20-3659-cr
United States v. Jean

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of April, two thousand twenty-two.

PRESENT:

BARRINGTON D. PARKER,
MICHAEL H. PARK,
BETH ROBINSON,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. **20-3659**

SPENCER JEAN, also known as CASH,

Defendant-Appellant.

FOR DEFENDANT-APPELLANT: JOSEPH FERRANTE, Keahon, Fleischer & Ferrante, Hauppauge, NY.

FOR APPELLEE: ANTHONY BAGNUOLA (David C. James, *on the brief*), *for* Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Seybert, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

The government's proof at trial, viewed in the light most favorable to the government, established the following: Ryan Goetz met Defendant Spencer Jean, whom he knew as "Cash," at a halfway house, and learned that Jean had experience selling drugs. After both left the halfway house, Goetz contacted Jean to sell him marijuana, and they agreed to meet at Goetz's house the next day. Jean called Goetz twice the next morning to inform him of his estimated time of arrival. Shortly after the second call, Goetz saw Jean standing in his doorway. Jean told Goetz to "give me your shit now," leading to a physical struggle, which ended with Jean shooting Goetz in the leg and fleeing with Goetz's marijuana. App'x at 368.

After trial, the jury convicted Jean of five counts: (1) Hobbs Act robbery, 18 U.S.C. § 1951(a); (2) discharging a firearm during a crime of violence, 18 U.S.C. § 924(c)(1)(iii); (3) possession of marijuana with intent to distribute, 21 U.S.C. § 841(b)(1)(D); (4) conspiracy to obstruct justice, 18 U.S.C. § 1512(k); and (5) obstruction of justice, 18 U.S.C. § 1512(c)(2). After the verdict, Jean moved for acquittal and a new trial under Federal Rules of Criminal Procedure 29 and 33. He argued that the government violated Rule 16 by failing to provide an adequate disclosure about the opinion of the government's cell-site expert, David M. Magnuson, and that the testimony of Goetz and that of another witness, Nastacia McPherson, was not credible because it was not corroborated by Jean's phone records.

The district court denied the motions. The court found that there was no Rule 16 violation because Jean "was well aware of what both Magnuson's testimony and any accompanying records

or slides would show," and that even if there had been a technical violation, it would not warrant a new trial because "the Court allowed [Jean] the time he requested to review the information." Special App'x at 57. The court also found that the discrepancies between the witnesses' testimony and the phone records were minor and that a reasonable jury could have credited the witness testimony. Jean timely appealed. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Jean raises six arguments on appeal, all of which are meritless. *First*, Jean argues that the district court abused its discretion by admitting Magnuson's testimony in violation of Rule 16, which requires the government to provide the defendant "a written summary" of expert testimony describing "the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." Fed. R. Crim. P. 16(a)(1)(G). A Rule 16 violation, however, "is not grounds for reversal unless the violation caused the defendant substantial prejudice," which requires the defendant to "demonstrate that the untimely disclosure of the evidence adversely affected some aspect of his trial strategy." *United States v. Walker*, 974 F.3d 193, 203–04 (2d Cir. 2020) (cleaned up).

Even if there had been a Rule 16 violation, Jean cannot demonstrate substantial prejudice from the allegedly untimely disclosure of Magnuson's testimony. As the district court noted, Jean had the underlying cell-site data months before trial, he knew well ahead of time that the government would call an expert to discuss it, and it was obvious that the expert would testify about Jean's location around the time of the shooting and attempt to place him at the scene of the crime. Moreover, the government turned over Magnuson's slide presentation two days before he testified, and the court granted Jean's counsel the time he requested to review it. Notably, defense counsel did not object to the introduction of Magnuson's testimony or the cell-site data on which

he relied. Under these circumstances, Jean cannot demonstrate substantial prejudice, so we affirm the district court's rejection of Jean's Rule 16 argument.[1]

Second, Jean argues that the government committed prosecutorial misconduct by knowingly eliciting false testimony from Goetz and Nastacia McPherson, another government witness. In order for a new trial to be granted on the ground that a witness committed perjury, the defendant must show that "(i) the witness actually committed perjury; (ii) the alleged perjury was material; (iii) the government knew or should have known of the perjury at the time of trial; and (iv) the perjured testimony remained undisclosed during trial." *United States v. Josephberg*, 562 F.3d 478, 494 (2d Cir. 2009) (cleaned up).

