No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSE SOTO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

APPENDIX VOLUME 1 – COURT OPINIONS AND STATUTORY PROVISIONS INVOLVED

KEVIN A. BUCHAN
Counsel of Record
Buchan, Palo & Cardamone, LLC
750 Broad Street, Suite 202
Shrewsbury, New Jersey
732-328-8700 voice
732-328-9933 fax
kbuchan@bpclawnj.com

Counsel for Petitioner

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APPENDIX A

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

November 20, 2024

Kevin A. Buchan
Buchan Palo & Cardamone
750 Broad Street, Suite 202
Shrewsbury, NJ 07702

Mark E. Coyne
Richard J. Ramsay
Office of United States Attorney
970 Broad Street, Room 700
Newark, NJ 07102

RE: USA v. Jose Soto
Case Number: 23-1827
District Court Case Number: 2-20-cr-00903-002

ENTRY OF JUDGMENT

Today, **November 20, 2024** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:

A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/ Caitlyn
Case Manager
267-299-4956

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1827

UNITED STATES OF AMERICA

v.

JOSE SOTO,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(District Court No. 2-20-cr-00903-002)
District Judge: Honorable William J. Martini

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 28, 2024

Before: RESTREPO, MATEY, and McKEE,
Circuit Judges

(Filed: November 20, 2024)

Kevin A. Buchan
Buchan Palo & Cardamone
750 Broad Street
Suite 202
Shrewsbury, NJ 07702
Counsel for Appellant

Mark E. Coyne
Richard J. Ramsay
Office of United States Attorney
970 Broad Street
Room 700
Newark, NJ 07102
Counsel for Appellee

OPINION

McKEE, Circuit Judge.

A jury convicted Jose Soto of one count of conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371, two counts of bank robbery, in violation of 18 U.S.C. § 2113(a), and two counts of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii) and 18 U.S.C. § 2.[1] At sentencing, the District Court set his offense level at 29 and ultimately sentenced him at the high-end of his Guidelines range: 289 months in federal

[1] **Appx 1010.**

prison (including two mandatory and consecutive seven-year terms). Soto's offense level determination incorporated a two-level enhancement for obstruction of justice pursuant to United States Sentencing Guideline ("USSG") §3C1.1. The District Court imposed this enhancement based on allegations that Soto improperly: (1) stepped onto an elevator full of jurors and asked one of them to press the first floor button; (2) interacted with a testifying witness's brother on the weekend of trial; and (3) greeted victims as they entered the courthouse. Because the record inadequately supports this enhancement's application, we will vacate and remand for a new sentencing.

I. Background

Law enforcement arrested Jose Soto and Nicholas Ortiz in connection with an armed robbery of PNC Bank in Passaic, New Jersey, on February 6, 2020, and an armed robbery of the Valley National Bank, in Little Falls, New Jersey, on February 27, 2020.

A jury trial ensued. After jury selection, an occasion arose wherein Soto got on an elevator with fourteen jurors for his trial.[2] When he first stepped onto the elevator, he asked one of the jurors to press the button for the "[f]irst floor."[3] Two jurors reported the interaction to a court security officer ("CSO").[4] The Judge responded by reprimanding Soto. The

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[2] **Appx 187.** There is nothing in the record that indicates whether the jurors were wearing juror badges at the time, but the District Court assumed that they were. ***Id.***

[3] **Appx 187.**

[4] ***Id.***

Judge told him that, "[h]is conduct is just inexplicable,"[5] and that "it's pretty self-evident that a defendant in a case knows he's not to interact in any way with the jury."[6] Soto's counsel did not deny that the interaction occurred, but noted that the Judge had not previously instructed Soto to avoid any interaction whatsoever with the jurors, and that Soto did not purposefully ignore any of the Court's instructions.[7] The Judge responded by focusing on the consequences of Soto's conduct—not his intention. He said:

