maintain that the District Court abused its discretion by crediting the testimony of Juror 7 and Juror 2269. They argue that both jurors were implicated in Alternate Juror 2's allegations and thus had an incentive to deny any misconduct. Rather than relying on Juror 7 and Juror 2269's testimony, the defendants contend, the District Court should have questioned the other jurors and the marshal. In addition, the defendants argue that the District Court should have requested Alternate Juror 2's and Juror 2269's phone records in order to establish whether they spoke during the jury's deliberations.

That argument lacks merit. "We have explicitly rejected any automatic rule that jurors are to be individually questioned" about alleged misconduct. *Williams–Davis,* 90 F.3d at 499. And we have stated that when questioning jurors about an alleged improper contact, a judge is "entitled to rely on their testimony if he found it credible." *United States v. Butler,* 822 F.2d 1191, 1197 (D.C.Cir.1987); *see also id.* (Jurors' assurances of impartiality are "*not* inherently suspect, for a juror is well qualified to say whether he has an unbiased mind in a certain matter.") (quoting *Smith v. Phillips,* 455 U.S. 209, 217 n. 7, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)) (internal quotation marks omitted); *United States v. Gartmon,* 146 F.3d 1015, 1029 (D.C.Cir.1998) ("The district court, having observed the demeanor of the juror, is in the best position to determine the credibility" of the juror's assurance "that the contact would not influence him.").

Here, the District Court had broad discretion to determine how to investigate Alternate Juror 2's allegations, and we must give the District Court's factual findings regarding juror misconduct "great weight" on review. *White,* 116 F.3d at 928. After conducting two hearings, the District Court carefully analyzed the jurors' testimony, made detailed credibility assessments, and set forth factual findings supported by the record. The court was ****332 *155** well within its discretion to conclude that there was insufficient evidence substantiating the allegations. Juror 7 and Juror 2269 consistently denied the alleged misconduct and corroborated each other's testimony. In contrast, Alternate Juror 2 admitted that she had no proof of Juror 7's inappropriate relationship with the marshal. Where, as here, "the allegation of an improper communication was countered by substantial evidence that no such communication had occurred," the District Court "was not required to pursue the matter any further." *Id.* at 929.

We will not disturb the District Court's well-supported determination that the alleged improper juror activity did not occur.

XI

At the conclusion of the first post-verdict hearing on juror misconduct, Tommy Edelin moved for the District Court judge to recuse. Edelin allegedly had observed the judge "lead the witness" by "subtly shaking his head across in a no gesture or up and down in a yes gesture as the question was being responded to by the juror." June 27, 2003 Hearing Tr. at 50. The District Court denied the motion for recusal. At the start of the second post-verdict juror hearing, Edelin renewed his motion and added another ground for recusal: the judge's "longstanding professional relationship" with the marshal implicated in the allegations of improper juror activity. July 11, 2003 Hearing Tr. at 3–4. The District Court again denied the motion.

[45] On appeal, the defendants submit that the judge had an obligation to recuse himself from adjudication of the juror misconduct allegations pursuant to 28 U.S.C. § 455(a) and § 455(b)(1). We review a district court judge's refusal to recuse for abuse of discretion. *SEC v. Loving Spirit Foundation Inc.,* 392 F.3d 486, 493 (D.C.Cir.2004).

[46] Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Under that provision, "a showing of an *appearance* of bias or prejudice sufficient to permit the average citizen reasonably to question a judge's impartiality is all that must be demonstrated to compel recusal." *United States v. Heldt,* 668 F.2d 1238, 1271 (D.C.Cir.1981).

[47] The defendants argue that any reasonable observer would question the impartiality of a judge who is telegraphing answers to a testifying juror. We do not disagree with that general statement. But apart from Tommy Edelin's unsubstantiated allegation, there was no evidence that the judge was in fact leading the juror through the judge's body language or demeanor. As the Government points out, only Edelin "claimed to have witnessed this behavior; no one else corroborated his claim," including Edelin's own attorneys. Gov't Br. 205. Nor did any other defendant join Edelin's motion for recusal. The utter lack of corroboration is significant given that numerous attorneys and defendants were present at the hearing.

Section 455(b)(1) provides that a judge "shall also disqualify himself" where "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."

The defendants contend that the judge's longstanding relationship with the marshal required the judge to recuse under Sections 455(a) and (b)(1). The Government maintains that Tommy Edelin's recusal motion on that ground was untimely because he raised the issue only at the ****333 *156** court's second hearing on juror misconduct. We need not resolve the timeliness question. Assuming for the sake of argument that the motion was timely, we conclude that the District Court did not abuse its discretion in denying recusal.

The defendants acknowledge that "a duty to recuse does not arise simply because a case involves a marshal with whom a judge has no special relationship." Defs.' Br. 112. The defendants therefore argue that the judge and the marshal had a special relationship: The marshal "was the chief marshal assigned to the courtroom providing protection to both the judge and jury." Defs.' Br. 113–14. But there is no evidence that the judge and marshal's interactions amounted to anything more than ordinary contact incident to their respective courtroom roles. In short, the mere fact that the judge and the marshal interacted in the course of performing their respective duties is insufficient to create a reasonable question regarding the judge's impartiality. *See* *United States v. Faul,* 748 F.2d 1204, 1211 (8th Cir.1984) ("Assuming that the deceased marshals did have contact with the court by providing security, it does not follow that the judge had a professional or personal relationship with either marshal sufficient to demonstrate personal prejudice bias.") (internal quotation marks omitted); *United States v. Sundrud,* 397 F.Supp.2d 1230, 1236 (C.D.Cal.2005) ("a casual relationship with a victim officer who provides court security does not require recusal").

The defendants failed to carry their burden of establishing the appearance or existence of judicial bias. The District Court judge did not abuse his discretion by denying the motion to recuse.

XII

Four months into the trial, Tommy Edelin raised concerns to the District Court regarding his lead counsel, James Rudasill. The court had appointed Rudasill and two other attorneys, Pleasant Brodnax and William Kanwisher, to represent Edelin. Edelin informed the court that he distrusted Rudasill's ability to represent his interests and complained about a lack of cohesion in his defense team. Over a 10–day period, Edelin made several requests to the District Court to remove Rudasill. Because the District Court determined that Rudasill had not "done anything wrong or committed any misconduct," the court declined to discharge him. Aug. 16, 2001 Bench Conference Tr. at 4.

[48] Tommy Edelin now argues that the District Court's refusal to discharge Rudasill violated Edelin's right to the assistance of counsel. He says that in seeking to remove Rudasill, he did not wish to proceed pro se but rather to proceed with Brodnax and Kanwisher as his attorneys. We review the denial of a motion to replace court-appointed counsel for abuse of discretion. *See* *United States v. Graham,* 91 F.3d 213, 221 (D.C.Cir.1996).

[49] [50] [51] [52] An indigent criminal defendant who seeks court-appointed counsel does not have a constitutional right to choose his attorney; "he has only the right to effective representation." *Id.* at 217. Effective representation "may be endangered if the attorney-client relationship is bad enough." *Id.* at 221. When a defendant asks the district court to replace appointed counsel, the court "generally has an obligation to engage the defendant in a colloquy" on the record "concerning the cause of the defendant's dissatisfaction with his representation." *Id.* The defendant bears the burden of showing good cause to replace appointed counsel, "such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between ****334 *157** the attorney and the defendant." *Smith v. Lockhart,* 923 F.2d 1314, 1320 (8th Cir.1991).

[53] Here, the District Court held multiple colloquies on the record in order to determine the reasons for Tommy Edelin's dissatisfaction with Rudasill. Although Edelin complained of a breakdown in trust and communication, the record does not suggest that the attorney-client relationship had deteriorated to the point where Rudasill could not provide effective assistance of counsel. Indeed, during the court's final bench conference on the matter, Rudasill reported that he had met with Edelin for several hours the night before in "a frank and productive meeting." Aug. 16, 2001 Bench Conference Tr. at 4. Rudasill confirmed that he was able to communicate with and represent Edelin effectively. Kanwisher, moreover, stated that "the defense itself could be compromised if in fact Mr. Rudasill was to be discharged" and that Rudasill's discharge would render Kanwisher's own representation of Edelin ineffective. Aug. 9, 2001 Proceeding Tr. at 17601–02. In those circumstances, the District Court did not abuse its discretion in denying Edelin's motion to discharge Rudasill.

XIII

The defendants also challenge their sentences. The defendants were sentenced before the Supreme Court's landmark Sixth Amendment decision in *United States v. Booker,* 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). That decision changed the previously mandatory Sentencing Guidelines into advisory Sentencing Guidelines.

[54] At sentencing, two of the defendants (Earl Edelin and Henry Johnson) raised Sixth Amendment objections to the then-mandatory Sentencing Guidelines. On this record, we cannot say with sufficient confidence that the District Court would have imposed the same sentences under the advisory Guidelines. Under *Booker,* Earl Edelin and Johnson are therefore entitled to vacatur of their sentences and to resentencing under the advisory Sentencing Guidelines. Two of the defendants (Bryan Bostick and Shelton Marbury) did not raise the Sixth Amendment issue in the District Court. We must apply the plain error standard. Under that standard, we cannot say with sufficient confidence that the District Court would have imposed the same sentences under the advisory Guidelines. Bostick and Marbury are therefore entitled to what our cases have termed a *Booker* remand of the record to determine whether the District Court would impose different sentences, more favorable to the defendants, under the advisory Guidelines. *See* *United States v. Coles,* 403 F.3d 764, 770 (D.C.Cir.2005). The sentence of the remaining defendant, Tommy Edelin, is affirmed. Based on his conviction for continuing criminal enterprise, which we affirm in this decision, Tommy Edelin received a statutorily mandated life sentence. *See* 21 U.S.C. §§ 848(b)(1), (b)(2)(A). *Booker* deals only with the Guidelines and does not affect Tommy Edelin's sentence, as he has expressly conceded on appeal. *See* Defs.' Br. 262 n. 92; *see also* *United States v. Carson,* 455 F.3d 336, 384 (D.C.Cir.2006).

