



U.S. Department of Justice

*United States Attorney
Eastern District of New York*

FTB:CWE/AA/JB
F. #2020R00955

271 Cadman Plaza East
Brooklyn, New York 11201

June 16, 2024

By E-mail and ECF

The Honorable Frederic Block
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Anuli Okeke
Docket No. 22-CR-20 (FB)

Dear Judge Block:

The government writes respectfully to convey certain comments and proposed revisions to the jury charge, and in response to the defendant's jury instructions letter dated June 16, 2024. Def. Ltr., ECF No. 45. In particular, the government respectfully requests (a) a modification of the mens rea for wire fraud conspiracy; (b) a conscious avoidance instruction; (c) an equally-available-witnesses instruction, to the extent called for by defense summation; (d) a modification to the venue charge; and (e) certain other minor modifications, as described below. The government also opposes the defendant's request for a multiple conspiracies charge.

I. Wire Fraud and Conspiracy Mens Rea

The jury instructions properly define the mens rea required for substantive wire fraud in Count Two. Contrary to the defense, "no instruction should [be] given on willfulness because willfulness is not an element of mail or wire fraud." United States v. Novis, No. 20-CR-335 (JMA), 2023 WL 4746541, at *22 (E.D.N.Y. July 24, 2023) (collecting cases).

Because substantive wire fraud does not require proof of the defendant's willfulness, the government is "also not required to prove that [the defendant] acted 'willfully'" as to conspiracy to commit wire fraud. United States v. Napout, No. 15-CR-252, 2017 WL 6375729, at *10 (E.D.N.Y. Dec. 12, 2017) (finding that "Napout's argument that the government must prove that Napout entered into a conspiracy knowing that the objectives of the conspiracy were 'illegal' is simply incorrect" because the government was "not required to show 'willfulness' for any of the charges" at issue); Jury Instruction, United States v. Napout, No. 15-CR-252 (PKC) (not including "willfulness" instruction in jury charge explaining conspiracy and

wire fraud) (ECF No. 872). That is because “[t]he law of conspiracy requires the same [m]ens rea as would be required to support a conviction for a substantive violation.” Novis, 2023 WL 4746541, at *22 (quoting United States v. Herrera, 584 F.2d 1137, 1150 (2d Cir. 1978)). Accordingly, the government respectfully requests a revision to the instruction for the mens rea required to commit wire fraud conspiracy that omits the willful requirement.

II. Conscious Avoidance

The government also requests that the Court instruct the jury on conscious avoidance with respect to the substantive counts of bank and wire fraud in Counts Two and Three. “A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact.” United States v. Fofanah, 765 F.3d 141, 144–45 (2d Cir. 2014) (quoting United States v. Kozeny, 667 F.3d 122, 132 (2d Cir. 2011)). “That is to say, the instruction permits a finding of knowledge even where there is no evidence that the defendant possessed actual knowledge.” United States v. Ferrarini, 219 F.3d 145, 154 (2d Cir. 2000).

The test for when a conscious avoidance charge is permissible has two prongs. Fofanah, 765 F.3d at 144–45. First, the defendant must “assert[] the lack of some specific aspect of knowledge required for conviction.” Id. Second, there must be an “appropriate factual predicate for the charge ..., i.e., the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.” Id. (internal quotation marks omitted).

Both prongs are met here. In this case, the defendant has sought to distance herself from her PPP fraud co-conspirators, arguing that she did not have “knowledge of what those other bank employees were doing.” Tr. 38 (defense opening statement); id. (“[T]hey won’t be able to meet their burden to show that she was a willful participant in that scheme that’s been described to you”). Accordingly, the defense has “assert[ed] the lack of some specific aspect of knowledge,” satisfying the first prong. Fofanah, 765 F.3d at 144–45.

As to the second prong, there is an appropriate factual predicate for the conscious avoidance charge because the defendant was at least on notice of red flags and ethical lapses at the Popular Bank branch she was tasked with overseeing such that “the defendant was aware of a high probability of [fraud] and consciously avoided confirming that fact.” Fofanah, 765 F.3d at 144–45. As amply shown at trial, employees of the bank flagrantly violated bank rules in visible ways, including by (a) forging checks on behalf of customers, Tr. 465 (Lengane Testimony); (b) taking money from PPP loan applications, Tr. 144-145 (Ponce Testimony); and (c) bringing customers to secure areas of the bank, Tr. 408-410 (Viloria Testimony). The defendant herself observed deficiencies in PPP applications, accepting applicants with nonsensical income and employment numbers and tax forms bearing indicia of fraud. Tr. 511; Tr. 467 (“So a couple of months before Fatim’s applied for a \$250,000 PPP loan, your bank account had \$30 in it? A. Yes sir.”) (Lengane Testimony). Even when others at Popular Bank informed the defendant of red flags, she continued to pass up fraudulent documents to ensure the PPP loans were funded. See Tr. 504-505.

To be sure, the government’s primary theory is that the defendant had actual knowledge of the scheme and committed it with that actual knowledge of its purpose. But in light of the defense argument and the red flags apparent to the defendant, the jury should be instructed on this alternative theory. United States v. Kaplan, 490 F.3d 110, 128 (2d Cir. 2007) (“We reject [the defendant’s] argument that it was error for the district court to give a conscious avoidance charge when the government argued actual knowledge in the alternative. . . . So long as the Government can establish a factual predicate for conscious avoidance, it is free to argue alternative theories of conscious avoidance and actual knowledge.”).