> I've had situations in [which] a defendant is walking down a hall, a juror is walking down the hall, the defendant smiles at the juror, says good morning, which is inappropriate too. Those don't seem to be a big issue. Okay? The fact that at least two jurors reported [the elevator interaction] and took the time to come up, see [the CSO] . . . is something we have to address right now.[8]

The Judge then interviewed each juror about the incident; one juror (Juror #2) stated that he could not be objective in weighing the evidence against Soto because of the interaction and was excused.[9]

The prosecutors also alleged that—the morning following the elevator interaction, but before Soto was

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[5] Appx 193.
[6] *Id.*
[7] **Appx 192.**
[8] Appx 193.
[9] **Appx 224.**

reprimanded by the Court—Soto "approached" the victims scheduled to testify on the steps of the courthouse, to "greet them."[10] He allegedly did so while neglecting to acknowledge any of the FBI agents accompanying the victims.[11] The government averred that it did not see "any indication of a threat or anything like that …."[12] None of the victims testified about this interaction. In response to the government's allegation, Soto's counsel offered his version of the facts: "I was there, he was waiting for me on the courthouse steps. The word 'approach,' I don't think he approached anybody. People walked in and he may have said 'Good morning.' Now that's the extent of what I think happened this morning."[13]

Finally, over the weekend—after trial started, but before co-defendant Ortiz testified—Soto attended, with government permission, a family event in his neighborhood.[14] The government reported that Soto approached one of Ortiz's brothers on the street and asked him whether he was Ortiz's brother.[15] The brother allegedly did not reply and kept walking.[16] The government then explained that Ortiz's mother lives "very, very close to the defendant and that [Ortiz's] brother was visiting the mother and so was in the area of the defendant's residence at that time."[17] Additionally, the government stated that the defendant and Ortiz are "distant

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[10] Appx 190.
[11] **Appx 190, 983.**
[12] Appx 190.
[13] Appx 192.
[14] **Appx 984.**
[15] ***Id.***
[16] ***Id.***
[17] Appx 407.

relatives," so it is possible Ortiz's brother and Soto knew each other.[18]

The prosecutor represented that FBI agents had interviewed Ortiz's brother and "confirmed th[e] story" and that the agents were looking into whether they could find surveillance footage to further corroborate it.[19] When later asked whether the government was prepared to bring Ortiz's brother in to testify, the government said that he lived in South Jersey, so it would be difficult to get him to court, but they could possibly have him appear remotely.[20] The Judge suggested that the prosecutor offer the agent's report and said, "[t]hen we'll go from there."[21] The prosecutor agreed.[22] The prosecutor later represented that there existed video evidence of the two passing each other in the street,[23] but neither the government's notes, nor the surveillance footage are part of the record before us, and the Judge made no factual findings related to this interaction.

When deciding to apply the enhancement for obstruction of justice at Soto's sentencing hearing, the Judge explained that §3C1.1 was "very applicable" to the elevator incident. [24] The Judge then acknowledged that the additional "two things" (greeting victims and interacting with Ortiz's brother) "in their own right probably wouldn't result in an

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[18] *Id.*
[19] Appx 612.
[20] **Appx 647.**
[21] *Id.*
[22] ***Id.***
[23] **Appx 984.**
[24] Appx 988–98.

enhancement, but when [combined] with, clearly, getting on an elevator during the course of the trial, not only could have, but did in fact impede and affect at least one juror and caused this Court to have to do a lengthy voir dire of the jurors because of his conduct getting on the elevator. That was not a mistake."[25]

II. Analysis

On appeal, Soto argues that the District Court made several errors. The only argument that has merit is Soto's claim that the District Court erroneously applied an enhancement for obstruction under USSG §3C1.1.[26]

A. Applicable Law

As we have previously recognized, individuals are entitled to due process at their sentencing hearings:

> Prosecutors, of course, may not introduce any and all hearsay testimony at a sentencing proceeding. The admission of hearsay statements in the sentencing context is subject to the

[25] Appx 989.