In the interest of judicial economy on remand, we will also consider here the remaining four defendants' challenges to the District Court's Guidelines calculations, as the Guidelines still play a role in post-*Booker* sentencing. *See* *Gall v. United States,* 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

In order to calculate a defendant's sentence under the Sentencing Guidelines, the ****335 *158** district court must determine the defendant's "relevant conduct." U.S.S.G. § 1B1.3. In a conspiracy case, relevant conduct includes both acts committed directly by the defendant and " all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B); *see* *United States v. Mellen,* 393 F.3d 175, 182 (D.C.Cir.2004). The scope of a defendant's jointly undertaken criminal activity "is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant" in the conspiracy. U.S.S.G. § 1B1.3 cmt. n. 2.

[55] Marbury, Johnson, Earl Edelin, and Bostick maintain that the District Court improperly calculated their Guidelines offense level on the Count One drug distribution conspiracy by holding each of them responsible for distributing the maximum amount of crack cocaine (1.5 kilograms or more) under the 2001 Guidelines, without first making sufficiently particularized factual findings in support of each defendant's relevant conduct.

The problem for the defendants is that the District Court also found each of them responsible for several murders committed in furtherance of the Count One drug conspiracy. Those murders maximized each defendant's offense level (to level 43) under the Guidelines for the Count One conspiracy. Therefore, any error with respect to the drug quantity findings had no impact on the defendants' Guidelines offense level for the Count One conspiracy. The defendants in turn claim that the District Court did not make sufficient findings or otherwise erred in attributing several murders to each of them. But those arguments are entirely without merit, as we will now explain.

First, as to Marbury, the District Court found that "the murders of Anthony Payton, Damien Jennifer, Robert Keys, Sherman Johnson, and Edgar Watson were reasonably foreseeable to defendant Marbury and that he is properly held accountable for these murders as acts in furtherance of the narcotics conspiracy charged in Count One." Defs.' Br. 287. The Sentencing Guidelines provide that a defendant's drug offense level will be increased to the maximum offense level of 43 if "a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111." U.S.S.G. § 2D1.1(d)(1); *see also* U.S.S.G. § 2A1.1(a). The District Court therefore increased Marbury's offense level for the Count One drug conspiracy to 43.

Marbury contends that the District Court failed to make sufficiently detailed or particularized findings that the murders were foreseeable to him and within the scope of his conspiratorial agreement. Although the District Court cited the trial testimony of five named witnesses, Marbury asserts that the court should have cited specific portions of the trial transcript in support of its conclusion. He further protests that the five murders for which he was held responsible were not committed in furtherance of the Count One drug distribution scheme but rather were part of a separate conspiracy to murder members of the Stanton Terrace Crew. As a result, he argues, the murders should not affect his offense level for the Count One drug conspiracy.

Marbury's arguments are meritless. Marbury directly participated in and was convicted of two of the five murders for which he was held accountable—the killing of Payton and Keys. And as discussed in Part II above, the record amply supports the inference that the violent campaign against the Stanton Terrace Crew (including the murders of Payton and Keys) was undertaken at least in part to further the ****336 *159** profits and operations of the Count One drug conspiracy. Applying clear error review to the District Court's findings of fact and giving "due deference" to the District Court's application of the Guidelines to the facts, *see United States v. Fahnbulleh,* 752 F.3d 470, 481 (D.C.Cir.2014), Marbury's murders of Payton and Keys result in the maximum offense level of 43 for the drug conspiracy.

Second, like Marbury, Johnson objects that the District Court erroneously held him responsible for several murders in furtherance of the Count One drug conspiracy. The District Court applied U.S.S.G. § 2D1.1(d)(1) based on Johnson's convictions for the murder of Payton and for use of a firearm in the murder of Edgar Watson. The application of U.S.S.G. § 2D1.1(d)(1) automatically increased Johnson's offense level for the Count One drug conspiracy to 43, the maximum offense level. Johnson resurrects his sufficiency of the evidence claim, arguing that the Stanton Terrace murders (including the murders of Payton and Watson) comprised a separate conspiracy unrelated to the drug distribution scheme. Given the clear sufficiency of the evidence supporting a contrary conclusion, we uphold the District Court's conclusion that Johnson's murders of Payton and Watson result in the maximum offense level of 43 for the Count One drug conspiracy.

Third, echoing his co-defendants, Earl Edelin asserts that the District Court erred in holding him accountable for murders in furtherance of the Count One conspiracy. Crediting the trial testimony of six witnesses, the District Court found that ten murders committed by Earl Edelin's co-conspirators were reasonably foreseeable to Earl Edelin and in furtherance of the Count One drug distribution conspiracy. Including those murders in Earl Edelin's relevant conduct automatically results in the maximum offense level of 43. Earl Edelin submits that the District Court erred by failing to cite specific portions of the trial transcript establishing that those murders were both foreseeable to him and within the scope of his particular conspiratorial agreement. But the District Court did adopt findings of fact from the presentence report and, by doing so, made specific findings about Earl Edelin's being a driving force in the violence and in conflicts with rival drug crews. And the record contains overwhelming evidence that the murders fell within Earl Edelin's jointly undertaken criminal activity in furtherance of the Count One conspiracy.

Five of the murders that the District Court counted as relevant conduct (Anthony Payton, Damien Jennifer, Robert Keys, Sherman Johnson, and Edgar Watson), for example, were directed against members of the Stanton Terrace Crew. Although Earl Edelin did not physically participate in those murders, he was directly involved in efforts to kill Stanton Terrace Crew members. As discussed earlier, multiple witnesses testified that Earl Edelin taught his co-conspirators killing techniques to use against the Stanton Terrace Crew, provided guns for use in the shootings, kept tabs on the conflict, and shared information regarding the whereabouts of Stanton Terrace Crew members. Moreover, the testimony indicates that he did so in order to protect his network's distribution activities and drug sales. In a similar vein, two of the other murders (Arion Wilson and Charles Morgan) for which Earl Edelin was held accountable occurred during an 18–month conflict with another rival drug crew. Witnesses testified that during that dispute, Earl Edelin provided information a few times a week about where members of the enemy crew were located and the cars they were driving. He also supplied his co-conspirators with firearms during the conflict. Given that evidence, ****337 *160** the District Court permissibly concluded that those murders were reasonably foreseeable to Earl Edelin and within the scope of his particular conspiratorial agreement. Earl Edelin's accountability for any one of those murders results in the maximum Guidelines offense level of 43 for the Count One drug conspiracy. *See* U.S.S.G. §§ 2A1.1(a), 2D1.1(d)(1).

Fourth, Bostick's challenge to the District Court's calculation of his Guidelines sentence fails for much the same reasons. The jury found Bostick guilty of the first degree murders of Rodney and Volante Smith. In addition, the jury found that both murders were racketeering acts committed in furtherance of the Count Three RICO conspiracy. First degree murder committed as a racketeering act results in the maximum Guidelines offense level of 43. *See* U.S.S.G. §§ 2A1.1, 2E1.1. Bostick maintains that there was insufficient evidence that the Smith murders were committed in furtherance of a conspiracy to participate in a RICO enterprise. But as discussed in Part II above, the record easily supports the conclusion that Bostick committed the murders in order to improve his standing in Tommy Edelin's racketeering and drug distribution conspiracy.

The District Court also found Bostick responsible for the murders of Arion Wilson and Charles Morgan as jointly undertaken criminal activity in furtherance of the Count One drug conspiracy and the Count Three RICO conspiracy. Bostick objects that the District Court failed to explain how those murders were foreseeable to Bostick or within the scope of his conspiratorial agreement. But the District Court explicitly addressed that issue at sentencing. Wilson and Morgan were killed by Bostick's co-conspirator, Thaddeus Foster, during an 18–month feud with an enemy drug crew. Tommy Edelin had ordered his associates to kill the members of the rival crew. In 1994, Bostick, Foster, and another co-conspirator caught sight of a gold van, which they identified as belonging to enemy crew member Kevin Clark. They fired numerous shots at the van's occupants, who survived the attack. A few weeks later, Foster spotted a gold van at a rest stop in North Carolina, which he again identified as Clark's van. Foster shot and killed the van's occupants, Wilson and Morgan. In holding Bostick accountable for those murders, the District Court explained that it "was foreseeable that anyone in this van would be killed if the van was identified as Clark's." June 14, 2004 Sentencing Tr. at 7. Given Bostick's active participation in the conflict and in particular the first attack on a gold van, the District Court did not err by holding him responsible for the Wilson and Morgan murders as jointly undertaken criminal conduct in furtherance of the Count One drug conspiracy and the Count Three RICO conspiracy.

In short, even if the District Court erred in not explaining or justifying the drug quantities attributed to each defendant—an issue we do not decide—none of the defendants can show prejudice from any such error because the murders themselves resulted in the maximum Guidelines offense level of 43, and the District Court made sufficient findings and appropriately explained its conclusions with regard to the murders.

XIV

Defendants Bryan Bostick, Henry Johnson, and Shelton Marbury appeal the District Court's orders requiring them to pay restitution to the families of their murder victims. The District Court ordered Bostick to pay $4,688 in funeral expenses to the mother of one of his murder victims. It ordered Johnson and Marbury to pay ****338 *161** about $18,380 in funeral expenses and lost wage earnings to the mother of one of their victims. And it ordered Marbury to pay $6,589.83 in funeral expenses to the mother of another of his victims. For each of the defendants, the District Court ordered restitution in the amount recommended by the Probation Office in the presentence report. Because the defendants did not object to the restitution orders in the District Court, we review for plain error.

The Mandatory Victims Restitution Act of 1996 provides that a defendant convicted of an offense resulting in the victim's death must "pay an amount equal to the cost of necessary funeral and related services." 18 U.S.C. § 3663A(b)(3). In addition, the defendant must "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." *Id.* § 3663A(b)(4). The court "shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order." *Id.* § 3664(a).

