

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

UNITED STATES OF AMERICA :
 :
 v. : Crim. No. 05-170-02
 :
 MARCEL HARPER :

MEMORANDUM

Padova, J.

October 23, 2007

On March 12, 2007, Marcel Harper was convicted by a jury of conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 371 (Count I); armed bank robbery, and aiding and abetting armed bank robbery, of the Artisans Bank in Wilmington, Delaware on April 14, 2004, in violation of 18 U.S.C. §§ 2113(d) and 2 (Count II); use and carrying, and aiding and abetting the use and carrying, of a firearm in connection with a crime of violence on April 14, 2004, in violation of 18 U.S.C. §§ 924(c) and 2 (Count III); armed bank robbery, and aiding and abetting armed bank robbery, of the Citizens Bank in Brookhaven, Pennsylvania on June 15, 2004, in violation of 18 U.S.C. §§ 2113(d) and 2 (Count IV); and use and carrying, and aiding and abetting the use and carrying, of a firearm in connection with a crime of violence on June 15, 2004, in violation of 18 U.S.C. §§ 924(c) and 2 (Count V). Harper has moved for entry of judgment of acquittal or for a new trial on all counts pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure.

I. LEGAL STANDARD

In deciding a motion for judgment of acquittal pursuant to Rule 29, a court must view all of the evidence introduced at trial in the light most favorable to the Government and uphold the verdict so long as “*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” United States v. Voight, 89 F.3d 1050, 1080 (3d Cir. 1996) (quoting Jackson v.

Virginia, 443 U.S. 307, 319 (1979)). “The court is required to ‘draw all reasonable inferences in favor of the jury’s verdict.’” United States v. Smith, 294 F.3d 473, 476 (3d Cir. 2002) (quoting United States v. Anderskow, 88 F.3d 245, 251 (3d Cir. 1996)). The court is not permitted to weigh the evidence or assess the credibility of witnesses, as both of these functions are for the jury. United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992) (citing Glasser v. United States, 315 U.S. 60, 80 (1941) and United States v. Inigo, 925 F.2d 641, 649 (3d Cir. 1991)). Thus, the defendant bears a “very heavy burden” when challenging the sufficiency of the evidence supporting a jury verdict, United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995), and a finding of insufficiency “should ‘be confined to cases where the prosecution’s failure is clear.’” Smith, 294 F.3d at 477 (quoting United States v. Leon, 739 F.2d 885, 891 (3d Cir. 1984)).

“Upon the defendant’s motion, the court may . . . grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33. “Whether to grant a Rule 33 motion lies within the district court’s sound discretion.” United States v. Ortiz, 182 F. Supp. 2d 443, 446 (E.D. Pa. 2000) (citation omitted). A court must grant a motion for new trial pursuant to Rule 33 if it finds that “errors occurred during the trial, and it is reasonably possible that such error, or combination of errors, substantially influenced the jury’s decision.” United States v. Rich, 326 F. Supp. 2d 670, 673 (E.D. Pa. 2004) (citing United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994)). In addition, the court may grant a motion for new trial on the ground that the verdict is contrary to the weight of the evidence if the court finds that “‘there is a serious danger that a miscarriage of justice has occurred - that is, that an innocent person has been convicted.’” United States v. Gagliardi, Crim. A. No. 04-796, 2005 U.S. Dist. LEXIS 13193, at *3 (E.D. Pa. 2005) (quoting United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002)).

II. DISCUSSION

Harper seeks judgment of acquittal based on the ground that there was insufficient evidence to support his convictions because: 1) no reasonable jury could have convicted him of the robbery of the Citizens Bank; 2) the Government failed to prove that the banks he was convicted of robbing were federally insured institutions; and 3) the jury's verdict was based on the perjured testimony of Special Agent Vito Roselli. Harper also claims that he is entitled to a new trial because: 1) the Government committed misconduct by presenting the perjured testimony of Special Agent Roselli; 2) the Court erred by denying his motion to strike the testimony of Special Agent Roselli; and 3) the Court erred by failing to give a special jury instruction regarding the testimony of cooperating witness Ronnie Muir.¹

A. The Citizens Bank robbery

Harper argues that he is entitled to a judgment of acquittal on all charges related to the robbery of the Citizens Bank on June 15, 2004, because “the best view of the evidence suggests that Harper dropped out of the plan” before the Citizens Bank robbery. (Def. Mem. at 2.) There was evidence presented at Harper's trial that the Citizens Bank robbery was carried out by Burnie Tindale,

¹Harper's Post Verdict Motions also assert that the Court should grant his motion for new trial based on newly discovered evidence that the testimony of critical witnesses at his trial differed from the testimony of the same witnesses at his co-defendant Christopher Booker's trial. (Def. Mot. ¶ 8(a).) The Motion does not, however, identify these critical witnesses or specify the subject of the testimony that allegedly differed in the two trials. Furthermore, Harper's Memorandum does not even mention this ground for new trial. We find, accordingly, that Harper has wholly failed to prove that the interests of justice require us to grant a new trial on this basis.