[26] Soto also claims the Judge abused his discretion by: (1) allowing the government to admit photographs from Soto's phone that depict stacks of cash and cash strewn about his home; (2) allowing Agent Barile to testify as a lay witness; (3) not permitting Soto to try on a piece of evidence (a glove); and (4) the manner in which he handled the jury's note indicating that there was a deadlock. He also alleges that (5) the Judge failed to consider COVID-19 jail conditions under 18 U.S.C. § 3553(a). For the reasons the District Court explained, all these claims fail.

> requirements of the Due Process Clause. Under the precedent of this Court, hearsay statements must have some "minimal indicium of reliability beyond mere allegation.[27]

We review the factual findings underlying an obstruction of justice enhancement under §3C1.1 for clear error.[28] Clear error exists only if the district court's ruling was "completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting data."[29] If the factual findings are adequately supported, then "we review the District Court's application of the Guidelines to the facts for abuse of discretion."[30]

The standard of proof for determining willful obstruction of justice is by a "preponderance of evidence."[31] The government has the burden of proving that it is "more likely than not" that the accused willfully obstructed justice.[32] Notably, there must be evidence in the record

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[27] *United States v. Robinson*, 482 F.3d 244, 246 (3d Cir. 2007) (quoting *United States v. Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990)); *see also* USSG §6A1.3(a).

[28] *United States v. Gray*, 942 F.3d 627, 633 (3d Cir. 2019). This Court has jurisdiction to review the judgment under 18 U.S.C. § 3742(a)(2) and 28 U.S.C. § 1291.

[29] *United States v. Vitillo*, 490 F.3d 314, 330 (3d Cir. 2007) (quoting *United States v. Haut*, 107 F.3d 213, 218 (3d Cir. 1997)).

[30] *United States v. Kluger*, 722 F.3d 549, 555 (3d Cir. 2013).

[31] *United States v. Kim*, 27 F.3d 947, 960 (3d Cir. 1994).

[32] *See, e.g.*, *United States v. Belletiere*, 971 F.2d 961, 966 (3d Cir. 1992) (finding that the prosecution failed to meet its burden because it failed to introduce any evidence that could

supporting the District Court's findings.[33] Although the record need not contain direct evidence of the conduct, other evidence must be present in the record to support an inference that the individual willfully obstructed justice.[34]

B. The Factual Findings Do Not Support Soto's Enhancement

Here, the factual findings required to support this enhancement are completely absent from the record. First, the District Court did not explicitly adopt the findings of the presentence report ("PSR"), which incorporated all three allegations of obstruction. But even if it had, after weighing the government's evidence, courts "may accept any *undisputed* portion of the presentence report as a finding of fact."[35] Instead, Soto objected and provided "detailed reasons" why the "findings were unreliable."[36] The PSR itself made that clear with respect to the family incident. A footnote specified that

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have made it more likely than not that Belletiere "willfully" attempted to obstruct justice).

[33] *See United States v. Douglas*, 849 F.3d 40, 50–51 (3d Cir. 2017), *rev'd en banc on other grounds*, 885 F.3d 124 (3d Cir. 2018) (finding that the district court inappropriately applied an obstruction of justice enhancement when it relied on factual findings not supported in the record regarding Douglas's "willfulness").

[34] *Kim*, 27 F.3d at 960–61 (reasoning that even though the record did not contain direct evidence of Kim's false cooperation and misstatements, other evidence in the record allowed the district court to make that inference).

[35] Fed. R. Crim. P. 32(i)(3)(A) (emphasis added).

[36] *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002)).

"[d]efense counsel objected to this claim and stated there was no evidence of any interaction between Soto and Ortiz's brother."[37] The same footnote went on to note that the government "submitted video footage showing the two men passing on the street and Soto turning back several times," and that there was "no audio recording of the interaction" that was reported to the police by Ortiz's brother.[38] The Judge did not rule on these objections, rendering full adoption of the PSR impossible. Thus, the unadopted PSR could not have, by itself, supplied a factual basis to support the District Court's findings.