Perjury is more than false testimony. Perjury requires "testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory." *United States v. Monteleone*, 257 F.3d 210, 219 (2d Cir. 2001). "Simple inaccuracies or inconsistencies in testimony do not rise to the level of perjury." *Id.*

Even if Goetz testified falsely that his telephone call with Jean to plan a marijuana deal occurred the evening before the shooting, Jean still could not demonstrate that Goetz intentionally lied and that his testimony about the timing of the communication was material in light of the other

[1] We also reject Jean's arguments that the underlying cell-site data should have been excluded because the phone records were missing cell-site data and the records that contained the missing data were not turned over. The government turned over three sets of phone records. Although the second set of phone records were missing the cell-site data for certain phone calls, including at least one call between Jean and Goetz, the first set of phone records the government turned over a few months before trial included the missing data. And contrary to Jean's argument, the third set of phone records, which also contained the cell-site data missing from the second set, were disclosed by the government two weeks before trial. Jean also claims that the first and third set of records were obtained in violation of Jean's Fourth Amendment rights, but he provides no explanation or support for this assertion. We deem this argument waived because it was "not sufficiently argued in the briefs." *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998).

evidence showing that they planned to consummate a marijuana deal some time before Jean arrived at Goetz's home. Although Jean's phone records do not reflect a call between Goetz and Jean until the day of the shooting,[2] a video of marijuana that Goetz claims he sent to Jean via Snapchat was introduced as evidence at trial and Goetz testified that he sent that video to Jean the evening before the shooting. Additionally, McPherson testified that early the next morning, Jean told her over the phone that he was going to see Goetz because Goetz had marijuana.[3]

Jean also argues that McPherson committed perjury when she testified that she spoke with Jean after the shooting as they traveled in two separate cars to a third person's house.[4] Although this phone call does not appear in Jean's phone records, McPherson testified that they called using FaceTime. Jean has not demonstrated that a FaceTime call would be reflected in Jean's cell phone records. In addition, substantial other testimony corroborates McPherson's testimony that during the call, Jean admitted that he "had no choice" but to shoot because "the guy rushed him." Goetz's testimony independently showed that Goetz and Jean had a physical altercation that resulted in a shooting, and other portions of McPherson's testimony inculpated Jean—for example, she testified that Jean later removed a white bag of marijuana from the back of the car and removed a gun from the white bag. We thus reject Jean's prosecutorial misconduct argument because he fails to show

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[2] We note that Jean does not address the possibility that they called using a method that is not reflected on Jean's cell phone records.

[3] Nor can Jean demonstrate Detective Timothy Conroy's apparently inaccurate testimony that Jean's phone records reflected calls with Goetz the day before the shooting was perjurious. In any event, the portion of Conroy's testimony at issue was elicited by defense counsel and not the prosecution.

[4] Jean also claims that McPherson committed perjury when she testified that on the morning of the shooting, Jean told her that he was planning to see Goetz. He argues that Jean could not possibly have planned to see Goetz because the phone records do not reflect any calls between Jean and Goetz until after this phone call with McPherson. Jean fails to demonstrate perjury, however, because the video and Goetz's testimony are evidence that Jean and Goetz did communicate about a marijuana deal the day before the shooting.

that the allegedly false testimony by Goetz and McPherson was either intentionally false or material.

Third, Jean argues that he received ineffective assistance of counsel because, among other things, his attorney failed to notice the missing cell-site data in the phone records, did not retain a cell-site expert, and did not ask for a longer continuance to review Magnuson's slide presentation. In order for a defendant to establish ineffective assistance of counsel: "(1) he must show that counsel's performance was deficient," and "(2) he must show that the deficient performance prejudiced the defense." *Gonzalez v. United States*, 722 F.3d 118, 130 (2d Cir. 2013) (cleaned up).

We are not inclined to resolve claims of ineffective assistance of counsel when such claims are presented for the first time by new counsel on direct appeal. *See United States v. Williams*, 205 F.3d 23, 35 (2d Cir. 2000) (expressing this Court's "baseline aversion to resolving ineffectiveness claims on direct review" except in narrow circumstances) (citation omitted); *see also Massaro v. United States*, 538 U.S. 500, 504 (2003) ("[I]n most cases a motion brought under [28 U.S.C. § 2255] is preferable to direct appeal for deciding claims of ineffective assistance.").