Harper's Post Verdict Motions further state that “the Court erred as a matter of law in failing to instruct Special Agent Roselli not to interject verbally when witnesses were testifying on the witness stand.” (Def. Mot. ¶ 8(e).) However, the Motion does not identify any time during the trial when this occurred and, again Harper's Memorandum does not mention this ground for new trial. We find, accordingly, that Harper has wholly failed to prove that the interests of justice require us to grant a new trial on this basis.

Jeryle Sowell, and Chris Booker. (3/7/07 N.T. at 42-62.) Tindale, Sowell and Booker were assisted by Ronnie Muir, who helped to select the bank to be robbed, participated in rehearsals for the robbery, and helped to place the stolen car which was used in the robbery. (Id. at 33-38.) They were also assisted by Henry Myers, who was told about the placement of the stolen car used in the robbery. (Id. at 40-41.) It is undisputed that Harper did not enter the Citizens Bank during the June 15, 2004 robbery. (Gov't Mem. at 6.) Consequently, the question before us is whether, viewing the evidence in the light most favorable to the Government, there was sufficient evidence for the jury to find that Harper aided and abetted the armed bank robbery of the Citizens Bank and the use and carrying of a firearm in connection with a crime of violence on June 15, 2004.

In order to “establish liability based upon an aiding and abetting theory, the government must prove (1) that the substantive crime has been committed, and (2) the defendant knew of the crime and attempted to facilitate it.” U.S. v. Garth, 188 F.3d 99, 113 (3d Cir. 1999) (listing cases). A conviction for aiding and abetting also requires “proof that the defendant is in some way associated with the substantive offense - ‘that he participated in it as in something that he wished to bring about, that he sought by his action to make it succeed.’” Id. (quoting United States v. Bey, 736 F.2d 891, 895 (3d Cir.1984)).

There is no dispute that there was a conspiracy to commit armed bank robbery, which resulted in the robberies of the Artisans Bank on April 14, 2004, and the Citizens Bank in Brookhaven, Pennsylvania on June 15, 2004.² There is also no dispute that the substantive crime of armed bank

²Tindale, Sowell, and Muir all testified that they met with each other and planned, rehearsed and executed the Artisans Bank and Citizens Bank robberies. (3/6/07 N.T. at 210-35; 3/7/07 N.T. at 3-64, 160-205; 3/8/07 N.T. at 56-108.)

robbery of the Citizens Bank in Brookhaven, Pennsylvania on June 15, 2004 was committed.³ In addition, there is no dispute that the substantive crime of use and carrying of a firearm in connection with a crime of violence was committed in connection with the Citizens Bank robbery on June 15, 2004.⁴

Harper contends that the evidence establishes that he dropped out of the bank robbery conspiracy before the Citizens Bank robbery because he did not enter the bank as part of the robbery, he did not participate in dress rehearsals for the robbery, and Ronnie Muir took what was to be his (Harper's) share of the proceeds of the robbery. As we mentioned above, it is undisputed that Harper did not enter the Brookhaven, Pennsylvania Citizens Bank during the June 15, 2004 robbery. (Gov't Mem. at 6.) There is also evidence that Harper did not participate in the dress rehearsals for the Citizens Bank robbery and that he did not receive money which had been set aside for him from the proceeds of the robbery. (3/7/07 N.T. at 38, 41-42, 66, 205-06; 3/8/07 N.T. at 106.) There is additional evidence that, on an unspecified day prior to June 15, 2004, Harper was asked to participate directly in the commission of the Citizens Bank robbery by going into the bank and letting the others know when to come in, and that he did not show up at the bank on that occasion. (3/7/07 N.T. at 192-93.) Sowell testified that, when Harper failed to show up at the Citizens Bank, the robbery was called off for that day. (Id. at 193.)

Evidence was also presented at trial that Harper was a participant in the overall bank robbery conspiracy and that he participated in the preparations for the armed robbery of the Citizens Bank.