III. Uncalled Witnesses Equally Available

To the extent the defense argues that the government did not call certain witnesses in its closing argument, the government requests an instruction for uncalled witnesses’ being equally available. United States v. Dawkins, 999 F.3d 767, 797 (2d Cir. 2021) (“[W]here a witness is equally available to both sides, but is not called by either side ... the court has discretion to ... [among other options] instruct the jury that no unfavorable inference may be drawn against either side.”). The government proposes the following instruction.

There are several persons whose names you have heard during the course of the trial but who did not appear here to testify, and one or more of the attorneys has referred to their absence from the trial. I instruct you that each party had an equal opportunity or lack of opportunity to call any of these witnesses. Therefore, you should not draw any inferences or reach any conclusions as to what they would have testified to had they been called. Their absence should not affect your judgment in any way. You also should, however, remember my instruction that the law does not impose on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

See Sand, Instruction No. 6-7; United States v. Bahna, 68 F.3d 19, 22 (2d Cir. 1995).

IV. Venue

The government proposes the following modification to the venue instruction. While the Court’s recitation of venue law is correct, it contains bases for venue that are not relevant to the evidence presented at trial, namely “pass through” venue. See Ex. 300-B (interstate financial transaction communications were sent and received in Brooklyn, New York in furtherance of the scheme). Further, the government does not oppose the defense’s requested additions on count specific instruction.

In determining whether some act in furtherance of the crime you are considering occurred in the Eastern District of New York, you may consider a number of things. Venue can be conferred based on physical presence or conduct, ~~and passing through a district, including through or over waters, is sufficient to confer venue.~~ Venue can also be based on electronic impulses, including email communications and electronic transfers of funds such as banking transfers, ~~passing through a district~~ beginning or ending in a district. Venue lies in any district where electronic communications are sent or received and any district through which electronic ~~communications~~ financial transactions are routed. Venue is proper where a telephonic communication in furtherance of a crime was made and where it was received. The government need not prove all of these bases of venue; any one is sufficient.

V. Multiple Conspiracies

There is no basis for a multiple conspiracies charge, as requested by the defense, and the Court should decline to give one. Although the defense contends that “[e]vidence to support such a [charge] has been introduced throughout the trial,” Def. Ltr. 2-3, the defense fails to identify any evidence or law to support a multiple conspiracies charge.

“The essence of any conspiracy is, of course, agreement.” United States v. Maldonado-Rivera, 922 F.2d 934, 963 (2d Cir. 1990). “[C]oconspirators need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan.” Id. “The goals of all the participants need not be congruent for a single conspiracy to exist, so long as their goals are not at cross-purposes.” Id. A multiple conspiracies charge “is appropriate when the evidence shows separate networks operating independently of each other.” Dawkins, 999 F.3d at 797. “[B]ut it is not warranted when the evidence shows that each alleged member agreed to participate in what he knew to be a collective venture directed toward a common goal.” Id. “[L]apses of time, changes in membership, or shifting emphases in the locale of operations [do not] necessarily convert a single conspiracy into multiple conspiracies.” Maldonado-Rivera, 922 F.2d at 963. “Indeed, it is not necessary that the conspirators know the identities of all the other conspirators in order for a single conspiracy to be found.” Id.

In this case, there was a singular conspiracy to defraud PPP loans. The conspiracy covered a short period of time in the summer of 2020. The conspiracy included a specific location: the 125th Street of Popular Bank. And it comprised the defendant, her lieutenants at Popular Bank, corrupt tax preparers, and fraudulent applicants. The goal of the conspiracy was also uniform and straightforward: stealing PPP loan money. The fact that there

were numerous transactions within the conspiracy does not alter that there was one conspiracy. Maldonado-Rivera, 922 F.2d at 963 (“a single conspiracy is not transformed into multiple conspiracies merely by virtue of the fact that it may involve two or more phases[.]”). Nor is the government required to prove that the defendant knew every member of the conspiracy. See United States v. Evans, 293 F. App’x 63, 66-67 (2d Cir. 2008) (the government is not required to prove that each of the conspirators was acquainted with each of the others, but only that they knew from the scope of the operation that others were involved in the performance of functions vital to the success business). The facts of this case are a far cry from cases where a multiple conspiracies charge was found warranted. United States v. Cambindo Valencia, 609 F.2d 603, 625 (2d Cir. 1979) (multiple-conspiracy charge required where, inter alia, the only apparent connection among most of the coconspirators was that they were from Colombia).

VI. Policies

The government does not oppose the defense’s requested instruction on policies and procedures. Def. Ltr. 3.

VII. Other Requests

The government requests the Court omit any instruction on expert witnesses and give its standard instruction on summary charts. Last, the Court should amend one aspect of the conspiracy to commit wire and bank fraud, as shown below.

Count One charges the defendant with participating in a conspiracy to
commit wire fraud and bank fraud.

* * *

For the reasons given above, the government respectfully requests that the Court adopt the revisions to its jury charge proposed herein.

Respectfully submitted,

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