In this case, the government offers theories about the trial attorney's motives and strategies to explain various actions or inactions by trial counsel, but we do not have the benefit of a developed record on the subject. Because we cannot properly evaluate Jean's ineffective assistance of counsel claim on the record before us, we decline to consider the claim on direct appeal.

Fourth, Jean argues that there was insufficient evidence that Jean knew that Goetz was a drug dealer and that Jean stole his drugs, which the government needed to prove to satisfy the jurisdictional element of Hobbs Act robbery. *See Taylor v. United States*, 579 U.S. 301, 309

(2016) ("In order to obtain a conviction under the Hobbs Act for the robbery or attempted robbery of a drug dealer . . . . it is enough that a defendant knowingly stole or attempted to steal drugs or drug proceeds."). We disagree. Among other evidence, Goetz sent Jean a video of marijuana in advance of their deal and testified that they discussed the drug deal leading up to the shooting, Goetz testified that Jean stole his marijuana, and McPherson testified that she saw Jean remove a white bag of marijuana from a car he was driving shortly after the shooting.

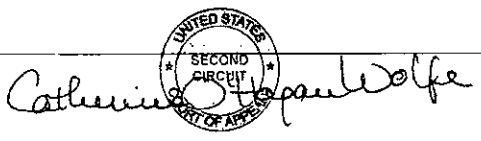
Fifth, Jean argues that the jury's special interrogatory answers finding that he discharged but did not brandish the firearm was repugnant because in order to discharge a firearm, one must first brandish it. This is incorrect. Brandishing requires the intent to "intimidate," while discharging does not include an intent requirement. 18 U.S.C. § 924(c)(4); *see also Dean v. United States*, 556 U.S. 568, 572-73 (2009). The jury thus could have found that during the physical altercation, Jean shot Goetz immediately after producing the firearm without using it to intimidate Goetz before firing.

Sixth, Jean argues that the district court erred by denying his speedy trial motion because the government filed an untimely indictment. *See* 18 U.S.C. §§ 3161(b), 3162(a)(1). "[C]ourts will not dismiss an untimely indictment pursuant to § 3162(a)(1) if it pleads different charges from those in the complaint, and this applies even if the indictment charges arise from the same criminal episode as those specified in the original complaint." *United States v. Gaskin*, 364 F.3d 438, 451 (2d Cir. 2004) (cleaned up). Here, although the charges in the complaint and the indictment arose from the same criminal episode, the complaint charged Jean with being a felon in possession of a firearm while the indictment charged Jean with crimes that "require[d] proof of elements distinct from or in addition to those necessary to prove the crime[] pleaded in the complaint." *Id.* at 453.

We have considered the remainder of Jean's arguments and find them to be without merit

Accordingly, we affirm the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

-against-

SPENCER JEAN, a/k/a "CASH,"

Defendant.
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MEMORANDUM AND ORDER
19-CR-0123(S-2)(JS)

APPEARANCES
For the Government: Anthony Bagnuola, Esq.
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For the Defendant: Joseph J. Ferrante, Esq.
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SEYBERT, District Judge:

Defendant Spencer Jean moves for (1) a judgment of acquittal pursuant to Federal Rule of Criminal Procedure Rule 29 and (2) alternatively, for a new trial on all counts pursuant to Federal Rule of Criminal Procedure 33. (Mot., D.E. 110.) The Government opposes the motion in its entirety. (Opp., D.E. 111.) For the following reasons, Defendant's motion is DENIED.

BACKGROUND

Familiarity with the record is presumed. The Court summarizes the facts and evidence only as necessary for resolution of Defendant's motion.

On July 2, 2019, following a weeklong jury trial, Defendant was convicted of (1) Hobbs Act robbery of a drug dealer, in violation of 18 U.S.C. § 1951(a); (2) discharging a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii); (3) possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); (4) conspiracy to obstruct justice, in violation of 18 U.S.C. § 1512(k); and (5) obstruction of justice, in violation of 18 U.S.C. § 1512(c)(2). He was found not guilty[1] of Count Six, illegal possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2) and 3551 et seq. (Verdict Sheet, D.E. 98; Superseding Indictment, D.E. 50.)

I. The Charged Crimes

Briefly summarized, on March 20, 2018, Defendant went to Ryan Goetz's house in Middle Island, New York, purportedly to buy marijuana. At an earlier date, Goetz and Defendant had met in a halfway house.[2] (Tr. 88:5-22.) Goetz knew Defendant as "Cash"

[1] Count Six related to a shooting that occurred on November 23, 2016 and is not discussed in this Order. Counts One through Five stemmed from a separate March 20, 2018 shooting and Defendant's subsequent attempts to present a false alibi. (Superseding Indictment.)