³Tindale, Sowell, and Muir all testified that they participated in the robbery of the Citizens Bank. (3/7/07 N.T. at 33-64, 186-205; 3/8/07 N.T. at 94-108.)

⁴Tindale and Sowell both testified that firearms were used in connection with the Citizens Bank robbery. (3/7/07 N.T. at 42, 48, 52, 54, 57-59, 196-97, 199-200.)

Tindale testified that he, Muir, Sowell and Harper participated in the robbery of the Artisans Bank in Wilmington, Delaware. (3/6/07 N.T. at 211.) Harper participated by helping to plan that robbery. Id. After Muir selected the Artisans Bank to be robbed, Tindale drove there with Muir and Harper, and Harper drew a sketch/blueprint of the bank to be used in planning and rehearsing for the robbery. Id. at 212-13. Harper then prepared the plan for the robbery. Id. at 214. Harper told Tindale how to “take control of a bank, how one person go [sic] to the counter, one person take over the lobby area and one person be at the door.” Id. Harper also told Tindale how to “[t]ake control of the lobby, the customers and the bank itself, by doing -- taking control of the counter, the office and the door.” Id. at 218. Harper also instructed Tindale:

When you enter the bank, the person with the speed should go to the counter, the person with the next speed should enter the lobby area and I should enter the door and hold the door. When getting the customers, you wanna -- you don't wanna scare a customer into a heart attack or nothing, so you don't want to do too much screaming or anything like that. Try to talk clear and calm, so you don't have to keep repeating yourself. When laying the customers down and the employees down, make them spread they arms and they legs, that way they can't get up and run and jump on you or anything like that. And the weather, he said to try to do it when it's raining or something like that.

(3/6/07 N.T. at 219.) Harper also instructed Tindale how to use weapons during the robbery to control the room: “Just try not to point the gun, let the gun do all the talking try not to point it too much at a customer, you point it -- or an employee and, you know, just keep trying to talk calmly and everything like that. Let the gun do most of the controlling of the situation.” (Id. at 220-21.) Harper also told Tindale that he needed three men inside the bank to commit the robbery and that he needed to use a stolen car to get to the bank and a clean getaway car. (Id. at 221, 224.)

Muir testified that Harper instructed him (and Tindale) how to commit an armed bank robbery

as well. (3/8/07 N.T. at 57-60.) Harper told Muir that he would need three guys to go into the bank to commit the robbery and that he would need guns and a stolen vehicle. (Id. at 57.) Harper also told Muir the roles the three guys would take once they entered the bank. (Id. at 58-59.) Harper instructed Muir that, after the robbers entered the bank, they should brandish the guns and take control over the bank using a calm voice. (Id. at 60-61.) Prior to the Artisans Bank robbery, Muir and Harper traveled to that bank. (Id. at 63.) Harper went inside the bank, cased the bank, and then told Muir what the bank looked like on the inside. (Id.) Muir and Harper went back to Tindale's home and Harper drew a diagram of the bank so that the three people who were robbing the bank would know, when they entered the bank, "where the area was at, far as where is the teller and the customer service booth was [sic]." (Id. at 64.) Harper participated in more than two discussions with Tindale and Muir to plan the Artisans Bank robbery. (Id. at 65.) Muir further testified that, once they had returned to Philadelphia after robbing the Artisans Bank, he, Tindale and Sowell went to Harper's home and showed him the money they had obtained from Artisans Bank. (Id. at 86.) Harper was given some of the proceeds of the Artisans Bank robbery. (Id. at 91-93.)

Muir also testified that Harper helped Muir and Tindale decide to rob another bank. (Id. at 94.) Tindale testified at Harper's trial that Harper and Muir selected the Citizens Bank in Brookhaven, Pennsylvania for the second robbery and prepared a diagram of that bank to assist in the robbery:

Q. Now, after you had completed the Artisan's Bank robbery, were there any plans to commit other robberies, other bank robberies?

A. Yes.

Q. And how did that come about?

A. Not too -- not too far from that one right there was another bank picked out, a Citizens Bank.

Q. And who picked out the Citizens Bank?

A. That one was brought to my attention by Mike and Ronnie.

Q. Mike Harper and Ronnie Muir?

A. Yes.

Q. And how did they tell you?

A. They just came and told me that they think they found the next bank.

Q. And did they tell you anything else?

A. Yeah, They brought a diagram with them at that time, and --

Q. When you say they, who was -- who was it that brought the diagram?

A. Oh, Mike Harper and Ronnie Muir.

(3/7/07 N.T. at 33-34.) Muir also testified that he drove to the Citizens Bank in Brookhaven, Pennsylvania with Harper prior to the robbery. (3/8/07 N.T. at 95.) According to Muir, Harper went inside the bank, looked around, and later told Muir and Tindale what the inside of the bank looked like.⁵ (Id.) Tindale testified that Harper took him to see the Citizens Bank in Brookhaven, Pennsylvania before the robbery and instructed him to go inside and look around to prepare for the robbery:

Q. Now, you said they took you out there?

⁵The testimony of Muir and Tindale differs with respect to the initial stages of the planning for the Citizens Bank robbery. Muir testified that he selected the bank on his own and also testified that he and Tindale later drove out to the bank together, without Harper, so that Tindale could look at the inside of the bank. (3/8/07 N.T. at 94-97.)

A. Yeah.

Q. Harper & Muir?

A. Yeah.

Q. And where did you go?

A. We went up to the Citizens Bank.

Q. And do you know where that was located?

A. Brookhaven or Chester area. Some -- like around that way.

* * *

Q. And what happened next?

A. We got up there. Mike said that's the one. Him and Jeryle, he said go inside, ask for coin wrappers or --

Q. Who said this to you?

A. Mike Harper -- or ask about opening up an account or something, as I go in, take a look at all your surroundings, check everything out and come back out and let -- let us know.

(3/7/07 N.T. at 34-35.) Tindale also testified that he met with Harper and Muir after this trip to the Citizens Bank to plan the robbery. (Id. at 35-36.) Tindale further testified that, after the robbery, he returned to his apartment and met with Sowell, Booker, Muir and Myers to split the proceeds of the robbery. (Id. at 65.) He split the money five ways, with shares for himself, "Jeryle Sowell, Chris Booker, and Mike Harper, and Ronnie." (Id.) Tindale set aside a few thousand dollars of the proceeds of the robbery for Harper because he (Harper) had instructed the others on how to commit the robbery. (Id. at 66.) Sowell testified that \$2,500 was set aside for Harper from the proceeds of the Citizens Bank robbery. (Id. at 205-06.) Although Tindale intended to give Harper his share of

the proceeds, Muir took the money that had been set aside for Harper. (Id. at 206.) Tindale testified that, since Muir took the money set aside for Harper, he (Tindale) later gave Harper a few hundred dollars on different occasions. (Id. at 66-67.) Harper never asked him for more money. (Id. at 68.) Muir confirmed that he took the money set aside for Harper.⁶ (3/8/07 N.T. at 106-07.)

We find that there is some evidence that Harper was not an active participant in the Citizens Bank robbery after he helped to select that bank for robbery and visited that bank in order to help Muir and Tindale plan for the robbery. However, we also find that, examining the evidence in the light most favorable to the Government, there was sufficient evidence for the jury to find that Harper knew that Tindale and Muir were planning to rob the Citizens Bank in Brookhaven, Pennsylvania using firearms and that he attempted to facilitate both the bank robbery and the use of firearms in connection with that robbery by instructing the others on how to rob a bank using firearms, by going to the Citizens Bank with Muir, entering the bank to examine it and to tell Muir and Tindale what the inside of the bank looked like, and by telling Tindale what he should do when he went into the Citizens Bank to look around before the robbery. We further find that the evidence was sufficient for the jury to find that Harper assisted in the robbery of the Citizens Bank, and the use of a firearm in connection with that robbery, as “something that he wished to bring about, [and] that he sought by his action to make it succeed.” United States v. Garth, 188 F.3d at 113 (quoting United States v. Bey, 736 F.2d at 895); see also United States v. Gordon, 290 F.3d 539, 547-48 (3d Cir. 2002) (finding that evidence was sufficient for jury to find Gordon guilty of aiding and abetting a violation of 18 U.S.C. § 924(c)(1) in connection with a bank robbery, even though Gordon did not enter the

⁶Muir’s testimony differed from Sowell’s on this point, as Muir testified that there was about \$1500 set aside for Harper from the proceeds of the Citizens Bank robbery. (3/8/07 N.T. at 106-07.)

bank during the commission of that robbery, where the bank robbery conspiracy consisted of seven bank robberies, Gordon had entered the bank and brandished a weapon during four of those robberies, the use of a gun had been discussed during the planning stages of the crimes, and Gordon had observed the use of a firearm in several of the other robberies). Harper's Post Verdict Motions are, accordingly, denied as to this ground for relief.⁷