And while the record does include passing *references* to an FBI affidavit and surveillance footage,[39] neither piece of evidence is actually *in* the record, and it is far from clear that the District Court considered them. Meanwhile, Soto explicitly denied that there was ever any interaction with Ortiz's brother, "much less an attempt at an 'indirect threat.'"[40] He also argued that any interaction with members of the jury or other witnesses was "inadvertent and not intended to be any kind of threat or obstruction of justice in any way."[41] The District Court declined to hold a hearing on these issues and failed to enter into the record any of the support the government claimed it had, but nonetheless applied the obstruction enhancement.

Due process was therefore lacking here. In applying the obstruction enhancement, the District Court improperly relied

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[37] Appx 1031.
[38] *Id.*
[39] ***See* Appx 612, 984.**
[40] Appx 940.
[41] *Id.*

upon the government's unsubstantiated allegations about Soto's interactions with victims and a testifying witness's brother. The District Court's application of a sentencing enhancement without supporting evidence requires remand and resentencing.

C. The District Court Abused its Discretion by Inferring Soto's Intent Solely from his Elevator Conduct

While there was adequate record evidence to support the District Court's finding that Soto entered the elevator with jurors and asked them to press the button for floor one, it would have been an abuse of discretion for the District Court to infer wrongful intent from this action alone.

We have defined "willfully," as used in §3C1.1, as acting consciously ("deliberately or intentionally") with the purpose of obstructing justice, as opposed to "negligently, inadvertently, or accidentally."[42] Obstructive conduct under §3C1.1 includes "threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so."[43] Further, we have held that the obstruction of justice enhancement may apply only when an individual acts *willfully*—that is, with the purpose of achieving an obstruction of justice.

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[42] *United States v. Jenkins*, 275 F.3d 283, 287 (3d Cir. 2001) (finding that the individual's "failure to appear in state court was an intentional action, one taken with full awareness of the proceedings").

[43] USSG §3C1.1, cmt. n. 4(a).

District courts in our Circuit often infer willfulness based on behavior far more outlandish than what the court determined Soto did here.[44] Although Soto's behavior may

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[44] *See, e.g., United States v. Green*, 617 F.3d 233, 238 (3d Cir. 2010) (yelling "bitch I oughta kill your fucking ass" at government witness); *United States v. Williams*, 591 F. App'x 78, 96 (3d Cir. 2014) (nonprecedential opinion) (making threatening telephone calls to coerce co-defendant into not testifying at trial); *United States v. Webb*, 499 F. App'x 210, 214 (3d Cir. 2012) (nonprecedential opinion) (asking brother to confront a critical witness during his trial for armed robbery); *United States v. Carter*, 293 F. App'x 954, 957 (3d Cir. 2008) (nonprecedential opinion) (leaving a voice message for witness stating, "loose lips sink ships" and "you should be running instead of running your mouth" and witness testifying that they considered such statements to be a threat); *United States v. Rinick*, 219 F. App'x 238, 241–42 (3d Cir. 2007) (nonprecedential opinion) (threatening to kill someone who called him a "rat"); *United States v. Bush*, 94 F. App'x 101, 102 (3d Cir. 2004) (nonprecedential opinion) (writing, in a letter to wife while awaiting sentencing, that he would "get that prosecutor . . . for doing this to me," and would get witness "for fucking up our getaway trip for that weekend").