[2] Goetz described the halfway house as "an environment where . . . the prison sends you to reacclimate into society before you get released completely." (Tr. 86:4-6.) Goetz had previously been convicted of mail fraud. (Tr. 132:9-133:11.) His time on supervised release went "terrible" and he violated it numerous times. (Tr. 193:17-194:1.) He testified at trial under a non-prosecution agreement. (Tr. 134:9-136:4; 800:11-18.)

and did not know his real name. (Tr. 89:8-13.) Goetz identified Defendant as "Cash" at trial. (Tr. 87:14-25.) Goetz became aware that Defendant had experience selling drugs. (Tr. 94:25-95:11.) Goetz himself had been treated for drug use at the halfway house. (Tr. 86:9-23.) Based on that information, after both had left the halfway house, Goetz contacted Defendant on March 19, 2018 to offer to sell Defendant marijuana. (Tr. 96:2-25.) They arranged for a deal the next day, March 20, 2018. That night and the following morning, the two called and texted each other. (Tr. 102:7-106:16.) On the morning of March 20, while Goetz was in the bathroom, he heard his front door open. He left the bathroom and saw Defendant standing in his doorway. (Tr. 106:19-107:5.) The marijuana was on the kitchen table. Defendant stated "give me your shit now" and Goetz and Defendant physically struggled over the marijuana. (Tr. 107:22-108:10.) In the ensuing altercation, Defendant took out a gun, shot Goetz in the leg, and fled with the marijuana. (Tr. 108:17-24; 207:25-208:4.) Goetz called 911 and reported he had been shot. At trial, Goetz concluded his testimony by stating that there was no doubt in his mind that "Cash"--Defendant--had shot him on March 20, 2018. (Tr. 207:22-208:4.)

Natasha McPherson had known Defendant since childhood and, like Goetz, knew him to go by "Cash." They became

romantically involved in 2015.[3] (Tr. 424:7-23.) During their relationship, Defendant sold marijuana. (Tr. 430:1-8.) On March 20, 2018, Defendant told her he was going to see "the kid from the halfway house" about some marijuana. She told him not to go. (Tr. 430:9-11, 19-25; 431:1-22.) Later that same day, Defendant called her and told her to get dressed so they could go out to eat. (Tr. 435:2-12.) He arrived at her home in West Babylon in a dark grey four-door BMW accompanied by his friend "Marv." Defendant told her to drive with Marv and that Defendant would drive her car. (Tr. 435:14-436:11.) During the car ride, she spoke with Defendant via FaceTime, and he told her he "had no choice but to do it because the guy rushed him." (Tr. 439:21-440:3.) Also during the car ride, Marv stated that Defendant "didn't have to shoot him." (Tr. 439:16-20.)

McPherson and Marv arrived at Marv's house and waited. Defendant arrived approximately 10 to 15 minutes later wearing different clothes. When Defendant opened the rear door of the BMW, McPherson saw white bags and smelled marijuana. She then observed Defendant use a white glove to remove a gun from the backseat of the car and hand it to Marv. McPherson and Defendant went to IHOP in Freeport. (Tr. 440:7-441:10.)

[3] McPherson's presence was secured by subpoena and she stated she did not want to testify at trial. (Tr. 422:22-423:3.)

Notably, much of the above was corroborated by cell phone records of conversations and messages and cell site records tracking Defendant's phone's location. The receipt from IHOP was also admitted at trial.

At IHOP, Defendant first told McPherson he planned to use her as an alibi. (Tr. 441:11-13.) On April 8, 2019, Defendant filed a cursory Notice of Alibi (D.E. 17) stating his intent to establish at trial that he was traveling between Medford, New York and Freeport, New York with an intended stop at the time Goetz was robbed. On April 18, 2019, he filed a Supplemental Notice of Alibi (D.E. 23) "advis[ing] that at the place and approximate time of the alleged crime charged in the [I]ndictment, the [D]efendant was traveling from 3115 Horseblock Road, Medford, New York, towards Middle Island, New York, then changed course and traveled west and south to Freeport New York." In support of his alibi, Defendant intended to call Natasha McPherson.

