

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
<b>v.</b>	:	<b>NO. 04-334-1</b>
	:	
<b>JOSEPH F. HOFFMAN</b>	:	

**MEMORANDUM AND ORDER**

**Kauffman, J.**

**April 4, 2005**

On February 9, 2005, the defendant, Joseph F. Hoffman (“Defendant”), was found guilty by a federal jury of one count of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346 (Count Five); one count of Hobbs Act conspiracy, in violation of 18 U.S.C. § 1951(a) (Count Six); and two counts of Hobbs Act Extortion, in violation of 18 U.S.C. § 1951(a) (Counts Seven and Eight). Presently before the Court is Defendant’s Motion for Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure or, in the alternative, for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. For the reasons which follow, the Motion will be denied.

**I. Standard of Review**

**A. Rule 29**

Federal Rule of Criminal Procedure 29 provides that the trial court "shall order the entry of judgment of acquittal ... if the evidence is insufficient to sustain a conviction ..." Fed. R. Crim. P. 29(a). In determining a post-verdict motion for judgment of acquittal, the Court "must view the evidence in the light most favorable to the jury verdict and presume that the jury properly

evaluated [the] credibility of witnesses, found the facts, and drew rational inferences." United States v. Iafelice, 978 F.2d 92, 94 (3d Cir.1992). The Supreme Court has held that "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis original).

#### B. Rule 33

A district court may grant a defense motion for a new trial, "if required in the interests of justice." Fed. R. Crim. P. 33. The decision whether to grant a motion for new trial is within the sound discretion of the trial court. United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976). "A motion for a new trial is not favored and should be granted with great caution." United States v. Miller, 987 F.2d 1462, 1466 (10th Cir.1993); see also United States v. Clemons, 658 F.Supp. 1116, 1119 (W.D. Pa. 1987) ("the power to grant a new trial should be exercised sparingly and granted only when the evidence preponderates heavily against the verdict"). A district court is "empowered to grant a new trial only if [it is] convinced that the evidence is such that the verdict was not 'rational', or if the verdict is against the weight of the evidence." Gov't of the Virgin Islands v. Keith Commission, 706 F.Supp. 1172, 1184 (D.V.I. 1989) (stating that a court may grant the motion if it determines there has been a miscarriage of justice).

## **II. Analysis**

Defendant argues that: (1) counts seven and eight of the Indictment should have been dismissed because F.B.I. money was used to pay Defendant, precluding a substantive Hobbs Act conviction as a matter of law; (2) count six should have been dismissed because it involved an

intrastate conspiracy that was not subject to prosecution under the Hobbs Act; (3) count five of the Indictment should have been dismissed because the victim was the city of Philadelphia, and Defendant did not defraud the United States; (4) the Court erred in admitting testimony from out of court declarants; (5) the Court erroneously permitted the Government to consider prejudicial evidence that tickets not specifically identified in the Indictment were dismissed; (6) the evidence was insufficient as a matter of law to support the jury's verdict because the Government failed to prove knowledge and intent; and, (7) the Court erred in overruling defense objections and by failing to charge the jury in accordance with defense requests.

A. The Convictions on Counts Seven and Eight

Counts Seven and Eight of the Indictment charged violations and attempted violations of the Hobbs Act.<sup>1</sup> Defendant argues that the jury should not have been allowed to consider these counts because payments provided by law enforcement are insufficient to establish the required effect on interstate commerce. However, because the Indictment alleged an attempt to violate the Hobbs Act, the crime was complete when Defendant agreed to accept the payoff.<sup>2</sup> United States v. Jannotti, 673 F.2d 578, 591-94 (3d Cir. 1982) (holding that jurisdiction over attempted Hobbs

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<sup>1</sup> The broad language of the Hobbs Act covers anyone who “in any way or degree obstructs, delays, or affects [interstate] commerce or the movement of any article or commodity in commerce, by ... extortion or attempts or conspires so to do .. shall be [guilty of a crime].” 18 U.S.C. § 1951.

<sup>2</sup> The Indictment specifically charged that Defendant, “unlawfully obstructed, delayed and affected commerce and the movement of articles and commodities in commerce, and attempted to do so, by extortion, in that, defendant HOFFMAN unlawfully obtained and attempted to obtain property and things of value ... under color of official right.”