The parties' briefing on whether this conduct (alone or in combination with the two other incidents) rises to the level of obstruction necessary to justify an enhancement is sparse. Soto only cites *Jenkins*, 275 F.3d at 287 **(Appellate Br. 32)**, for the proposition that §3C1.1 requires willfulness. The government cites no analogous cases whatsoever but includes one string cite for the proposition that the district court, as the

have been "inappropriate," the District Court's focus was not on Soto's intent to obstruct—the critical element to apply this enhancement—but on the fact that two out of fourteen jurors were made uncomfortable by sharing an elevator with him. Indeed, the court made no mention of the other jurors who either did not care or, in some instances, did not even notice.[45] In recognizing that an accused person greeting a passing juror by saying "good morning" is inappropriate but is not a "big issue,"[46] the District Court acknowledged that not all "inappropriate" behavior creates an inference of intent necessary for an enhancement, and we certainly agree. While there is evidence that Soto's conduct made Juror #2

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finder of fact, determines the motive for a defendant's actions and what was meant by the defendant's statements. **(Appellee Br. 49).** The support for this proposition is largely out-of-circuit. The only in-circuit case the government includes is *United States v. Adair*, 38 F.4th 341, 354 (3d Cir. 2022), which stands for the proposition that the court can evaluate factual findings in the record for purposes of an enhancement of §3B1.1. In doing so, the government overlooks that much of what it describes is not in the record; they are accusations that the District Court apparently accepted without any factual finding or record support.

[45] *See, e.g.*, Appx 204 ("JUROR NO. 3: No, actually nothing happened. He just -- he was, like, one of the last people to get in the elevator, so . . . ."); *id.* at 205 ("JUROR NO. 4: No, no, no, it's fine. I'm okay with it. It's fine."); *id.* at 211 (In response to being asked whether Juror No. 9 would hold the interaction against the defendant he stated, "No, everybody's gotta get downstairs"); *id.* at 211–12 (Jurors No. 10 and 11 did not even recall that Soto stepped into the elevator).

[46] Appx 193.

uncomfortable, that evidence does not bear on the ultimate issue: whether Soto *intended* to cause the jurors to feel uncomfortable. And, in any event, nearly all the other jurors were unfazed by this interaction, if they even noticed it at all.[47]

Given the logistical limitations and configurations of many courthouses, it will often be difficult to prevent the kind of interaction that apparently occurred between Soto and his jurors without proof of the accused's mindset.[48] Without more, Soto's request that a juror push an elevator button for a particular floor is simply the kind of interaction that occurs in daily life. After all, the juror may have been even more threatened if Soto had approached her and reached across her to push the button himself. Moreover, although it could be argued that Soto should simply have not gotten on the elevator, nothing suggests that he was ever so advised. In sum, there is simply not enough in this record to justify a conclusion that Soto intended to obstruct justice.

Moreover, we fail to see how Soto's elevator behavior is materially different from the passing greeting the District Court described, and the District Court provides no explanation. It merely acknowledged that his behavior "did in fact impede" justice because the Court was required to conduct "a lengthy voir dire because of his conduct getting on the

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[47] **Appx 200–17.**

[48] This risk is heightened where judges hold court at unusual hours, as here. *See* Appx 189 ("To be candid, I don't think there [are] too many other jurors here for other cases here at 8:00 in the morning because most judges don't start early. I don't know if there's a better solution in terms of how we're entering and exiting the courthouse and the courtroom.").

elevator."[49] The District Court imposed the enhancement because Soto's conduct did in fact impede the proceedings; but the obstruction of justice enhancement under the Guidelines turns on his intent—not the consequences of actions.[50]

In sum, the District Court committed clear error by improperly relying on allegations not supported in the record. Even if it had exclusively relied on what is in the record, the Court would have abused discretion by applying the enhancement; Soto's behavior here is simply not enough to support an inference that he willfully intended to obstruct justice, and courts simply cannot read "obstruction" into such everyday interactions without more than what appears on this record.

As the District Court noted, greeting a juror with "good morning" will often be inconsequential,[51] even though it could also be interpreted as intimidation. Relying on such conduct to impose a sanction for obstruction of justice puts the accused on the horns of a dilemma. On the one hand they may very well believe that ignoring a passing juror would be interpreted as an act of rudeness that would adversely reflect upon them. On the other hand, greeting the passing juror with something as mundane as "good morning" might be interpreted as ill-advised, an improper communication, or some kind of intimidation. The fundamental guarantee of due process simply does not allow a court to imprison someone for such

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[49] Appx 989.