Upon receiving the alibi information, the Government interviewed McPherson. She admitted that the alibi was false and that Defendant had asked her to testify falsely on his behalf. He contacted her numerous times via Google Voice because "it was secure." (Tr. 444:8-446:15; see, e.g. Tr. 454:21-25.) Defendant's brother also reached out to her several times in an effort to get

her to provide an alibi. (Tr. 456:3-458:7.) She testified to the same before a Grand Jury and at this trial.[4]

II. Procedural History

Defendant was initially indicted on March 7, 2019, on the charges related to the Goetz robbery. (Indictment, D.E. 1.) Attorney Richard A. Finkel was appointed to represent him. (CJA Appt., D.E. 12.) On April 20, 2019, after the matter was reassigned to the undersigned from Hon. Joseph F. Bianco, the Government filed a Superseding Indictment which included the additional charges related to the false alibi and obstruction with McPherson. (Superseding Indictment.) On May 3, 2019, Finkel moved to withdraw as Defendant's attorney and attorney Richard D. Haley was appointed. (Minute Entry, D.E. 42.)[5] After motion practice not relevant here, this Court set a trial date of June 17, 2019, in order to allow Mr. Haley adequate time to prepare. (Minute Entry, D.E. 62.) Jury selection took place on June 17, 2019 (Minute Entry, D.E. 76) and the trial commenced on June 24, 2019. Defendant was found guilty of five of six counts. On July 18, 2019, at Defendant's request, this Court appointed him a new

[4] After the trial, despite express warnings from the Court, Defendant continued to attempt to contact McPherson. (Status Report Concerning Investigation of Post-Conviction Conduct, D.E. 105.)

[5] Finkel testified at trial regarding the obstruction and false alibi charges.

attorney, Joseph J. Ferrante, for any post-trial motions. (CJA Appt., D.E. 103.)

After being granted extensions, Defendant submitted this post-trial motion on October 28, 2019. The Government opposed on November 27, 2019, and Defendant replied on December 11, 2019 (Reply, D.E. 112).

DISCUSSION

I. Legal Standards

A. Rule 29 Motion for a Judgment of Acquittal

Under Federal Rule of Criminal Procedure Rule 29(a), "[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." "Under Rule 29, the standard is whether, 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. Kenner, No. 13-CR-0607, 2019 WL 6498699, at *3 (E.D.N.Y. Dec. 3, 2019) (internal quotation marks and citations omitted; emphasis in original) (collecting United States Supreme Court and Second Circuit cases). "[V]iewing the evidence in the light most favorable to the government means drawing all inferences in the government's favor and deferring to the jury's

assessments of the witnesses' credibility." Id. (internal quotation marks and citation omitted).

B. Rule 33 Motion for a New Trial

Under Federal Rule of Criminal Procedure Rule 33(a), "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." This Court "must examine the entire case, take into account all facts and circumstances, and make an objective evaluation." United States v. Aguiar, 737 F.3d 251, 264 (2d Cir. 2013) (internal quotation marks and citation omitted). "A district court may grant a Rule 33 motion only in extraordinary circumstances, and only if there exists a real concern that an innocent person may have been convicted." Kenner, 2019 WL 6498699 at *3 (internal quotation marks and citations omitted). Rule 33 gives this Court "broad discretion" but "that discretion must be exercised 'sparingly,' and relief under the rule should be granted 'only with great caution and in the most extraordinary circumstances.'" United States v. Mayes, No. 12-CR-0385, 2014 WL 3530862, at *1 (E.D.N.Y. July 10, 2014) (quoting United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992)).

II. Rule 29 Motion for a Judgment of Acquittal

Defendant moves for a judgment of acquittal, arguing that the testimony of Government witnesses Goetz and McPherson was not credible. He contends that "Goetz was the only eyewitness to

the events that took place in his house. Re-reading his testimony leaves nothing to the imagination. He is professional liar. His testimony should be wholly disregarded. He played a big role at trial. To have a conviction stand based on his testimony would be a grave injustice." (Mot. at 18.) As to McPherson, who "testified under subpoena. She did not want to be there. She had a history of mental issues that were excluded under the guise of irrelevance, but [Defendant] disagree[s] with that assessment. [Defendant] believe[s] that some of the evidence provided showed that she very often alerted [Defendant] to her instability towards him and herself." (Mot. at 18.)