B. The Federally Insured Status of the Victim Banks

Harper claims that he is entitled to a judgment of acquittal as to the bank robbery offenses because there was insufficient evidence to support his convictions as to the element of the bank robbery offenses that the victim banks were insured by the Federal Deposit Insurance Corporation. The bank robbery statute defines "bank" as any member bank of the Federal Reserve System, any bank organized or operating under the laws of the United States, and "any institution the deposits of which are insured by the Federal Deposit Insurance Corporation." 18 U.S.C. § 2113(f). Consequently, we must determine whether, drawing all possible inferences in favor of the government, sufficient evidence was introduced at trial to establish beyond a reasonable doubt that the Artisans Bank located at 4901 Kirkwood Highway, Wilmington, Delaware and the Citizens Bank located at 5001 Edgemont Avenue, Brookhaven, Pennsylvania were federally insured at the time of

⁷Harper also contends that the Court erred by instructing the jury as to this issue, and that he is, consequently, entitled to a new trial pursuant to Federal Rule of Criminal Procedure 33. However, Harper does not explain his contention (i.e., whether he presently objects to the Court's instruction regarding the level of participation required for conviction or whether he means that the Court should have granted a directed verdict to his client due to the insufficiency of the Government's proof on this element). Since we have found that there was sufficient evidence for the jury to convict Harper in connection with the charges arising out of the robbery of the Citizens Bank, and as Harper did not object to the instruction which we read to the jury with respect to aiding and abetting, and does not claim that our aiding and abetting instruction was incorrect, his request for a new trial is denied with respect to this ground for relief.

the robbery.

Joseph J. Strusowski, Assistant Vice President and Security and Loss Prevention Officer for Artisans Bank since August 2003, testified as follows at Harper's trial on behalf of the Government with respect to this issue. (3/5/07 N.T. at 117.)

Q. And is the Artisan's Bank, 4901 Kirkwood Highway in Wilmington, a federally insured financial institution?

A. Yes sir, it is.

Q. And by whom is -- whom or what is it insured?

A. It's insured by the Federal Deposit Insurance Corporation, or FDIC.

(Id. at 128.) Paul Hendrickson, the Regional Security Manager for Citizens Bank, also testified at Harper's trial on behalf of the Government regarding this issue. (3/6/07 N.T. at 171.) He was asked whether Citizens Bank is federal insured and answered "Yes, sir, by the Federal Deposit Insurance Corporation." (Id. at 187.) Harper contends that this evidence is insufficient to establish that the victim banks were federally insured at the time they were robbed, because "in each exchange the questioning was in the present tense applicable to conditions that prevailed in March 2007 and not nearly three years before when the banks were robbed." (Def. Mem. at 5.)

Testimonial evidence of a bank employee who is personally aware of the bank's federal insurance status is sufficient to establish federally insured status under the bank robbery statute. See United States v. McIntosh, 463 F.2d 250 (3d Cir. 1972) (holding that the uncontradicted testimony of the assistant vice-president and manager of a bank branch was sufficient to establish that the bank was insured by the FDIC). Consequently, we need only determine whether the testimony of these bank employees that each bank was federally insured at the time of trial was sufficient for the jury

to determine that each bank was federally insured at the time it was robbed.

As a general matter, evidence of the subsequent existence of a fact may be evidence of its existence at the time in question. See United States v. Bortnick, Crim. A. No. 03-414, 2005 U.S. Dist. LEXIS 33541, at *25 (E.D. Pa. July 20, 2005) (“When the existence of an object, condition, quality, or tendency at a given time is in issue, the *prior existence* of it is in human experience some indication of its probable persistence or continuance *at a later period* Similar considerations affect the use of *subsequent existence* as evidence of existence at the time in issue.” (quoting 2 John H. Wigmore, *Wigmore on Evidence* § 437, at 513)). The United States Court of Appeals for the Third Circuit has not directly examined the question of whether evidence that a bank is federally insured at the time of trial is sufficient to establish that the bank was federally insured at the time it was robbed. However, the Courts of Appeals that have done so have focused on “whether the present-tense testimony, viewed in context, supports a reasonable inference that the bank was federally insured at the time of the fraud.” Id. (citing United States v. Judkins, 267 F.3d 22, 23 (1st Cir. 2001); United States v. Nnanyererugo, 39 F.3d 1205, 1208 (D.C. Cir. 1994); United States v. Rangel, 728 F.2d 675 (5th Cir. 1984); United States v. Sliker, 751 F.2d 477, 484-85 (2d Cir. 1984); United States v. Knop, 701 F.2d 670, 673 (7th Cir. 1983); United States v. Safley, 408 F.2d 603, 605 (4th Cir. 1969); Cook v. United States, 320 F.2d 258, 259-60 (5th Cir. 1963)). Indeed, the United States Court of Appeals for the Eighth Circuit rejected an argument that a bank manager’s testimony that the bank “is” insured by the FDIC was insufficient to establish that the bank was insured by the FDIC at the time of the crime, explaining that:

“existence of [a] fact is some indication of its probable existence at an earlier time.” Such testimony, moreover, would be irrelevant unless it is understood to be evidence of a status that extended into

the past, and a reasonable factfinder would be justified in assuming that a witness would not be testifying to an extraneous fact. While the present tense has, it is true, an instantaneous aspect, it also can describe a status. The sentence “I am a man” carries with it an inference that I always was one.

United States v. Lewis, 260 F.3d 855, 856 (8th Cir. 2001) (quoting United States v. Mitchell, 136 F.3d 1192, 1193 (8th Cir. 1998)).

Strusowski’s testimony prior to the questions regarding the federally insured status of Artisans Bank concerned his actions on the day of the Artisans Bank robbery. He testified that he was notified of the robbery on the morning of April 14, 2004, and left his office at 9:15 a.m., arriving at the Kirkwood Highway branch at 9:50 a.m. (3/5/07 N.T. at 118.) He further testified that, once he arrived at the bank, he aided the police by gathering the surveillance tape. (Id. at 118.) Strusowski also explained to the jury how the bank’s surveillance cameras work and identified photographs that were taken by the surveillance cameras during the robbery. (Id. at 119-128.) Strusowski was asked whether the bank was insured by the FDIC immediately following his testimony concerning the manner in which he provided the surveillance tapes to the police the morning of the robbery. (Id. at 128.)

Similarly, prior to his testimony about the federally insured status of Citizens Bank, Hendrickson testified about his responsibilities as the Regional Security Manager of Citizens Bank, his actions following the Citizens Bank robbery on June 15, 2004, and the amount of the loss to the bank as a result of the robbery. (3/6/07 N.T. at 171-87.) Hendrickson testified that he received a telephone call on June 15, 2004 that the hold-up button had been pushed at the Brookhaven, Pennsylvania branch, and he left for the branch within five minutes of receiving that call. (Id. at 173-74.) He further testified that he traveled to the Brookhaven branch in order to make sure that the

police had arrived, that branch employees were prepared to be interviewed, and to obtain good pictures from the bank's security cameras that could be used by the police. (Id. at 173-76.) He explained to the jury how the bank's security cameras work and identified pictures taken during the robbery. (Id. at 174-85.) He also testified regarding the amount of loss suffered by the bank as a result of the robbery. (Id. at 185-87.) Hendrickson testified about Citizens Bank's federally insured status immediately following his identification of the surveillance photos from the robbery and his testimony at to the amount of the loss. (Id. at 187.)

Viewed in this context, we find that Strusowski's and Hendrickson's uncontradicted present-tense testimony regarding Artisans Bank's and Citizens Bank's federally insured status supports a reasonable inference that each of the banks was insured by the FDIC at the time of the robbery. See United States v. Lewis, 260 F.3d at 855-56; see also United States v. Judkins, 267 F.3d 22, 23 (1st Cir. 2001) (noting that uncontradicted testimony that a credit union is federally insured was sufficient to satisfy the essential element of 18 U.S.C. § 2133 of proof of federal insurance at the time of the robbery); United States v. Pascarella, 84 F.3d 61, 71 (2d Cir. 1996) (determining that present tense testimony regarding the federally insured status of a bank was sufficient to establish that element of the crime of bank fraud where the trial took place two to three years after the fraudulent activity, as "[t]he government may rely on 'oral testimony that the bank is insured, [where] the interval between the crime and the trial is not too great, [and] it is reasonable to conclude that viewed in context, the jury could draw the inference that the bank was insured at the time [of the fraud]'" (quoting United States v. Schermerhorn, 906 F.2d 66, 70 (2d Cir.1990))); United States v. Bortnick, 2005 U.S. Dist. LEXIS 33541, at *25-*26 (finding that present tense testimony regarding a bank's federally insured status in 2005 was sufficient, in context, for the jury to find that the bank's funds were federally

insured when the crime occurred in 1998 and 1999); c.f. United States v. Abuhouran, 162 F.3d 230, 234 (3d Cir. 1998) (rejecting argument, in a money laundering case, that the government had not established that the bank was federally insured, where witnesses testified that the bank deposits at issue were federally insured and “[a] juror would reasonably have understood these witnesses to refer to the years in which the deposits were affected by the charged conduct”); but see United States v. Allen, 88 F.3d 765, 769 (9th Cir. 1996) (holding that present tense testimony of a credit union’s federally insured status was not sufficient to establish that the credit union was federally insured when the crime took place, four and one-half years before). Harper’s Post Verdict Motions are, accordingly, denied as to this ground for relief.⁸