[50] *See* USSG §3C1.1, cmt. n. 2 (advising the court to ensure behavior under this enhancement "necessarily reflect[s] a *willful* attempt to obstruct justice") (emphasis added).

[51] Appx 193.

conduct without more than what appears on this record. Accordingly, the District Court erred in applying a sentencing enhancement for this innocuous conduct under the circumstances here.

III. Conclusion

Although this record compels our conclusion that a sentencing enhancement for obstruction of justice was not justified under the circumstances here, it goes without saying that jurors perform an absolutely essential function. We therefore take this opportunity to reiterate the importance of taking all reasonable and appropriate measures to ensure their safety and security as well as the need to create an atmosphere that will allow them to deliberate without fear or apprehension. Citizens who sacrifice their time and convenience to discharge the constitutional obligation of jury duty perform a service that is essential for the proper functioning of our system of justice. Courts must remain vigilant in ensuring that jurors do not have a reason to question the priority courts assign to providing a "safe space" for the discharge of that service. Nevertheless, for the reasons we have explained, we are satisfied that the defendant's conduct here did not rise to the level of compromising the safety or security of these jurors. Accordingly, imposition of this obstruction enhancement was clear error. There is simply "no rational relationship" between the enhancement and "the supporting data."[52]

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[52] *Vitillo*, 490 F.3d at 330.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	Crim. No. 20-903
v.	
JOSE SOTO.	**OPINION**

WILLIAM J. MARTINI, U.S.D.J.:

Currently before the Court is Defendant Jose Soto's ("Defendant") motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure ("Motion"). ECF No. 129. For the reasons set forth below, Defendant's Motion is **DENIED**.

I. BACKGROUND

On October 14, 2022, following a six-day jury trial, Defendant was convicted of one count of conspiracy to commit bank robbery, two counts of bank robbery, and two counts of using and carrying a firearm during and in relation to a crime of violence. ECF No. 119.

On Thursday, October 27, 2022, defense counsel emailed the Court for permission to file a Rule 33 motion for a new trial by the next week. The Government did not object, and the Court did not respond, before the Defendant filed the instant Motion on Wednesday, November 2, 2022. Defendant provides no reason for his delay, but considering all relevant circumstances, including the fact that Defendant requested the extension before the October 28, 2022 deadline and filed the Motion less than a week later, the Court will consider his submission. *See* Fed. R. Crim. P. 45(b)(1)(A); *cf. United States v. Kennedy*, 354 F. App'x 632, 636 (3d Cir. 2009) (noting that pursuant to Rule 45(b)(1)(B), courts may grant extensions for Rule 33(b)(2) motions due to excusable neglect, which is an equitable determination that should take account of relevant circumstances).

II. LEGAL STANDARD

Rule 33 of the Federal Rules of Criminal Procedure provides, in relevant part, that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Where, as here, a Rule 33 motion is based on "an alleged error or combination of errors at trial," a new trial will be ordered only when it is "reasonably possible that such error, or combination of errors, substantially influenced the jury's decision." *United States v. Tiangco*, 225 F. Supp. 3d 274, 279 (D.N.J. 2016) (citations and internal quotation marks omitted); *see also United States v. Moten*, 617 F. App'x 186, 195 (3d Cir. 2015) ("A new trial is required on the basis

of cumulative errors only when 'the errors, when combined, so infected the jury's deliberations that they had a substantial influence on the outcome of the trial.'" (quoting *United States v. Thornton*, 1 F.3d 149, 156 (3d Cir. 1993))).