The defendants claim that the District Court erred by adopting the restitution amounts recommended by the Probation Office without requesting specific computations of those amounts. But as the Government points out, Rule 32(i)(3)(A) of the Federal Rules of Criminal Procedure provides that the sentencing court "may accept any undisputed portion of the presentence report as a finding of fact." The defendants did not dispute the restitution amounts set forth in their presentence reports. As a result, they cannot show that the District Court erred, let alone plainly erred, by ordering restitution in those amounts.

XV

We now touch on several issues that all parties agree require remand. In particular, certain of the defendants' convictions should be vacated or merged, and certain technical or clerical corrections to the judgment should be made.

First, a clerical error: Shelton Marbury's sentence for Count 22 (assault with intent to murder while armed of Darnell Murphy) should be vacated because he was acquitted of that count.

[56] Second, Bryan Bostick's convictions on Counts 64 and 65 (possession of a firearm during a crime of violence under D.C.Code § 22–4504(b)) should merge, and one should be vacated. Under D.C. law, the merger of multiple convictions for possession of a firearm during a crime of violence "is proper if they arose out of a defendant's uninterrupted possession of a single weapon during a single act of violence." *Appleton v. United States,* 983 A.2d 970, 978 (D.C.2009) (internal quotation marks omitted). Because Bostick's convictions on Counts 64 and 65 arose out of his uninterrupted possession of a weapon during the murders of Rodney and Volante Smith, merger is appropriate.

Third, Henry Johnson's and Marbury's convictions on Counts 69 and 70 (possession of a firearm during a crime of violence under D.C.Code § 22–4504(b)) should merge, and one conviction should be vacated for each defendant. The convictions arose out of those defendants' uninterrupted possession of firearms during the murder of Anthony Payton and the assault with intent to murder of Darnell Murphy.

Fourth, Marbury's convictions on Counts 71 and 72 (possession of a firearm during a crime of violence under ***162** D.C.Code § 22–4504(b)) ****339** should merge, and one should be vacated. Both convictions arose out of Marbury's uninterrupted possession of a firearm during the assault with intent to murder of police officers Kerbin Johnson and Darren Marcus.

[57] Fifth, Johnson's convictions on Counts 56 and 57 should merge, and one should be vacated. Counts 56 and 57 charge the use of a firearm during and in relation to a crime of violence or a drug trafficking crime under 18 U.S.C. § 924(c). Merger is appropriate where multiple convictions under Section 924(c) arise from "only one use of the firearm." *United States v. Wilson,* 160 F.3d 732, 749 (D.C.Cir.1998). Both of Johnson's convictions on Counts 56 and 57 arose from his single use of a firearm during the murder of Edgar Watson and the attempted murder of Dionne Johnson.

[58] Sixth, Tommy Edelin's conviction of the Count One drug conspiracy should merge into his conviction of the Count Two continuing criminal enterprise. A drug conspiracy under 21 U.S.C. § 846 is a lesser included offense of continuing criminal enterprise under 21 U.S.C. § 848. *See Rutledge v. United States,* 517 U.S. 292, 300, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996). Because "Congress intended to authorize only one punishment," Edelin's Section 846 conviction, as well as its concurrent sentence, "is unauthorized punishment for a separate offense and must be vacated." *Id.* at 307, 116

S.Ct. 1241 (internal quotation marks omitted).

Seventh, Tommy Edelin's judgment should reflect that his convictions on Counts 86, 87, and 88 are for the unlawful use of a communication facility under 21 U.S.C. § 843(b). The judgment lists Counts 86 and 87 under "Possession of a Firearm During a Crime of Violence" and Count 88 under "Distribution of Five Grams or More of Cocaine Base."

Eighth, the "Statement of Reasons" portion of Tommy Edelin's judgment should indicate that the District Court did not waive (due to inability to pay) the $100,000 fine imposed on Edelin. The District Court imposed the fine during its oral delivery of Edelin's sentence. The court did not indicate that the fine would be waived.

* * *

We affirm the judgments of conviction. Under *Booker,* two of the defendants (Earl Edelin and Henry Johnson) are entitled to vacatur of their sentences and to resentencing under the advisory Sentencing Guidelines. Two of the defendants (Bryan Bostick and Shelton Marbury) are entitled to what our cases have termed a *Booker* remand of the record to determine whether the District Court would impose different sentences, more favorable to the defendants, under the advisory Guidelines. The sentence of the remaining defendant, Tommy Edelin, is affirmed. We also remand for the technical corrections noted in Part XV of this opinion.

So ordered.

All Citations

791 F.3d 127, 416 U.S.App.D.C. 304

Footnotes

1 The Government also presented testimony about the autopsy of an eleventh homicide victim that is not at issue here. The expert who testified about that autopsy had conducted the examination.

2 In *United States v. Moore,* 651 F.3d 30, 72–73 (D.C.Cir.2011), we held that autopsy reports are testimonial under certain circumstances based on the Supreme Court's decisions in *Bullcoming v. New Mexico,* ––– U.S. ––––, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011) and *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). *Moore* came down before the Supreme Court's decision in *Williams v. Illinois,* ––– U.S. ––––, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). We need not decide here whether or how *Williams* affects the analysis of autopsy reports as testimonial. As we explain, assuming the reports were testimonial, their admission was harmless error.

KeyCite Yellow Flag - Negative Treatment
Distinguished by United States v. Slatten, D.D.C., July 30, 2019

283 F.Supp.2d 8
United States District Court,
District of Columbia.

UNITED STATES of America,
v.
Tommy EDELIN, Earl Edelin, Shelton Marbury, Henry Johnson, Marwin Mosley, Bryan Bostick, Defendants.

No. CRIM.98–264 (RCL).
|
Sept. 16, 2003.

Synopsis
Defendants convicted of murder while engaging in continuing criminal enterprise moved for "appropriate relief," on grounds that jury was subjected to outside influences. The District Court, Lamberth, J., held that: (1) defendants failed to show that juror had inappropriate personal relationship with deputy marshal; (2) even if deputy marshal told alternate juror that defendant had confessed to one murder, alternate juror had already been dismissed, and thus alleged comment could not have prejudiced defendant; (3) even if alternate juror discussed her opinions of case before she was discharged and jury began deliberations, defendants were not prejudiced; and (4) defendant waived his right to be present at hearing on allegations that jury was subjected to outside influences.

Motion denied.

West Headnotes (15)

[1] **Criminal Law**—Objections and Disposition Thereof

Nobody may inquire into so-called inside influences on jury, such as pressure among jurors, misunderstanding of instructions, compromise verdict, or self-imposed time limit, but only into outside influences. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

1 Cases that cite this headnote

[2] **Criminal Law**—Objections and Disposition Thereof

District court has great discretion in shaping appropriate inquiry into allegation of jury prejudice. Fed.Rules Evid.Rule 606, 28 U.S.C.A.

[3] **Criminal Law**—Objections and Disposition Thereof

Hearing inquiring into allegation of outside influence on jury need not be conducted as full evidentiary hearing, it need only be sufficiently detailed to permit judge to determine whether any prejudice is likely to result.

[4] **Criminal Law**—Objections and Disposition Thereof

Risk of examination and cross-examination rising to level of juror harassment is permissible factor to consider in shaping procedure for hearing inquiring into allegation of outside influence on jury.

3 Cases that cite this headnote

[5] **Criminal Law**—Objections and Disposition Thereof

Court investigating accusation of outside influence on jury need not examine all jurors, only those relevant to accusation.

[6] **Criminal Law**Objections and Disposition Thereof

Weight of evidence against defendants is relevant to determination whether jury's exposure to outside influence was prejudicial.

[7] **Criminal Law**Objections and Disposition Thereof

Only if there is sufficient likelihood of prejudice from particular intrusion into jury deliberations will government have burden of proving harmlessness.

[8] **Constitutional Law**Conduct of or Affecting Jurors; Deliberations

Due process does not require new trial every time juror has been placed in potentially compromising situation, but only where actual bias has been proven and found to be prejudicial. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

[9] **Criminal Law**Communication Between Jurors and Third Persons

In assessing juror bias resulting from outside communication, court is to consider: nature of communication, length of contact, and impact of communication on both juror involved and rest of jury.

[10] **Jury**Relationship to Party or Person Interested

Defendants failed to show that juror had inappropriate personal relationship with deputy marshal during trial for murder while engaging in continuing criminal enterprise, much less that juror was biased by any such relationship.

1 Cases that cite this headnote

[11] **Criminal Law**Communication Between Jurors and Third Persons

Even if deputy marshal told alternate juror that defendant on trial for murder while engaging in continuing criminal enterprise had confessed to one murder, alternate juror had already been dismissed, and thus alleged comment could not have prejudiced defendant.

[12] **Criminal Law**Deliberations in General

Even if alternate juror discussed her opinions of case before she was discharged and jury began deliberations in trial for murder while engaging in continuing criminal enterprise, defendants were not prejudiced thereby, since there was no reason to believe that verdict was not based on evidence, and opinion expressed by alternate juror was that government had not proven its case beyond reasonable doubt.

[13] **Criminal Law**Communication Between Jurors and Third Persons

Even if juror disclosed vote tallies and vote splits to deputy marshal during trial for murder while engaging in continuing criminal enterprise, defendants were not prejudiced thereby, since deputy marshal did not provide any outside information about the case to jury.

[14] **Criminal Law** Communication Between Jurors and Third Persons

Former juror's communication with deputy marshal to arrange her ride to courthouse for hearing on allegations that jury at trial for murder while engaging in continuing criminal enterprise was subjected to outside influences was not improper.

[15] **Criminal Law** Proceedings After Verdict

Defendant waived his right to be present at hearing on allegations that jury at trial for murder while engaging in continuing criminal enterprise was subjected to outside influences by objecting to representation by substitute counsel.