At the outset, "[t]he proper place for a challenge to a witness's credibility is in cross-examination and in subsequent argument to the jury[,] not in a motion for a judgment of acquittal." United States v. Truman, 688 F. 3d 129, 139 (2d Cir. 2012) (internal quotation marks and citations omitted). Here, Defendant challenges witness credibility and points to what he perceives as significant issues with their testimony. For example, he places great emphasis on Goetz's testimony regarding the date Goetz created contact information for Defendant in Goetz's phone. He asserts that Goetz could not have created the contact in May 2017, as the phone indicated, because Defendant was only in the halfway house from 2015 to 2016. (Mot. at 15-16.) But the jury heard Goetz's uncertainty about dates--when the Government asked

when he had lived in the halfway house, he responded he was "unsure." (Tr. 85:21-22.) And while defense counsel extensively crossed Goetz on issues with the halfway house, attempting to discredit his assertion that over the course of approximately four months he never learned "Cash's" real name, (see Tr. 167:5-171:6), he did not attack the phone contact creation date. Defendant also argues that while Goetz said they planned the drug deal the night before March 20, there are no phone records documenting that. (Mot. at 16-17.) However, there are numerous documented contacts on the morning of March 20 through the time of the shooting. These minor discrepancies, after the passage of time, do not warrant a judgment of acquittal.

As to McPherson, Defendant similarly nitpicks her account of the timing of several phone calls that had taken place over a year earlier. (Mot. at 18.) He attacks her assertion that he told her to create Google Voice numbers because they were "secure" because "[h]ad she been honest she would have told the jury that the google phone number is only preferable because if it has a more local area code, that it would cost less to the inmate and his family." (Mot. at 19.) Notwithstanding that Defendant provides no support for this assertion other than his own apparent belief about the supposed benefits of using Google Voice numbers while incarcerated, again, Defendant had ample opportunity to cross McPherson on these issues at trial.

Despite these issues, "[a] reasonable jury could believe [Goetz] and [McPherson], irrespective of the minor contradictions in their respective testimonies." United States v. Rodriguez-Santos, No. 18-CR-0298, 2019 WL 2407424, at *5 (D.P.R. June 6, 2019) (collecting cases and denying Rule 29 and Rule 33 motion). "When testimonial inconsistencies are revealed on cross-examination, the jury [i]s entitled to weigh the evidence and decide the credibility issues for itself." United States v. O'Connor, 650 F.3d 839, 855 (2d Cir. 2011) (jury may properly credit a witness "who may have been inaccurate, contradictory and even untruthful in some respects [but] was nonetheless entirely credible in the essentials of his testimony") (internal quotation marks and citations omitted). Moreover, despite Goetz and McPherson having no relationship or apparent contact, their testimony largely corroborated each other's accounts of March 20's events.

Furthermore, in addition to being able to evaluate any alleged inconsistencies in the witnesses' testimony, the jury was aware of issues touching on their credibility. Both the Government and defense counsel exhaustively detailed Goetz's prior convictions, bad acts, fraud, and the fact that he was testifying pursuant to an agreement with the Government. McPherson's mental health issues were before the jury (Tr. 473:6-17) and counsel vigorously cross examined her on any potential bias or ill will

toward Defendant based upon their failed romantic relationship (Tr. 479:8-486:16). These issues were also discussed by defense counsel at length during closing statements. (Tr. 782:17-788:6.) Armed with this background knowledge, the jury chose to credit their testimony.

Finally, the verdict demonstrates that the jury assessed the evidence as to each count and incident--the jury acquitted Defendant on the unrelated November 2016 shooting that did not involve Goetz or McPherson (although McPherson did testify as to conversations she had with Defendant about the shooting). The jury thus made a credibility determination regarding these witnesses' accounts of the charged crimes, and it is not this Court's province to disturb it. See United States v. O'Connor, 650 F. 3d 839, 855 (2d Cir. 2011). Accordingly, Defendant's motion for a judgment of acquittal is DENIED.

III. Rule 33 Motion for a New Trial

Defendant argues that the Government committed a Rule 16 violation and he was "denied a fair trial because the government failed to disclose their cell site expert in sufficient time (at trial with expert witness already testifying and received as an expert) with sufficient information, with sufficient results, sufficient exhibits, bases for his conclusions, and caused a

surprise at trial that no attorney could predict much less handle." (Mot. at 5.)[6]

Federal Rule of Criminal Procedure Rule 16(a)(1)(G) provides that "[a]t the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use . . . during its case-in-chief at trial . . . [t]he summary provided . . . must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications."