III. DISCUSSION

a. Admission of Photographs Depicting Cash

Before opening statements, Defendant objected to the Government's introduction of photographs depicting stacks of cash that were present on Defendant's phone. Defendant asserted that the photographs were unreliable and unfairly prejudicial under Rule 403 of the Federal Rules of Evidence because the photographs were taken from the phone's deleted space and, as such, lacked metadata that would indicate where, when, or how the photographs were taken. The Court denied Defendant's objection, holding that defense counsel could appropriately address these questions through cross-examination. Tr. Vol. 1, 46:3-52:18. Defense counsel subsequently inquired into these issues on cross-examination. Tr. Vol. 1, 200:11-203:9 (crossing Government expert regarding activation date of Defendant's phone), 208:12-209:5 (lack of metadata for disputed photographs).

Defendant repeats this same argument in his Motion, again asserting that the photographs are unreliable and unfairly prejudicial under Rule 403. Def.'s Br. 2-3. Under Rule 403, a court may exclude relevant evidence if its probative value is "substantially outweighed" by a danger of unfair prejudice. Fed. R. Evid. 403. However, "because Rule 403 only protects against prejudice that is 'unfair,' the 'prejudice against which the law guards' is only 'prejudice of the sort which clouds impartial scrutiny and reasoned evaluation of the facts, which inhibits neutral application of principles of law to the facts as found.'" *United States v. Walker*, 677 F. App'x 53, 57 (3d Cir. 2017) (quoting *Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 670 (3d Cir. 2002))

Because the photographs depict large sums of cash and were extracted from Defendant's phone, they are highly probative to Defendant's involvement in a bank robbery. *Cf. United States v. Lewis*, 449 F. App'x 266, 268 (4th Cir. 2011) (holding that photographs of the defendant with large sums of cash could "rationally [be] viewed by the jury as evidence of [defendant's] involvement in a drug distribution scheme." (citation and internal quotation marks omitted)). Further, the Government introduced substantial witness testimony relating to the creation and location of the photographs, further demonstrating their probative value. *See, e.g.*, Tr. Vol. 1, 180:19-186:11 (expert testifying to the creation and deletion of the disputed photographs, and to the metadata and location of a photograph on Defendant's phone depicting a table similar to the one in the disputed photographs), 192:14-24 (date range of data on Defendant's phone), 195:15-197:11 (creation and deletion of contested photographs); *see also* Tr. Vol. 2, 302:13-18 (co-defendant testifying to dividing robbery proceeds on Defendant's living room floor).

Defendant adequately addressed his initial claims of unreliability and unfair prejudice through cross-examination and failed to assert any new basis for prejudice in his Motion. On the bases already cited by Defendant, the Court did not err in admitting the

photographs. Given the weight of the rest of the Government's evidence offered at trial, the admission of the photographs could not have "excite[d] the emotions of the jury to irrational behavior" such as to cause a danger of unfair prejudice that outweighs their probative value. *See Lewis*, 449 F. App'x at 268 (holding that admission of photographs depicting defendant with large sums of cash was not an abuse of discretion because they "would not excite the emotions of the jury to irrational behavior[.]").

b. Response to Jury Communications

During the first day of deliberations, the jury deliberated for approximately three and a half hours before recessing for the day. Tr. Vol. 4, 698:4, 703:25. Fifteen minutes into the second day of deliberations, at 8:45 A.M., the jury submitted a written note to the Court, which asked: "What happens if we all do not agree?" ECF No. 113. The Court was in the process of convening the attorneys before it received a second note from the jury twenty-five minutes later. The note stated: "Please disregard our previous question." [1] ECF No. 115. Five minutes after sending the second note, the jury indicated that they had reached a verdict. ECF No. 117. The Court convened the attorneys shortly thereafter and informed them of the jury's three communications. Tr. Vol. 5, 708:4-20. The jury was brought in, and unanimously convicted Defendant on all five counts. After ordering the Defendant remanded to custody, the Court asked if there was anything else that counsel would like to discuss. Defense counsel did not raise any objections or issues. Tr. Vol. 5, 717:3-12.

In his Motion, Defendant argues that the Court erred by allowing a verdict without instructing the jury on Rule 31(b)(3) of the Federal Rules of Criminal Procedure, which states that "[i]f the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts." Def.'s Br. 3.[2] Having not done so, Defendant argues that the Court undermined the unanimous verdict and caused a miscarriage of justice that requires a new trial. Def.'s Br. 3-4.