C. The Trial Testimony of Special Agent Roselli

Harper argues that he is entitled to a new trial because the Government committed misconduct by presenting the perjured testimony of FBI Special Agent Vito Roselli at trial and because the Court erred by denying his trial motion to strike that testimony. He also argues that he is entitled to judgment of acquittal because the jury’s verdict was based on the perjured trial testimony of Agent Roselli. Harper contends that Agent Roselli committed perjury when he testified before the Grand Jury investigating the robbery of the Citizens Bank that he (Harper) had received a portion of the proceeds of that robbery. That Grand Jury testimony was the subject of Harper’s pre-trial “Motion to Dismiss Indictment for Perjury/Abuse of the Grand Jury and Prosecutorial

⁸Harper also contends that the Court erred by instructing the jury as to this issue, and that he is, consequently, entitled to a new trial pursuant to Federal Rule of Criminal Procedure 33. However, Harper does not explain his contention (i.e., whether he presently objects to the Court’s instruction regarding the banks’ federally insured status or whether he means that the Court should have granted a directed verdict to his client due to the insufficiency of the Government’s proof on this element) or support his contention with any references to the record or citations to the law. His request for a new trial is, accordingly, denied with respect to this ground for relief.

Misconduct.” (Docket No. 165.) Agent Roselli testified before the Grand Jury on September 29, 2005 that Harper received a large share of the proceeds of the Citizens Bank robbery. (1/17/07 N.T. at 49.) Agent Roselli admitted, during the hearing held on Harper’s Motion to Dismiss Indictment, that he knew, at the time of his testimony, that Harper did not receive that money, which had been set aside for him by his co-conspirator Burnie Tindale, but was later given a few hundred dollars by Tindale. (1/17/07 N.T. at 53-54.) There was also evidence presented during the hearing that, on September 22, 2005, prior to Agent Roselli’s Grand Jury testimony, Tindale testified before the Grand Jury that he had set aside a “cut” of the proceeds of the Citizens Bank robbery for Harper, but that another co-conspirator had taken the money and “pocketed it himself” and that he (Tindale) had later given Harper a few hundred dollars. (1/17/07 N.T. at 89-90.) We denied Harper’s Motion to Dismiss Indictment because there was no evidence that the Government was aware that Agent Roselli’s testimony was incorrect and because Harper was not prejudiced by this testimony. (1/22/07 Order-Memorandum at 3-4.)

Harper contends that, during his trial, Agent Roselli adopted as truthful his September 29, 2005 Grand Jury testimony that Harper received a large share of the proceeds of the Citizens Bank robbery. Agent Roselli did not testify regarding the recipients of the proceeds of the Citizens Bank robbery on direct examination. (3/8/07 N.T. at 170-98.) He was, however, extensively cross-examined by Harper’s trial counsel regarding his September 29, 2005 Grand Jury testimony. (*Id.* at 244-55.) Defendant contends that Agent Roselli “*never admitted* to the jury that he spoke falsely.” (Def. Mem. at 7.) However, Agent Roselli testified on cross-examination that his Grand Jury testimony was incorrect with respect to whether Harper received a large share of the proceeds of the Citizens Bank robbery:

Q. And we just talked about a, I think you said you made a mistake before the grand jury, is that correct?

A. That's correct.

* * *

Q. And when you testified before the grand jury on September 29th, you took an oath like you did today to tell the truth, is that correct?

A. That's correct.

Q. And you said to the grand jury that Marcel Harper received a large share of the proceeds from the Citizens Bank, is that correct?

A. I believe so, if you want to show me my grand jury transcript, but I believe I said that.

Q. And that was incorrect?

A. On the Citizens Bank?

Q. Yes.

A. At the time was it incorrect, to my knowledge? I don't know. Now, what I understand, it is incorrect. Again, unless I can see the context of the grand jury testimony, whether I said that as a fact or whether I said that as somebody told me that, I don't know.