Attorneys and Law Firms

***9** James W. Rudasill, Jr., Pleasant S. Brodnax, III, Christopher Michael Davis, Mary Elizabeth Davis, Davis & Davis, Shawn Franklin Moore, Federal Public ***10** Defender for D.C., Jensen Egerton Barber, Law Offices of J.E. Barber, P.C., Jerry Ray Smith, Washington, DC, William W. Kanwisher, Baltimore, MD, for defendants.

MEMORANDUM OPINION

LAMBERTH, District Judge.

This comes before the Court on Defendant Tommy Edelin's motion for appropriate relief [650], the United States' Response [648], Edelin's reply [667], Bryan Bostick's Supplement [702] and memorandum [707], and Earl Edelin's [666] and Marwin Mosley's [697] motions to join. Also pending before the Court is Tommy Edelin's motion for a complete investigation [7/30/02], the government's response [708], and the motions to join of Marwin Mosley [710], Earl Edelin [712], Shelton Marbury [713], and Henry Johnson [8/1/03], and Johnson's memorandum in support [715]. The final pending motion is Henry Johnson's motion for an evidentiary hearing [709], and the government's response [714]. Upon consideration of the law, the facts, the parties' submissions, and the evidentiary hearings conducted by the Court, the motions for relief will be denied.

I. Background

This post-verdict motion comes after a lengthy criminal trial in which the defendants were convicted on various narcotics and homicide offenses, and in which the jury declined to impose the death penalty. Tommy Edelin's counsel filed a motion after being approached at the dry cleaner by an alternate juror, Alternate Juror 2,[1] who had been released before deliberations began. Local Criminal Rule 24.2 prohibits a party or attorney from speaking with a juror after a verdict has been rendered "except when permitted by the court for good cause shown in writing." L.Cr.R. 24.2. Furthermore, Federal Rule of Evidence 606(b) provides for a very limited inquiry into outside influences on a jury, but not through an ex parte communication with an attorney. Despite these proscriptions, counsel spoke with the Alternate Juror 2 long enough to gather several allegations of jury bias from her, and included the substance of these allegations in a motion to the Court.[2] Alternate Juror 2 allegedly made three allegations that defense counsel for Tommy Edelin urges show improper jury bias: that Juror 7 had an inappropriate relationship with the Deputy Marshal in charge of the case, that Juror 7 revealed the tally of votes and the jury's split to the Deputy Marshal, and that the jurors improperly deliberated before being instructed.[3]

A few weeks later, one of the attorneys for Bryan Bostick ran into Alternate Juror ***11** 2 at a community meeting.

Bostick filed a supplement to Edelin's motion stating that Alternate Juror 2 had discussed the jury's conduct with him despite his request that she not do so.[4] The supplement alleges that Alternate Juror 2 stated that the jury panel discussed the case before deliberations, that the deliberating jurors communicated with the discharged alternate juror during deliberations, that the Deputy Marshal told Alternate Juror 2 that Bryan Bostick had confessed to a crime, that the jury panel suspected and discussed among themselves that Juror 7 had an inappropriate relationship with the Deputy Marshal, and that Juror 7 would remain in the van that returned the jury to its secure location at the end of the day with the Deputy Marshal.

To determine whether any of these alleged improprieties occurred and whether they affected the jury's impartiality, the Court held two evidentiary hearings. The first hearing was held June 27, 2003. At that hearing, the Court took the testimony of Alternate Juror 2 and Juror 7. Alternate Juror 2 testified that Edelin's counsel told her that some people, she believed it was the Marshals, were making negative statements regarding her character, which were that she was a violent person who did not get along with the other jurors. Tr. at 7–8. She recounted that she expressed frustration to counsel that the jury had deliberated with only 11 jurors, and that she should have been called back to deliberate,[5] and wondered if this had something to do with the fact that her "character was discredited." Tr. at 9. She stated that she had told Edelin's counsel that she believed that the Deputy Marshal had an inappropriate relationship with Juror 7. Tr. at 10. She said that Juror 7 and several other jurors had been taken to the bank by the ***12** Deputy Marshal, Tr. at 31, and that she had witnessed Juror 7 remaining in the van with the Deputy Marshal on two occasions and had heard rumors from other jurors "that they saw other things." Tr. at 35.

Alternate Juror 2 testified that after she was discharged, the Deputy Marshal asked her by telephone how she felt about the case, and that when she stated she did not believe the government had proven its case against Bryan Bostick, the Marshal said, "Do you know that he admitted he did that?" Tr. at 11, 15. Alternate Juror 2 testified that she responded, "Well as far as the instructions are concerned, I was told that I must see where they had proven that he was guilty beyond a believable [sic] doubt and I didn't see that." Tr. at 11. She said that she had a conversation with Juror 2269, a deliberating juror, while the jury was deliberating, and that Juror 2269 discussed the difference between the charges with her. Tr. at 12–13. She later stated that believed she had told Juror 2269 about the Deputy Marshal's comment regarding Bostick's alleged confession during this telephone call while the jurors were deliberating. Tr. at 30.

Alternate Juror 2 recounted that during the trial she believed that Bryan Bostick was looking at her, and that the other jurors expressed a belief that Bostick might have a romantic interest in her. Tr. at 13–14. She relayed an exchange between herself and the Deputy Marshal, that when the Marshal saw her ML 300 Mercedes he joked that she might need to be investigated. Tr. at 24. She also spoke of another exchange in which the Marshal assigned her and another juror seats in the van that transported the jury from their secret location to the courthouse; the incident happened when the two jurors squabbled over seats, and she noted that no other jurors had assigned seats. Tr. at 25. She commented that the jurors engaged in some form of discussion regarding the evidence before being charged, and that she did not believe the government had proven its case beyond a reasonable doubt. Tr. at 26–27. The only other type of discussion or outside evidence Alternate Juror 2 could recall was that one of the other jurors said that some of Tommy Edelin's relatives attended the school where that juror taught and the juror felt uncomfortable. Tr. at 30. She explained that she had attended the reading of the jury's verdict on the guilt/innocence phase. Tr. at 27–28. Finally, Alternate Juror 2 explained that she had seen one of the other jurors after the trial ended, and one of the prosecutors, but had not discussed the case with either one. Tr. at 33.

The next witness called at the June 27 hearing was Juror 7, the juror Alternate Juror 2 suspected had an inappropriate relationship with the Deputy Marshal. Juror 7 credibly testified that her relationship with the Deputy Marshal was professional, and that she had never had any social interaction with him outside the courthouse and jury context. Tr. at 41–43. She further recounted that she had never discussed the case, including the defendants' guilt or innocence, with the Deputy Marshal. Tr. at 42, 49. She stated that she had never gone anywhere in the jury van alone with the Deputy Marshal. Tr. at 43. She also testified that she never spent any time in the van alone with the Deputy Marshal, aside from a brief goodbye if she was the last juror to exit the van. Tr. at 47. She described the only outing she had attended with the Deputy Marshal, which involved going with two or three other jurors to pick up a pizza for the jury lunch while the trial was ongoing ***13** and before deliberations.[6] Tr. at 44, 46–47. She said that neither she nor any other juror, to her knowledge, had discussed the vote tallies with the Deputy Marshal. Tr. at 48.

The July 11 hearing was held to examine Juror 2269, the juror that Alternate Juror 2 testified she had spoken with while the jury was deliberating. Juror 2269 testified that she had spoken with Alternate Juror 2 in the courtroom the day after the verdict was read. Tr. at 6. Juror 2269 could not recall whether Alternate Juror 2 discussed her views of the case. Tr. at 7–8. She recounted that Alternate Juror 2 was upset about not being included in the deliberations. Tr. at 8. She testified that Alternate Juror 2 had not said anything about an alleged confession by Bryan Bostick. Tr. at 8–9. She credibly testified that while she may have had one or more phone conversations with Alternate Juror 2, these conversations did not occur during deliberations and she did not disclose any vote tallies to Alternate Juror 2. Tr. at 14–15. The Court questioned Juror 2269 regarding Juror 7 and the Deputy Marshal. Juror 2269 responded that she never witnessed any irregularity or unusual relationship between them. Tr. at 15–16, 19, 21. S

II. Analysis

[1] [2] Federal Rule of Evidence 606(b) limits a juror from testifying on any matter related to deliberations and the verdict except as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed.R.Evid. 606(b). That is, nobody may inquire into so-called "inside" influences on the jury-such as pressure among jurors, misunderstanding of instructions, a compromise verdict, or a self-imposed time limit-but only into outside influences. *United States v. Logan,* 250 F.3d 350, 381 (6th Cir.2001). A district court has great discretion in shaping the appropriate inquiry into an allegation of jury prejudice. *United States v. Williams–Davis,* 90 F.3d 490, 496–97 (D.C.Cir.1996); *United States v. Williams,* 822 F.2d 1174, 1190 (D.C.Cir.1987). Generally, the remedy is to hold a hearing to inquire into the alleged prejudicial contact. *Williams–Davis,* 90 F.3d at 496; *but cf.* *United States v. Boney,* 977 F.2d 624, 634 (D.C.Cir.1992) ("We do not now hold that any false statement or deliberate concealment by a juror necessitates an evidentiary hearing.").

[3] The hearing "need not be conducted as a full evidentiary hearing," the inquiry "need only be sufficiently detailed to permit the judge to determine whether any prejudice is likely to result." *United States v. Butler,* 822 F.2d 1191, 1196 (D.C.Cir.1987). The prevention of "juror harassment" through extensive questioning and cross-examination is a legitimate reason to curtail a hearing or not to call jurors in for questioning. *Id.* at 499; *see also* *Williams,* 822 F.2d at 1189 (declining to adopt a per se rule requiring individual questioning of jurors for a prejudice determination). Discretion in the trial judge is the hallmark in conducting post-verdict examinations of jurors. *See, e.g.,* *United States v. Logan,* 250 F.3d 350, 378 (6th Cir.2001) ("[T]rial judges are afforded considerable discretion in determining the amount of inquiry necessary, if any, in response to allegations of jury misconduct.").