Act violations was proper because the defendants had agreed to do acts which, had they been attainable, would have affected interstate commerce); United States v. Rindone, 631 F.2d 491, 494 (7th Cir. 1980) (holding that the offense of attempted extortion is complete when the bribe is solicited and before money is actually transferred). In an attempt case, “[t]here is no requirement that there be an actual effect on interstate commerce – only a realistic probability that an extortion will have an effect on interstate commerce.” United States v. Peete, 919 F.2d 1168, 1174 (6th Cir. 1990); see also United States v. Rodriguez, 360 F.3d 949, 957 (9th Cir. 2004) (finding that Hobbs Act attempt convictions may be based on sting operations); United States v. Bailey, 227 F.3d 792, 797 (7th Cir. 2000) (stating that “because Hobbs Act criminalizes attempts as well as contemplated crimes, the Government need not even prove that interstate commerce was affected, only that there exists a realistic probability of an effect on commerce”).<sup>3</sup>

Defendant relies on United States v. DiCarlantonio, 870 F.2d 1058 (6th Cir. 1989) for the proposition that the use of FBI money is insufficient to establish a substantive Hobbs Act violation. However, the DiCarlantonio court found that, there is “no barrier to attempt charges where F.B.I. funds are used.” Id. at 1061; see also Peete, 919 F.2d at 1175 (noting that the DiCarlantonio holding did not apply to attempt prosecutions). Other courts have rejected challenges to Hobbs Act attempt prosecutions based upon claims that extortion payments made

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<sup>3</sup> Although the Government need not prove an actual effect on interstate commerce in order to prove an attempted Hobbs Act violation, the Government notes that in this case several taxi companies which operated in interstate commerce were affected because the liabilities of the several taxi companies to the City of Philadelphia were reduced. See, e.g., United States v. Peete, 919 F.2d at 1175 (“the [Hobbs Act attempt] case before us is easy because the Government alleged and proved that the private business that [the defendant] solicited was engaged in interstate commerce”). Thus, the Government presented evidence that, even though F.B.I. money was used, Hobbs Act violations occurred because there was a reduction in the ticket liabilities of the taxi companies that operated in interstate commerce.

with F.B.I. money were insufficient to establish an impact on interstate commerce. See Bailey, 227 F.3d at 797 (“because factual impossibility is not a defense to an attempted crime, we have found an effect on interstate commerce when the F.B.I. provides the money extorted or stolen”); United States v. Thomas, 159 F.3d 296, 297-98 (7th Cir. 1998) (Hobbs Act attempt may be established in case where payment was made with FBI money); United States v. Edwards, 324 F.Supp.2d 10, 13-14 (D.D.C. 2004).

B. The Conviction on Count Six

Count Six of the Indictment alleged a Hobbs Act conspiracy. Defendant argues that the Court did not have jurisdiction over this count because the victim of the conspiracy was the City of Philadelphia and thus the conspiracy was intrastate. However, the Indictment alleged, and the Government presented evidence proving, the required impact on interstate commerce.<sup>4</sup> This Court also rejected Defendant’s argument, made in his Motion to Dismiss the Indictment, that a crime in which the City of Philadelphia was the victim could not be a crime against the United States.<sup>5</sup> Here, Defendant is charged with conspiring to commit Hobbs Act violations, a federal offense.

C. The Conviction on Count Five

Count Five of the Indictment charged Defendant with mail fraud based upon a letter sent to co-conspirator Charles Mirarchi which enclosed a \$4,000 check, the amount of extortion money Defendant had initially kept for himself. Defendant, again incorrectly, argues that, as the

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<sup>4</sup> See fn. 3.

<sup>5</sup> See this Court’s Order of December 15, 2004 (docket no. 37) denying Defendant’s Motion to Dismiss the Indictment.

City of Philadelphia is the victim, his actions did not affect interstate commerce and this charge should not have been presented to the jury. However, mail fraud does not require an impact on interstate commerce, but instead requires the use of the mails in furtherance of the scheme to defraud. See, e.g., United States v. Sawyer, 85 F.3d 713, 722-23 (1st Cir. 1996); United States v. Green, 494 F.2d 820, 827 (5th Cir. 1974) (upholding mail fraud counts where the use of the mails did not affect interstate or foreign commerce).