Defendant cites to no authority requiring the Court to instruct the jury about the possibility of mistrial at such an early stage of deliberations. *See United States v. Shannon*, No. S1 22 CR. 56 (JPC), 2022 WL 17581558, at *8 (S.D.N.Y. Dec. 12, 2022) ("The Court is unaware of any authority suggesting that informing the jury that its failure to reach a verdict would result in a mistrial, particularly at such an early stage of deliberations, was required."). Nonetheless, the Court already instructed the jury that there would be "no verdict" if they could not agree, rendering Defendant's argument that his requested instruction would have influenced the outcome as merely speculative. Tr. Vol. 4, 659:20-22. Further, courts in other jurisdictions have concluded that "[t]here is no requirement that, despite the jury having already reached a verdict, a response be provided and the jury be required to deliberate further in light of the response." *Crockett v. Uchtman*, No. 03 C

[1] Defendant fails to mention this communication in his Motion.

[2] Defendant appears to erroneously cite to Rule 31(a)(3), rather than Rule 31(b)(3).

4105, 2006 WL 8445523, at *4 (N.D. Ill. Oct. 19, 2006) (collecting cases), *aff'd sub nom. Crockett v. Hulick*, 542 F.3d 1183 (7th Cir. 2008); *see also United States v. Rodriguez*, 765 F.2d 1546, 1554 (11th Cir. 1985) (holding that the court's failure to answer a question before a verdict was reached thirty to sixty minutes later, where the court was temporarily unavailable, was not reversible error and did not require a new trial).

The Court also told the jury that if they had any questions or messages, the Court would talk to the lawyers first before responding. Tr. Vol. 4, 695:4-11. The jury was instructed to "continue [their] deliberations on some other subject" while waiting for the Court's response. *Id.* As such, the jury was aware of the potential for delay in the Court's response and presumably continued deliberating while they waited. *See United States v. Hakim*, 344 F.3d 324, 330 (3d Cir. 2003) (applying a "presumption that juries follow the instructions given by district courts").

IV. CONCLUSION

For the reasons set forth above, Soto's Motion is **DENIED**. An appropriate order follows.

/s/ William J. Martini

Date: January 19, 2023 **WILLIAM J. MARTINI, U.S.D.J.**

APPENDIX C

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 .

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Proposed Rules

The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of first-hand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick §11. Moreover, the practical impossibility of determinating by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore §1919. The rule

assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 415–417 (1952). If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform. Rule 56(1). Similar provisions are California Evidence Code §800; Kansas Code of Civil Procedure §60–456(a); New Jersey Evidence Rule 56(1).

Notes of Advisory Committee on Rules—1987 Amendment

The amendments are technical. No substantive change is intended.

Committee Notes on Rules—2000 Amendment

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g* , 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure* , 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). *See also United States v. Figueroa-Lopez* , 125 F.3d 1241 , 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16 (a)(1)(E)").

The amendment does not distinguish between expert and lay *witnesses* , but rather between expert and lay *testimony* . Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g., United States v. Figueroa-Lopez* , 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part

of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g* , 57 F.3d 1190 , 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp* . 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook* , 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown* , 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown* , the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

GAP Report—Proposed Amendment to Rule 701 . The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 701:

1. The words "within the scope of Rule 702" were added at the end of the proposed amendment, to emphasize that the Rule does not require witnesses to qualify as experts unless their testimony is of the type traditionally considered within the purview of Rule 702. The Committee Note was amended to accord with this textual change.

2. The Committee Note was revised to provide further examples of the kind of testimony that could and could not be proffered under the limitation imposed by the proposed amendment.

Committee Notes on Rules—2011 Amendment

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

‹ ARTICLE VII. OPINIONS AND EXPERT TESTIMONY Up Rule 702. Testimony by Expert Witnesses ›