Remmer v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), imposes a hearing requirement "whenever an encroachment upon the impartiality of the ***14** jury is threatened." *United States v. Williams,* 822 F.2d 1174, 1188 (D.C.Cir.1987) (citing *Smith v. Phillips,* 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982)). The D.C. Circuit has interpreted this to require (1) notice to the accused of juror contact, and (2) an opportunity for the accused to participate in any proceeding to determine its impact. *Williams,* 822 F.2d at 1190. The trial court determines the level of participation that is appropriate by the accused. These requirements were fulfilled in this case. The defendants received notice of the juror contact through the motions of Tommy Edelin and Bryan Bostick. At the hearings, the Court conducted the questioning, with frequent interruptions to allow counsel to propose questions to be asked of the jurors. Each counsel was given the opportunity to suggest questions, and the only questions rejected were those that improperly inquired into the internal functioning of the jury. *See* Fed. R. Evid 606(b).

[4] Several courts have endorsed the view that an examination of jurors need not rise to the level of a full adversarial hearing. *See, e.g.,* *United States v. Butler,* 822 F.2d 1191, 1195 (D.C.Cir.1987); *United States v. Calbas,* 821 F.2d 887, 896 (2d Cir.1987) ("The court wisely refrained from allowing the inquiry to become an adversarial evidentiary hearing, so as to minimize intrusion on the jury's deliberations."). The D.C. Circuit has "clearly" stated that "the trial court has broad discretion over the 'methodology' of inquiries into third-party contacts with jurors," a latitude the court explicitly extends to "trial courts' choices as to the proper procedures for post-trial hearings." *Williams–Davis,* 90 F.3d at 498–99 (citation omitted). The risk of "massive examination and cross-examination" rising to the level of juror harassment is a permissible factor to consider in shaping the procedure for a hearing on juror issues. *Id.*

at 499. All the court is required to do is "conduct[ ] an inquiry broad enough to lead it to a reasonable judgment that there has been no prejudice on an assumption as to the facts favorable to defendant's claim." *Id.* The more "speculative or unsubstantiated" the allegation of misconduct, the less the burden to investigate. *United States v. Bertoli,* 40 F.3d 1384, 1395 (3d Cir.1994) (quoting *United States v. Caldwell,* 776 F.2d 989, 998 (11th Cir.1985)).

The D.C. Circuit upheld a district court's decision to itself question jurors on whether they were aware of a statement made by defendant to a juror in an elevator, and to refuse to ask more detailed questions suggested by counsel. *United States v. Butler,* 822 F.2d 1191, 1195, 1197 (D.C.Cir.1987). The Second Circuit upheld a case in which the district judge conducted an inquiry by taking unsworn testimony *in camera* from jurors with an opportunity for defense counsel to submit questions beforehand. *Calbas,* 821 F.2d at 894; *cf. also* *Bertoli,* 40 F.3d at 1397 (no Fifth Amendment violation where Court examined jurors in camera for second round of examination). Here, the Court conducted the questioning in the defendants' presence and permitted them to suggest questions to be asked of the jurors.

[5] A Court need not examine all jurors, only those relevant to the accusation. *Leisher v. Conrad,* 41 F.3d 753, 756 (D.C.Cir.1994) ("[T]here is no *per se* rule that individual questioning is always required."); *United States v. Williams,* 822 F.2d 1174, 1189 (D.C.Cir.1987) ("We are unwilling to adopt a per se rule that individual questioning is always required."); *United States v. Bertoli,* 40 F.3d 1384, 1395 (3d Cir.1994) (no need for further investigation where court interviewed all jurors involved in alleged misconduct). ***15** Further, a Court has discretion to assess the credibility of jurors' testimony. *Bertoli,* 40 F.3d at 1395 ("[W]e cannot say that the court's decision to believe Juror Six over Juror Thirteen was clearly erroneous. The trial court had to believe one of the two jurors."); *see also* *Smith v. Phillips,* 455 U.S. 209, 217 n. 7, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (juror testimony is not "inherently suspect").

[6] Once there has been a hearing, "[t]he judge then determines whether the exposure was prejudicial or harmless." *United States v. Butler,* 822 F.2d 1191, 1196 (D.C.Cir.1987). In *United States v. Williams–Davis,* 90 F.3d 490 (D.C.Cir.1996), the D.C. Circuit accepted the District Court's finding of no prejudice where the forewoman's husband allegedly told the jury to "nail" the defendant. The weight of the evidence against the defendants is relevant to the prejudice inquiry. *Williams–Davis,* 90 F.3d at 497. In *Williams–Davis,* the D.C. Circuit found no abuse of discretion by the trial judge in finding no prejudice in part because "the evidence against defendants was overwhelming." *Id.* This case comprised eight months of evidence and testimony, and resulted in multiple convictions. The evidence in this case can certainly be described as "overwhelming."

Not every contact is prejudicial, or "calls for the same investigative technique." *Williams,* 822 F.2d at 1190. Ultimately, "Where the court conducts an inquiry broad enough to lead it to a reasonable judgment that there has been no prejudice, on an assumption as to the facts favorable to defendants' claim, it has fulfilled its procedural as well as its substantive duty." *Williams–Davis,* 90 F.3d at 499.

[7] *Remmer* placed the burden on the government to overcome the presumption that a contact was prejudicial. *Remmer v. United States,* 347 U.S. 227, 229–30, 74 S.Ct. 450 (presumption of prejudice when there is private communication with a juror). However, this standard was modified by the Supreme Court's subsequent decisions in *Smith v. Phillips,* 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) and *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). *Smith v. Phillips* states that the remedy for allegations of juror partiality "is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips,* 455 U.S. at 216, 102 S.Ct. 940; *see also* *Williams–Davis,* 90 F.3d at 496. The D.C. Circuit had interpreted *Remmer* and its successors as vesting "broad discretion in the trial court to assess the effect of alleged intrusions." *Williams–Davis,* 90 F.3d at 496–97. Only if there is a sufficient "likelihood of prejudice" from a particular intrusion will the government have the burden of proving harmlessness. *Id.* at 497. If the court finds that any particular intrusion poses enough of a "likelihood of prejudice," the burden shifts to the government to prove harmlessness. *Williams–Davis,* 90 F.3d at 497.

[8] [9] Due process, of course, "does not require a new trial every time a juror has been placed in a potentially compromising situation," *Smith,* 455 U.S. at 217, 102 S.Ct. 940, but only where actual bias has been proven and found to be prejudicial. In assessing juror bias the Court is to consider a number of factors, including: "the nature of

the communication, the length of the contact, ... and the impact of the communication on both the juror involved and the rest of the jury." *United States v. Williams,* 822 F.2d 1174, 1188–89 (D.C.Cir.1987). The decision whether the jury was improperly influenced and biased by an outside communication depends "upon how the jury interprets and expectably ***16** will react to the communication made." *Id.* at 1189.

A. Allegations Made by Alternate Juror 2

Alternate Juror 2 described three different circumstances that could give rise to a possibility of juror bias: an inappropriate relationship between Juror 7 and the Deputy Marshal, the Deputy Marshal's alleged statement that Bryan Bostick had confessed to a murder and Alternate Juror 2's decision to tell this to Juror 2269 about this statement during deliberations, and jury deliberations before being charged. Alternate Juror 2 did not confirm the allegations she had allegedly made to counsel for Tommy Edelin and Bryan Bostick and presented by counsel to the Court that Juror 7 or any other juror disclosed vote tallies to the Deputy Marshal, nor did the other jurors testify that this occurred. Nevertheless, the Court will address this allegation.

1. Inappropriate Relationship

[10] Alternate Juror 2 described the circumstances and rumors that led her to believe in the existence of an "inappropriate relationship" between Juror 7 and the Deputy Marshal: that she recalled the Deputy Marshal taking Juror 7 and several others to the bank on one occasion, June 27 Tr. at 31; that she witnessed Juror 7 speaking with the Deputy Marshal in the van on two occasions ("I have seen them twice where we all left and they were still communicating with each other, talking at the bus and on the bus, you know, stepping up to her or whatever," *id.* at 35); that she had heard "hearsay I was told by some other jurors that they saw other things," *id.;* and that she had observed that Juror 7 "would get upset when other Marshals, female Marshals, got near him," *id.* at 10.

As an initial matter, Alternate Juror 2's statements must be considered in the context in which she made them. She described her conversation with Tommy Edelin's counsel as opening with her complaint that she was not called to deliberate. She recalled saying to him: "I didn't understand why they didn't call me if they had 11 jurors. They are supposed to have 12." June 27 Tr. at 7. Counsel's response, she reported, was to mention to her "some statements that were made in reference to my character," which were "that I was a violent person, that I didn't get along with any of the jurors. I was always a problem when I was in the jury room." *Id.* at 7–8. When inquired as to who counsel said made these statements, Alternate Juror 2 responded, "My understanding if I remember it was Marshals who stated it." *Id.* at 8. The tone of the conversation between herself and Edelin's counsel, then, was set by an allegation by Edelin's counsel that the Marshals had defamed her character.

Alternate Juror 2 was upset by this alleged statement, and mentioned it repeatedly throughout her testimony. June 27 Tr. at 8, 9–10, 16, 33. This created an atmosphere in which Alternate Juror 2 felt hostility toward the Marshals, with whom she had not had a good relationship to begin with, *see infra,* and gave her an incentive to discredit them. Furthermore, she was upset that she had not been called back to deliberate, June 27 Tr. at 16–17, a fact corroborated by Juror 2269, July 11 Tr. at 8, and believed it had something to do with the alleged character defamation-giving her further incentive to seek to undermine the jury's verdict. Finally, the Court notes that Alternate Juror 2 has been untruthful in the past, when she failed to disclose a criminal arrest on her initial jury voir dire questionnaire, May 7, 2001 Tr. at 3809–3818, and in her voir dire. April 30, 2001 Tr. at 3395–3397 (discussing ***17** the incident but not revealing that she had been arrested in connection with it).