D. The Admission of Co-Conspirator Statements

Defendant argues that statements concerning ticket fixing by co-conspirators were inadmissible because the co-conspirators were not available for cross examination. However, co-conspirator statements may be admitted without the opportunity for cross examination. Bourjaily v. United States, 483 U.S. 171, 181-84 (1987); see also United States v. Drozdowski, 313 F.3d 819, 824 n.3 (3d Cir. 2002) (upholding admission of tape recorded co-conspirator's statements). Defendant's repeated assertion that Crawford v. Washington, 124 U.S. 1354 (2004), changed the rules for admitting co-conspirator statements is incorrect.<sup>6</sup> Crawford, in addressing testimonial statements, noted that "statements in furtherance of a conspiracy" are not testimonial. Id. at 1367, 1374. Further, the Third Circuit recently held that Crawford does not apply to conversations that are surreptitiously recorded pursuant to Title III, because the participants do not know that their statements are being recorded and may be offered in court. See United States v. Hendricks, 395 F.3d 173, 181 (3d Cir. 2005). In Hendricks, the Court went on to hold that party admissions and co-conspirator statements are not testimonial. Id.; see also United States v.

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<sup>6</sup> This is the same argument Defendant made in his Motion Regarding Tape Recordings which this Court denied on January 21, 2005 (docket no. 53). See this Court's Order granting the Government's Motion to Admit Tape and Video Recordings (docket no. 55).

Kemp, 2005 WL 35270 at \*2 (E.D. Pa. 2005).

E. The Admission of Evidence Relevant to the Mail Fraud Conspiracy, Mail Fraud and Wire Fraud Counts

Defendant argues that this Court erred in admitting evidence concerning parking tickets which were dismissed by him, but which were not specifically referenced in the Indictment. The Government acknowledges that not every instance of improper ticket fixing was listed in the overt acts section of the Indictment. However, in proving a conspiracy, the Government is not limited in its proof to the overt acts listed in the Indictment. See United States v. Adamo, 534 F.2d 31, 38 (3d Cir. 1976); see also United States v. Janati, 374 F.3d 263, 270 (4th Cir. 2004) (reversing the district court's ruling that the Government was limited during its case in chief on the conspiracy count to proving the overt acts alleged in the Indictment and stating that "it is well established that when seeking to prove a conspiracy, the [G]overnment is permitted to present evidence of acts committed in furtherance of the conspiracy even though they are not all specifically described in the indictment"); United States v. Powers, 168 F.3d 741, 749 (5th Cir. 1999) ("where a conspiracy is charged, acts that are not alleged in the Indictment may be admissible as part of the Government's proof").

Evidence of tickets which were illegally dismissed was presented through Government witnesses who testified that they were dismissed in exchange for money, future political favors, drinks and meals. The Government further introduced evidence of tickets for which Charles Mirarchi had entered an appearance but had not actually represented the ticket holder. Contrary to Defendant's arguments, these tickets were not irrelevant under Fed. R. Evid. 402, they were not unfairly prejudicial within the meaning of Fed. R. Evid. 403, nor were they prior bad act

evidence under Fed. R. Evid. 404(b). Thus, evidence of the ticket dismissals was properly admitted by the Court.

F. The Sufficiency of the Evidence

Defendant argues, without citation, that the evidence of knowledge and intent on his part was insufficient to support the jury's verdict. However, at trial the Government presented an abundance of evidence, including audio and video tape where the participants discuss making ticket dismissals appear legitimate, plan to expand the scheme in the future and caution others not to discuss the scheme on the telephone. This evidence was sufficient to establish that Defendant had the requisite knowledge and intent to commit the crimes alleged in the Indictment.

G. Objections at Trial

Defendant claims that the Court improperly ruled on his objections at trial, and incorporates by reference the "objections, requests, and arguments that were made on these issues at trial." Defendant's Motion for Judgment of Acquittal Under Rule 29 or New Trial Under Rule 33 at 6. Defendant does not make any specific argument regarding any of these objections. After reviewing the record, the Court finds that its rulings on Defendant's objections and regarding the jury charge were proper.

**III. Conclusion**

After reviewing the evidence in the light most favorable to the prosecution, the Court concludes that the trier of fact could have found the essential elements of counts Four through Eight beyond a reasonable doubt. Thus, Defendant's Motion for Judgment of Acquittal pursuant to Fed. R. Crim. P. 29 will be denied. Further, the Court concludes that the weight of

the evidence admitted at trial as detailed above would support the jury's verdict and that the guilty verdicts were not a miscarriage of justice. Thus, the Motion for new trial pursuant to Fed. R. Crim. P. 33 will be denied.

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**ORDER**

**AND NOW**, this 4<sup>th</sup> day of April, 2005, upon consideration of Defendant's Motion for Judgment of Acquittal Under Rule 29 or New Trial Under Rule 33 (docket no. 76), and the Government's Amended Response thereto (docket no. 79), and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **DENIED**.

**BY THE COURT:**

S/Bruce W. Kauffman  
**BRUCE W. KAUFFMAN, J.**