On March 22, 2019, the Government provided discovery to Defendant, including but not limited to cell site location data. (Rule 16 Letter, D.E. 15.) The discovery included T-mobile records obtained by a warrant. Essentially, the records established the location of Defendant's phone on March 20, 2018--the day of the Goetz robbery. This location data tended to show that Defendant's phone travelled from his home in Westbury, New York to Goetz's home in Middle Island, New York. The location of Defendant's phone corresponded with texts and calls to Goetz's phone. (Opp. at 6.)

[6] The Court finds that Defendant's challenge to the cell site evidence and expert testimony is grounded in unfairness. Even though he attacks cell site data generally in his Reply (see Reply at 4), he does not allege that the evidence was insufficient to convict him. Thus, the Court addresses the cell site arguments only as they pertain to a Rule 33 motion for a new trial.

On April 17, 2019, at a status conference before Judge Bianco, Defendant's first attorney Finkel requested "the expert reports--the cell tower information is going to be very important to us . . . so I'd like to know when we're going to get that from the Government." (April 17 Tr., D.E. 109, 12:5-9.) The Government indicated it would turn the information over "two weeks before trial . . . maybe by the end of next week." The Government explained that it did not currently have the report. (April 17 Tr. 12:10-20.) Judge Bianco ordered the Government to turn the report over "immediately" if they received it before the estimated date.

On April 26, 2019, the Government provided information about several potential expert trial witnesses. The Government explained that

> David M. Magnuson is an analyst with Sierra Cellular Analysis Group and a former Special Agent with the FBI. Mr. Magnuson's curriculum vitae is attached as Exhibit "A" and outlines his training and experience related to the analysis of cellular phone records and data.

Magnuson was

> expected to testify about certain geolocation data obtained via judicial orders associated with the cellular telephone used by the defendant in or about and between March 2018 and May 2018. The data that Mr. Magnuson and/or Special Agent Wright will use to conduct his analysis was provided to the defense on March 22, 2019 under Bates-numbers [specifying relevant documents and records].

(Rule 16 Letter, D.E. 31, at 2.)

On June 11, 2019, the Government made a motion in limine to admit the cell site location data that had been identified in its March 22 initial disclosure and its April 26 letter describing the basis for Magnuson's opinions. (Motion in Limine, D.E. 73.) Defendant did not oppose the motion. (Response, D.E. 74.)

On Saturday, June 29, 2019, after the trial had commenced, Magnuson completed summary slides he intended to use while testifying. (Opp. at 15, Reply at 3.) That same day, the Government provided the slides to defense counsel by email pursuant to Federal Rule of Evidence 1006 (requiring the Government to "make the originals or duplicates available for examination or copying, or both, by [the defendant] at a reasonable time and place."). On Monday, July 1, the Government called Magnuson as a witness. (Tr. 665.) When the Government offered the slides into evidence, defense counsel stated

> Your Honor, it is certainly not my desire or intent to delay this proceeding. I might add and the fault may be mine. We have received, prior to today, the Government's Rule 16 discovery. Apparently, this particular document was provided to me via an email a few days ago. I have not, frankly, with one exception, returned to my office in the last few days. I leave this courtroom. I go return home. I review the file for the next day. So I have no doubt that the Government provided this to me in the last few days. The summary is the same. We've received up to this point all of the underlying information. We just haven't received the summary. I advise the

> Court of this fact because I have not had the opportunity to review this with my client for that reason, and the fault lies with me.

(Tr. 683:3-19.) Counsel requested 15 minutes to review the information with Defendant, and the Court allowed a break in the proceedings. When the trial resumed, the Court asked if Defendant had had an opportunity to review the documents, and Counsel answered yes. (Tr. 683:20-685:14; 687:5-7.) Despite not receiving the slides, Counsel said he had personally visited the Middle Island cell tower identified in the data before trial. (Tr. 689:21-25.) He further stated that they were "not asking for additional time to review the document" but that there were "aspects of the document that [they] would object to that, frankly, draw conclusions that the jury would have to draw as relates to some material facts." (Tr. 687:8-12.) In response to those objections, the parties agreed to redactions. (Tr. 692:2-693-21.) Counsel did note, however, his opinion that the slides were "a belated delivery of what [he] clearly regard[ed] as 3500 material" (Tr. 687:3-4) and that "it's one thing to provide the underlying data. It's another thing to provide a summary of those hundred and some odd pages and not allow the defense sufficient time to compare the underlying data with the summary." (Tr. 688:5-9.)