Alternate Juror 2 did not allege that she observed any inappropriate contact or behavior between the Deputy Marshal and Juror 7; her allegations were based on rumor, inference, and suspicion. She herself acknowledged that she had "no real proof." June 27 Tr. at 10. Furthermore, both Juror 7 and Juror 2269 testified to the contrary. Juror 7 stated that she had a purely professional relationship with the Deputy Marshal and that she never had any social interaction with him other than as a member of the jury. June 27 Tr. at 42. She said that the outing with herself and several other jurors during a lunch recess had not been to the bank, but to pick up a pizza. Tr. at 43. Alternate Juror 2 had not alleged that the outing had been taken by Juror 7 and the Deputy Marshal alone, and Juror 7 recalled that there were probably three and at the least two other jurors present. Tr. at 46. This gives no rise even to an inference of an inappropriate relationship.

As to the van, the laws of physics dictate that the jurors had to alight from the bus one at a time, and that the last person to leave the bus would be on it alone with the Deputy Marshal for the few seconds it takes to say goodbye. This is how Juror 7 described the situation, Tr. at 47, and Alternate Juror 2's account, even if credible, does not contradict it.

Juror 2269 repeatedly stated that she had observed no irregularity or improper behavior between anyone on the jury and any court staff, including the Marshals. July 11 Tr. at 15–16, 19, 21. She said, "A question was never raised to me [that anyone was acting improperly]. I thought the Marshals at all times were rather nice to us, and all of us, and we had conversations that had nothing to do with the court, but just very pleasant people. So I wouldn't say any of it was inappropriate. I never saw anything happen inappropriately, so I'd have to say no." Tr. at 19. When questioned specifically in reference to Juror 7, identified by her jury nickname, she maintained that she had never seen anything irregular between Juror 7 and any court staff or Marshal. Tr. at 21.

The Court finds that there is no evidence that Juror 7 was involved in an inappropriate relationship with the Deputy Marshal, and that Alternate Juror 2's suspicions were unfounded. Alternate Juror 2 presented no evidence whatsoever that such an inappropriate relationship existed, but based her speculation on rumors and suspicions. Juror 7 testified unequivocally that she did not have a social relationship, much less an inappropriate one, with the Deputy Marshal. And Juror 2269 testified that she had not observed anything irregular between Juror 7 and the Deputy Marshal. Furthermore, the burden is on the defendant to prove actual bias. *United States v. Williams–Davis,* 90 F.3d 490, 496 (D.C.Cir.1996). Here, there is no indication of bias, much less of prejudice.

2. Deputy Marshal's Alleged Statement Regarding Confession

[11] The most serious accusation made by Alternate Juror 2 is her allegation that the Deputy Marshal told her that Bryan Bostick had confessed to one murder. The Court does not find Alternate Juror 2 credible on this point. Alternate Juror 2 herself acknowledged that "the Marshals didn't say a lot to us." June 27, 2003 Tr. at 14. This sentiment was reflected in Juror 7's testimony, when she stated that the jurors and the Deputy Marshal "never discussed this trial ever," June 27 Tr. at 42, and that she never had any discussions with the Deputy Marshal regarding the guilt or innocence of the defendants or the evidence in the case, *id.* at 49. Alternate ***18** Juror 2 also indicated in her testimony that she did not have a good relationship with the Deputy Marshal, in recounting the incident in the van with the seating, in which she felt she was unfairly given an assigned seat, June 27 Tr. at 24–25, and that she did not respond in a joking manner to the Deputy Marshal's joke that she might need to be investigated because she drove a nice car, Tr. at 24. She testified that "at times [the Deputy Marshal] made me feel uncomfortable." Tr. at 24. These circumstances make it unlikely that the Deputy Marshal would discuss the case in such an open and conversational manner with Alternate Juror 2 at any time.

Even if this incident occurred, it occurred after Alternate Juror 2 had been released, and therefore could not have created any actual bias in Alternate Juror 2 or caused any prejudice to the defendants. Moreover, the Deputy Marshal's alleged statement did not influence Alternate Juror 2. She stated that "in my opinion it wasn't proven that he committed the crime," and that despite the confession "I was told that I must see where they had proven that he was guilty beyond a believable [sic] doubt and I didn't see that." June 27 Tr. at 11; *see also id.* at 27 ("Being honest, I probably would have said [the defendants were] not guilty because I didn't see the proof."); *id.* at 29 ("I made statements [to the Deputy Marshal] because basically I guess my comment was that even if he admitted it, I didn't see proof and so I still couldn't say, yes, you are guilty."). That Alternate Juror 2 either disbelieved or discredited the Deputy Marshal's alleged statement makes the possibility that she passed it on to a deliberating juror even more remote.

Alternate Juror 2 was unsure that she had relayed this comment to Juror 2269, and that if she had it was during deliberations. June 27 Tr. at 30 ("I think I did say to that to [Juror 2269]. I think I mentioned that to her .... If I am correct it was during the time while they were deliberating I think."). Alternate Juror 2 stated that in her alleged telephone call with Juror 2269 during deliberations, she refrained from giving an opinion on the verdict in telling her "I don't know [how I would vote] because I don't even know what the questions are." June 27 Tr. at 13. If she refused to comment on the evidence in the case, it is even less likely that she would comment on an alleged extra-judicial comment on non-evidence.

Juror 2269 stated that she had not spoken with Alternate Juror 2 by telephone while the jury was deliberating, saying "I did not talk to her at all, as far as I remember, during deliberation." July 11 Tr. at 15. Her testimony consistently revealed the truth of this statement.[7] She ***19** stated that she had not discussed the deliberations with Alternate Juror 2 because "I didn't talk to her during deliberations." *Id.* When questioned whether she had discussed the jury's vote tally with Alternate Juror 2, Juror 2269 responded, "I suppose not, because I didn't talk to her during deliberation." *Id.* Juror 2269 testified emphatically that Alternate Juror 2 had not made any statement to her regarding Bostick's alleged confession, responding to the question with "Absolutely not," and "She never said that to me." July 11 Tr. at 9. The Court finds that Juror 2269 is the more credible witness on this point.

Alternate Juror 2 testified that she initiated the call to Juror 2269. Tr. at 26. Alternate Juror 2 stated "[Juror 2269] said she was going to call me and just talk to me as a friend. She never did." June 27 Tr. at 13. Juror 2269 stated that she had not spoken to Alternate Juror 2 since shortly after the trial. July 11 Tr. at 7. She had difficulty recalling when and where she spoke to Alternate Juror 2. July 11 Tr. at 6–7 (spoke to her in courtroom either the day the verdict was announced or the day after). She did not remember Alternate Juror 2's views on the case. Tr. at 7–8 ("I don't remember what those views were, to be honest with you. It's almost a year and a-half ago, and I really don't."). These discrepancies between the jurors' testimony show that Alternate Juror 2 perceived a level of friendship between the two jurors that Juror 2269 did not share. Juror 2269 could not remember speaking with Alternate Juror 2 outside the trial until reminded of it, and could not recall how often they had spoken. She did not remember Alternate Juror 2's views on the case. Alternate Juror 2 expressed some disappointment that the women had not become friendly enough for Juror 2269 to call her. Given this situation, Alternate Juror 2's testimony that they discussed the case in detail during deliberations is not credible, especially given her acknowledged inability to remember clearly whether she had spoken to Juror 2269 during deliberations and, if she had, whether she had told Juror 2269 about Bostick's alleged confession.

The Court further finds that the circumstances surrounding this particular allegation make it even less likely to be credible that the other allegations. During the trial, a bench conference was held in which the Court stated that "Alternate Number 2, who is one of those that had made that comment about Mr. Bostick staring at him [sic], said to the Marshal, 'What do you do if one of the defendants looks like he's fallen in love with you?' ... I did observe the defendants today and did not see any kind of nonverbal communication that was apparent to me. I did observe Mr. Bostick throughout the course of the day and never really saw any nonverbal communication between he and any juror. I did see this afternoon he had a number of conversations with both of his counsel and wrote notes back and forth and looked at the witness, and I really never observed him even looking at the jurors." July 30, 2001 Tr. at 15,811. Mr. Bostick's counsel responded "This is very ironic, Your Honor, because Mr. Bostick expressed concerns to me ... and [co-counsel] that she was staring at him ... and I actually noticed and I kept saying to her [sic] just don't look at ***20** her.... I mean I noticed and [co-counsel] can confirm that. He's shaking his head yes. But, yeah, we did notice that she was, you know, seemingly staring at him because he said, gee, does she know me or whatever." *Id.* at 15,812. In the June 27 hearing, Alternate Juror 2 acknowledged that during the trial she believed that Bryan Bostick was staring at her, which she said lead the other jurors to joke that he had fallen in love with her. June 27 Tr. at 14. That Alternate Juror 2 believed that there was a connection between Bostick and herself gave her an especial incentive to undermine the verdict against him.

The only relevant inquiry where a post-verdict allegation of extraneous information is proffered is "the precise nature of the information proffered and the degree, if any, to which that information was actually discussed or considered." *United States v. Calbas,* 821 F.2d 887, 896–97 (2d Cir.1987). There are several factors to consider in assessing juror bias: the nature of the communication, the length of the contact, the possibility of removing juror taint by limiting instruction (inapplicable here), and the impact of communication on the involved juror and the rest of the jury. *United States v. Williams,* 822 F.2d 1174, 1188–89 (D.C.Cir.1987). Here, there is no evidence that the information was discussed or considered by the jury, and hence no evidence of any impact the alleged communication had on the jury. Juror 2269 did not receive the information, and therefore could not have given it to the deliberating jurors. Alternate Juror 2 was not a deliberating juror, and therefore could not have "actually discussed or considered" the alleged confession during deliberation. The Court finds that Alternate Juror 2's allegation that the Deputy Marshal told her that Bryan Bostick had confessed to a murder is unsupported and not credible. Furthermore, even if this statement had been made, it was not relayed to a deliberating juror, much less to the entire deliberating jury.

3. Pre–Deliberation Discussions

[12] While the D.C. Circuit has not condoned pre-deliberation discussions, it has taken a practical approach rooted in reality to acknowledge that jurors are

likely to discuss the case before being charged, and that "[t]he probability of some adverse effect on the verdict is far less than for extraneous influences" and " 'there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial.' " *Williams–Davis,* 90 F.3d at 505 (quoting *United States v. Resko,* 3 F.3d 684, 690 (3d Cir.1993)). The court ruled that "a trial court is virtually automatically justified in declining to pursue such an inquiry." *Id.* at 504. This is partly because the probability of an adverse effect on a verdict is lower than for outside influences. *Id.* at 505; *see also* *United States v. Bertoli,* 40 F.3d 1384, 1394 (3d Cir.1994) ("[I]ntra-jury communications pose a less serious threat to defendant's right to an impartial trial than do extra-jury influences, and therefore district courts are entitled to even greater deference in their responses to them than in responses to outside influences.").

Here, the allegation of premature deliberation must be inferred from Alternate Juror 2's testimony:

> **The Court:** Okay. Did you say anything to her [Juror 2269] about how you thought the jury should vote or what you thought about the evidence or anything like that?
>
> **The Alternate Juror:** That was said-everybody, not everybody most of the jurors made comments about that. That was like, no, we are not supposed to talk about it, but we did and most of the ***21** jurors made comments in reference to that.
>
> So I am not-I don't know if I said that on the phone in conversations or I may have said it when we were in the jury room because it appeared that everybody had their different views; but I can say that as far as me personally, if you are asking me to find beyond a reasonable doubt that the prosecutors find these people guilty and there are certain issues that I think don't constitute that they really did it, this is not proved to me, then I will say whether I believe they did it or not I have to go with the truth. They didn't prove it to me.

June 27 Tr. at 26–27.

Assuming that Alternate Juror 2 meant to say by this statement that the jurors engaged in discussion with one another regarding the evidence before being charged, nothing in this statement, and the defendants point to nothing, indicates that any pre-deliberation that might have occurred was prejudicial. No outside influence is alleged. The trial lasted 8 months, and the D.C. Circuit has recognized the possibility that jurors, "whose salient common interest must be the trial unfolding before them for several hours a day," might be unlikely "to obey the strictures of the standard rule." *Williams–Davis,* 90 F.3d at 505. Given the fact that even if these discussions occurred, no allegation of prejudice is offered (nor can the Court discern any manner in which this may have prejudiced defendants). Quite the opposite, in fact, as Alternate Juror 2 clearly had a strong belief that the government had not met its burden of proof and the opinion she expressed during any pre-deliberation, as quoted above, reflected that belief, and any prejudice would be to the government rather than the defendants. *Cf.* *United States v. Calbas,* 821 F.2d 887, 896 n. 9 (2d Cir.1987) (district court entitled to rely on the fact that extraneous information was intended to lead to acquittal to find no prejudice to defendant).

4. Disclosures to Deputy Marshal

[13] Tommy Edelin's counsel reported in his motion that Alternate Juror 2 stated that Juror 7 had disclosed vote tallies and vote splits to the Deputy Marshal. Alternate Juror 2 did not confirm this allegation during her testimony. Juror 7 stated that she did not disclose any vote tallies to the Deputy Marshal. June 27 Tr. at 48. However, to avoid any future disputes, the Court will evaluate this allegation as though Alternate Juror 2 had made it. This conduct is evaluated as a communication outside the trial. There is no allegation that the Deputy Marshal provided any outside information about the case but rather that information was allegedly passed to the outside from the jury. Thus, as in *Butler,* "[t]he nature of the contact was relatively innocuous; it did not provide the juror with any crucial extra-judicial information, and it did not constitute an attempt to bribe or intimidate the juror." *United States v. Butler,* 822 F.2d 1191, 1196 (D.C.Cir.1987). The prejudice analysis depends, inter alia, on the type of contact alleged to have occurred between the jury and an outside source. "[T]he innocuous nature of a contact will have great bearing on the question whether prejudice has already occurred." *United States v. Williams,* 822 F.2d 1174, 1188 & n. 147 (D.C.Cir.1987). Here, giving the defendants all reasonable inferences and presumptions, even if this alleged communication occurred, it was not prejudicial. Moreover, even if this was occurring, it ***22** was in the nature of pre-deliberation[8] and, as discussed above, does not require further inquiry.

B. Contact between Deputy Marshal and Juror 2269

[14] At the July 11 hearing, Juror 2269 stated that she had spoken with the law clerk and with the Deputy Marshal to arrange her pick-up to attend the hearing. She described the entire content of her conversation with the Deputy Marshal as limited to "where I was going to be picked up, what time, and with whom." July 11 Tr. at 14. She further stated that she did not know why she had been called to the Court, *id.,* confirming that she had not spoken with the Deputy Marshal on any substantive matter but only on the logistical aspects of her pick-up.

The defendants argue that this contact between Juror 2269 and the Deputy Marshal was improper and prejudicial. This argument fails. The jury in this trial was anonymous, based on a determination that the defendants posed a danger to the jurors. This Court has preserved that jury anonymity throughout the proceedings. Preservation of juror anonymity and protection of the jurors required following the same procedures for these hearings as were followed in the trial: the jurors met the Marshals at a designated but undisclosed Metro stop, and were brought to the courthouse in a van. This procedure was employed every day the jury sat in this lengthy eight month trial. Having coordinated this procedure for the entire trial, the Deputy Marshal was the person most familiar with and the best able to arrange for Juror 2269's pick-up. The routine use of this procedure and telephone confirmation of it by the Deputy Marshal was not improper.

There is no need to inquire further into the contact because the Court thoroughly explored it at the July 11 hearing, and the juror stated and confirmed that the contact was limited to the pick-up arrangement. The Deputy Marshal did not operate the van that brought Juror 2269 to the courthouse or have any direct contact with her. Furthermore, Juror 2269 swore to tell the truth in this matter. July 11 Tr. at 5. There is no indication whatsoever that she broke that oath. Her testimony was internally consistent and credible and her demeanor was thoughtful, without a sign of nervousness or other behavior that would indicate a lack of truthfulness

C. Henry Johnson's Motion for Hearing

[15] Henry Johnson's counsel was not present at the June 27 hearing because of a family emergency, and arranged for substitute counsel to represent Mr. Johnson. At the hearing, substitute counsel stated that he was not aware that the hearing was to be an evidentiary hearing, and that he needed to speak with Mr. Johnson regarding whether the defendant wanted to go forward with substitute counsel. At this point, Mr. Johnson interjected, stating, "I object, Your Honor." Mr. Johnson, left without representation based upon his own objection, was then excused from the courtroom. June 27 Tr. at 3–4. Johnson filed a motion seeking to have the Court reconvene the hearing for his counsel to question Alternate Juror 2 and Juror 7.

Rule 43 requires the defendant's presence in three specified stages of a trial: "(1) the initial appearance, the initial arraignment, and the plea; (2) every trial ***23** stage, including jury impanelment and the return of the verdict; and (3) sentencing." Fed.R.Crim.P. 43(a). The June 27 hearing did not fall into any of those three categories. The trial in this case was completed when the jury delivered its final verdict on October 24, 2001. The defendants have not yet been sentenced. Rule 43 does not mention nor apply to a hearing that is neither an appearance, a trial, nor a sentencing. While a defendant has a right to be present at trial, this has never extended to a right to be present at hearings held before or after trial. *United States v. Lynch,* 132 F.2d 111, 113 (3d Cir.1943); *see also* *Snyder v. Commonwealth of Massachusetts,* 291 U.S. 97, 107, 54 S.Ct. 330, 78 L.Ed. 674 (1934) ("The underlying principle gains point and precision from the distinction everywhere drawn between proceedings at the trial and those before and after. Many motions before trial are heard in the defendant's absence, and many motions after trial or in the prosecution of appeals."). Defendant Johnson's presence was not required at the hearing. Johnson effected a waiver of his presence by objecting to representation by substitute counsel. *See* *Diaz v. United States,* 223 U.S. 442, 455, 32 S.Ct. 250, 56 L.Ed. 500 (1912) (holding that a defendant can waive his right to be present at trial); *Campbell v. Blodgett,* 978 F.2d 1502, 1509–10 (9th Cir.1992) (recognizing a variety of circumstances in which a defendant may waive his presence at trial).

Furthermore, had Johnson remained in the hearing after dismissing his substitute counsel, his presence would not have affected the proceedings. *Snyder,* 291 U.S. at 106–07, 54 S.Ct. 330 ("Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow."). It would not have been in Johnson's interest to participate directly in the proceedings, as it could have resulted in a waiver of his Fifth Amendment right against self incrimination. Furthermore, "[f]or any represented party to communicate with the court directly is unorthodox." *Yardis Corp. v. Perry Silver,* 2000 WL 1763667 (E.D.Pa. Nov.30, 2000).

Johnson's counsel contends, "[a]s a result of Mr. Johnson and his counsel were absence [sic], questions that may be important to Mr. Johnson's defense were not allowed to be asked." Johnson Motion [709] at 5. Counsel did not elaborate on any such question. The government, in its response [709], urged counsel to submit any questions that were not asked that would have been beneficial to Johnson's case. Johnson did not seek to supplement his motion. None of the jurors implicated or even mentioned Johnson in any way. Nor has Johnson's counsel reported any unauthorized contact with any of the jurors that has raised further issues or issues specific to him. It is unknown what questions Johnson could have asked other than those asked by the Court and suggested by the attorneys for the other defendants. All the issues raised by counsel for Tommy Edelin and Bryan Bostick were thoroughly explored. In the absence of any indication from Johnson that any specific questions were left unasked or unanswered, in light of the Court's denial of all motions for relief in connection with Alternate Juror 2's allegations, and given that Rule 43 did not confer on Johnson a right to attend the hearing and that he waived any right he may have had, the Court will not hold a further evidentiary hearing in this matter.