Thus, on March 22 and April 26, well before trial, the Government provided Defendant with: the relevant cell site records, Magnuson's resume, the expected basis of Magnuson's

testimony, and the information and records that would underlie that testimony. The slides, turned over during trial, were a summary aid. Defendant objected to some of the content; the Government agreed to redactions. Despite Defendant's current arguments, it is readily apparent to the Court that Defendant was well aware of what both Magnuson's testimony and any accompanying records or slides would show: that his phone's location corresponded with the Goetz robbery and timeline. As far back as April, Defendant proposed an alibi that comported with the cell site data. He continued to argue that alibi right through closing statements. (Tr. 793:7-794:22.)

Even if the Court were to conclude that there was a technical Rule 16 violation, it would not compel a new trial. Defendant observes that "the trial court has broad discretion to fashion rulings that result in the admission of expert testimony on a playing field fair to the opponent." (Mot. at 6, citing United States v. Laster, 313 F. App'x 369; 372-73 (2d Cir. 2009) (the defendant's "argument on appeal amounts to a disagreement with the district court regarding the adequacy of the disclosures. Such evidentiary determinations are left to the discretion of the trial court, and [the defendant] has not shown that the district court abused its discretion here.).) Here, as detailed above, the Court allowed Defendant the time he requested to review the information. It also permitted his requested redactions.

In United States v. Douglas, 336 F. App'x 11, 13-14 (2d Cir. 2009), the Government conceded it should have given the defendant advance notice of an expert's testimony and the study it relied upon. The Second Circuit held that despite the Government's failure,

> [t]he district court, however, averted the possibility of a due process violation by giving defense counsel additional time to review the 2006 study and to prepare for the cross-examination of [the expert]. Defense counsel did not request any more time beyond what was given; nor has [the defendant] adequately explained on appeal how he was substantially prejudiced despite the district court's efforts to rectify any possible disadvantage. Therefore, [in ruling on the defendant's post-trial motions,] the district court properly refused to disturb the jury's verdict based on the Government's failure to turn over Rule 16 information related to [the expert's] testimony.

Id. (citing United States v. Tin Yat Chin, 476 F.3d 144, 146 (2d Cir. 2007) (after the Government's nondisclosure, district court allowed defense counsel sufficient time to prepare for expert witness mid-trial and the defendant identified no prejudice from not receiving a longer continuance)). Here, the Court does not believe the Government violated Rule 16. Even if it had, however, the Court gave defense counsel adequate time to prepare, and Defendant raised no objection to that process at trial.[7]

[7] The Court notes that Judge Bianco ordered the Government to turn over the reports in April. The Government did not do so. In the interim, attorney Finkel withdrew and this Court

Accordingly, any purported violation does not establish the extraordinary circumstances necessary to disturb the jury's verdict and grant Rule 33 relief.

Additionally, for the same reasons already discussed as to Defendant's Rule 29 motion, the Court finds that any arguments regarding Goetz's and McPherson's testimony do not warrant a new trial. Thus, Defendant's motion for a new trial under Rule 33 is DENIED.

CONCLUSION

For the foregoing reasons, Defendant's motion (D.E. 110) is DENIED in its entirety.

SO ORDERED.

/s/ JOANNA SEYBERT
Joanna Seybert, U.S.D.J.

Dated: January 7, 2020
Central Islip, New York

appointed attorney Haley. Ultimately, the Government gave the slides to Haley approximately 48 hours before their intended use at trial. While the Government could have made efforts to get the slides sooner, they turned them over as soon as they received them from their expert. For the reasons already stated, the belated disclosure does not warrant a new trial.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of August, two thousand twenty-two.

United States of America,

Appellee,

v.

Spencer Jean, AKA Cash,

Defendant - Appellant.

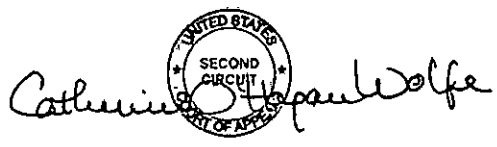
ORDER

Docket No: 20-3659

Appellant, Spencer Jean, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



Additional material from this filing is available in the Clerk's Office.