III. Conclusion

To disturb a jury's verdict, the Court must be satisfied that there is proof both of an improper outside influence causing ***24** bias and that the bias prejudiced the defendant. The Court has great discretion in crafting the inquiry and remedy where there has been an allegation of improper jury conduct. The defendants here claim that a variety of circumstances caused prejudicial bias within the jury: an inappropriate relationship between Juror 7 and the Deputy Marshal, a comment by the Deputy Marshal to released Alternate Juror 2 that Bryan Bostick confessed to a murder, pre-deliberation, and a disclosure of jury vote tallies by Juror 7 to the Deputy Marshal.

After conducting two evidentiary hearings, the Court finds that there was no inappropriate relationship between Juror 7 and the Deputy Marshal; that the Deputy Marshal did not tell Alternate Juror 2, after she was released, that Bryan Bostick had confessed to a murder and that Alternate Juror 2 did not relay such an alleged comment to deliberating Juror 2269 during deliberations; that Alternate Juror 2 did not speak to Juror 2269 during deliberations; and that Juror 7 did not disclose any jury votes to the Deputy Marshal. The Court further finds that the jury did not engage in pre-deliberation, and that if it did " 'there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial.' " *Williams–Davis,* 90 F.3d at 505 (quoting *United States v. Resko,* 3 F.3d 684, 690 (3d Cir.1993)). The Court further finds that the brief telephonic contact between Juror 2269 and the Deputy Marshal to arrange the routine pick-up necessary to preserve her anonymity and limited to the logistics of that pick-up did not prejudice the defendants. Finally, the Court finds that Henry Johnson was not prejudiced by his absence from the June 27 hearing.

A separate Order shall issue this date.

ORDER

This comes before the Court on Defendant Tommy Edelin's motion for appropriate relief [650], the United States' Response [648], Edelin's reply [667], Bryan Bostick's Supplement [702] and memorandum [707], and Earl Edelin's [666] and Marwin Mosley's [697] motions to join. Also pending before the Court is Tommy Edelin's motion for a complete investigation [7/30/02], the government's response [708], and the motions to join of Marwin Mosley [710], Earl Edelin [712], Shelton Marbury [713], and Henry Johnson [8/1/03], and Johnson's memorandum in support [715]. The final pending motion is Henry Johnson's motion for an evidentiary hearing [709], and the government's response [714]. Upon consideration of the law, the facts, the parties' submissions, and the evidentiary hearings conducted by the Court, and for the reasons set forth in an accompanying memorandum opinion,

It is hereby ORDERED that the Tommy Edelin's motion for appropriate relief [650] is DENIED.

It is further ORDERED that Earl Edelin's motion to join in part Tommy Edelin's motion for appropriate relief [666] is hereby GRANTED.

Earl Edelin's motion to waive his presence and the presence of counsel and to be represented by substitute counsel [703] was GRANTED orally at the June 27, 2003 hearing. It is hereby ORDERED that the Clerk shall terminate this motion from the pending motions docket.

It is further ORDERED that Shelton Marbury's motion to join the motion for appropriate relief [497] is hereby

GRANTED.

It is further ORDERED that Marwin Mosley's motion to join the motion for appropriate relief [697] is GRANTED.

***25** It is further ORDERED that the Clerk's office shall docket Bryan Bostick's Motion to Join and Adopt Co–Defendant Tommy Edelin's Motion for Appropriate Relief [10/21/2002]. It is further ORDERED that the motion is hereby GRANTED.

It is further ORDERED that Tommy Edelin's motion for a complete investigation [7/30/02] is DENIED.

It is further ORDERED that Marwin Mosley's motion to join Tommy Edelin's motion for a complete investigation and Henry Johnson's motion for an evidentiary hearing [710] is GRANTED.

It is further ORDERED that Earl Edelin's motion to join Tommy Edelin's motion for a complete investigation [712] is GRANTED.

It is further ORDERED that Shelton Marbury's motion to join Tommy Edelin's motion for a complete investigation [713] is GRANTED.

It is further ORDERED that Henry Johnson's motion to join Tommy Edelin's motion for a complete investigation [8/26/2003] is GRANTED.

It is further ORDERED that Henry Johnson's motion for an evidentiary hearing [709] is DENIED.

SO ORDERED.

All Citations

283 F.Supp.2d 8

Footnotes

1 The jury in this case was empaneled anonymously upon a determination that the defendants posed a danger to their safety. To continue that anonymity, the Court will refer to the three jurors questioned as Alternate Juror 2, Juror 7, and Juror 2269.

2 The motion as originally filed included the name and physical description of the alternate juror, in contravention of the Court's order that the jurors empaneled in this case be anonymous for their own safety. Order of March 5, 2001[441]. The Court ordered that the original motion be sealed, and that counsel refile the motion without any identifying information. Order of October 30, 2002[657].

3 The Court was curious that Alternate Juror 2 never brought to the Court's attention any of these allegations. Alternate Juror 2 confirmed in her testimony that she received a letter, from the undersigned judge, dated November 8, 2001, with the following text:

> You recently served as a juror in my court in the case of United States of America v. Tommy Edelin, et al., a trial over which I presided. This was the longest and most difficult criminal case that I have ever handled. Jury selection began on March 26, and opening statements began on May 7. The trial finally concluded with a final verdict on October 24.
>
> I would like to express my formal appreciation to you, individually, for your service to our court in this case. You have contributed to the fair and impartial administration of justice in our community by your performance of duty on this jury. I know that jury duty imposes at least some sacrifice for each person whose routine schedule is disrupted. In this case, you literally had to put your normal life on hold for months. It was really more than any good citizen should be expected to do, and our court and our community were indeed fortunate to have your services.
>
> I especially appreciate your patience as I tried to keep to a minimum the unavoidable delays that occur in any trial, particularly one as complicated as this one, with so many participants.
>
> Without good citizens like you, we could not fairly administer justice. Thank you very much for your dedicated and conscientious service on this jury
>
> Sincerely,
>
> Royce C. Lamberth

It is passing strange that this juror did not make her concerns known to the Court, orally or in writing, but, instead, engaged in a conversation with defendants' counsel.

4 At the June 27 hearing the Court discussed this chance meeting with Alternate Juror 2, and explored whether Bostick's counsel had tried to avoid running afoul of Local Criminal Rule 24.2:

> **The Court:** Okay. In the conversation you had with [Bostick's counsel] at the community meeting, you approached him and said you recognized him?
>
> **The Alternate Juror:** Um-hmm.
>
> **The Court:** And then did he make some comment to you about he couldn't talk to you or anything like that?
>
> **The Alternate Juror:** Not that I remember.

June 27, 2003 Tr. at 31.

5 The jury reached a verdict in the guilt/innocence phase of this trial as a jury of 12. Following the guilt/innocence verdict, the parties presented additional evidence and testimony in the penalty phase of this death penalty case. During the penalty phase one of the jurors fell ill, and the penalty phase jury deliberated with 11 members. Tr. of Oct. 23, 2001 at 664–65. Because the alternate jurors had not heard the penalty phase evidence, an alternate juror was not called to replace the dismissed member of the panel.

6 The Court supplied the jurors with lunch each day.

7 Juror 2269's testimony at one point can be interpreted to say that she spoke with Alternate Juror 2 during deliberations:

> **The Court:** So did you talk to her during the course of the trial also?
>
> **Juror Number 2269:** I don't remember talking to her on the phone, but I may have, but we did talk during lunch.
>
> **The Court:** Okay. Do you have any notion if she thought that during the time the jury was deliberating you had two or three phone conversations, do you have any—
>
> **Juror Number 2269:** That may be true. That may be true but it was in a personal nature as far as I remember.
>
> **The Court:** It didn't deal with the jury matters of the deliberations?
>
> **Juror 2269:** No. No.
>
> **The Court:** Okay. You didn't—
>
> **Juror Number 2269:** I did not talk to her at all, as far as I remember, during deliberation.

July 11 Tr. at 15. While Juror 2269 said at one point that it "may be true" that she had conversations with Alternate Juror 2 during deliberations, the transcript and her demeanor at the hearing show that she had misunderstood the question to ask had she *ever* had two or three telephone conversations with Alternate Juror 2. Upon realizing her mistake, she quickly corrected her testimony-without a question from the Court-to state that she did not speak to Alternate Juror 2 during deliberations. This was an understandable, brief, and quickly corrected misstatement arising from confusion. Juror 2269 was called to the courthouse and was given no explanation as to why she needed to appear, and then was called to testify to a full courtroom. It is only to be expected that she would be nervous and might misspeak.

8 Because Alternate Juror 2 was not present during deliberations, her alleged claim to defense counsel could not have been that Juror 7 supplied vote tallies to the Deputy Marshal during deliberations, but would have to apply to pre-deliberation.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-3074 **September Term, 2020**

98cr00264-16

Filed On: May 26, 2021

United States of America,

Appellee

v.

Bryan Bostick,

Appellant

Consolidated with 05-3012

BEFORE: Tatel, Pillard, and Wilkins, Circuit Judges

O R D E R

Upon consideration of appellant Bostick's petition for panel rehearing filed on April 8, 2021, and the supplement thereto filed on May 17, 2021, both filed in No. 04-3074, and appellant Marbury's petition for panel rehearing filed on April 5, 2021 in No. 05-3012, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Kathryn D. Lovett
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-3074 **September Term, 2020**

98cr00264-16

Filed On: May 26, 2021

United States of America,

Appellee

v.

Bryan Bostick,

Appellant

Consolidated with 05-3012

BEFORE: Srinivasan, Chief Judge, and Henderson, Rogers, Tatel, Millett, Pillard, Wilkins, Katsas, Rao, and Walker, Circuit Judges

O R D E R

Upon consideration of appellant Bostick's petition for rehearing en banc and the supplement thereto filed in No. 04-3074, and appellant Marbury's petition for rehearing en banc filed in No. 05-3012, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petitions be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Kathryn D. Lovett
Deputy Clerk