(3/8/07 N.T. at 245.) Harper also contends that, during this cross-examination, Agent Roselli “renewed and adopted his perjury. The jury could construct a road-map of statements that were beyond inconsistencies, but the kinds of irreconcilable inconsistencies that amount to fabrication.” (Def. Mem. at 7.) Unfortunately, Harper has failed to draw a road-map for the Court, and we fail to find an adoption of Agent Roselli's admittedly erroneous Grand Jury testimony in his trial testimony. Agent Roselli read aloud, to the jury, the Grand Jury testimony which Harper claims was false, and stated, to the jury at Harper's trial, that his Grand Jury testimony was incorrect:

A. Can you show me the grand jury testimony so I can make sure it's

in context?

(Pause)

Q. Page 16.

A. After the Citizens Bank robbery, again, they split that money in the same fashion. Muir did get a share, Harper also got a large share. And then Tindale, Sowell and Booker split shares. This is after the Citizens Bank robbery.

Q. Right.

A. Now this is from, I believe this is information, I'm not sure of whether I'm saying that this is what Tindale told me. But either way, it's incorrect.

(3/8/07 N.T. at 248-49.)

Harper's trial counsel subsequently cross-examined Agent Roselli on whether Agent Roselli knew that his testimony was incorrect at the time he testified before the Grand Jury and whether he purposely lied to the Grand Jury. (Id. at 249-55.) Agent Roselli denied knowing that his testimony on this issue was false at the time that he testified before the Grand Jury on September 29, 2005. (Id. at 249-55.) Contrary to Harper's suggestion, however, Agent Roselli's denial that he knowingly lied to the Grand Jury on September 29, 2005 was not an adoption of his previous false Grand Jury testimony. Rather, Agent Roselli repeatedly testified before the jury at Harper's trial that his Grand Jury testimony that Harper received a large share of the proceeds of the Citizens Bank robbery was incorrect. (Id. at 244-45, 249.)

On March 9, 2007, Harper moved to strike Agent Roselli's testimony from the record on the ground that it was perjury. (3/9/07 N/T. at 4.) He now contends that he is entitled to a new trial because we erred by denying that Motion and because the Government committed misconduct by

presenting Agent Roselli's testimony. (Def. Mem. at 8.) Harper's motion for new trial is denied with respect to his claim of trial court error and prosecutorial misconduct with respect to Agent Roselli's testimony because there is no evidence that Agent Roselli adopted his previously false testimony. Moreover, even if we were to now find that Agent Roselli did adopt that testimony, it would not be reasonably possible that our refusal to strike that testimony substantially influenced the jury's decision warranting a new trial. Rich, 326 F. Supp. 2d at 673.

Agent Roselli testified before the jury during Harper's trial that his Grand Jury testimony that Harper had received a large share of the proceeds of the Citizens Bank robbery was incorrect. Tindale, Sowell and Muir all testified that Harper did not receive the share of the proceeds of the Citizens Bank robbery that Tindale had set aside for him, because Muir pocketed those proceeds himself. (3/7/07 N.T. 65-66, 205-06; 3/8/07 N.T. at 106-08.) We find, accordingly, that it was not reasonably possible that any error made in connection with Agent Roselli's trial testimony regarding this Grand Jury testimony could have substantially influenced the jury's decision to convict Harper. We also find that Harper is not entitled to a judgment of acquittal on the grounds that the jury relied on Agent Roselli's perjured testimony, because the overwhelming evidence on the record at Harper's trial was that Harper did not receive any of the money which was stolen from the Citizens Bank. Harper's Post Verdict Motions are, accordingly, denied as to this ground for relief.

D. Jury Instruction with Respect to the Testimony of Ronnie Muir

Harper argues that he is entitled to a new trial because "this Honorable Court failed to give a special instruction after the jury asked to have the testimony of witness Ronnie Muir re-read." (Def. Mem. at 8.) Harper admits that he did not request a special instruction at the time, but now contends that "fundamental fairness dictated that the Court should have reminded the jury not to

have given [sic] co-operating witness Muir's testimony greater weight than that of any other witness." (Id.)

After the jury began its deliberations, it asked for a copy of the transcript of Muir's testimony, which had not yet been transcribed. The jury was interested in Muir's testimony regarding the robbery of the Citizen's Bank. Consequently, at our request, counsel listened to the recording of Muir's testimony and selected the portions of that testimony that they agreed should be played for the jury. The Assistant United States Attorney and Harper's trial counsel agreed that Muir's testimony on direct examination regarding the Citizens Bank robbery, as well as his entire cross-examination, should be replayed. These portions of Muir's testimony were, therefore, replayed for the jury.

“A trial court has broad discretion in deciding whether to accede to a jury's request for a reading of testimony.” United States v. Bertoli, 40 F.3d 1384, 1400 (3d Cir. 1994) (quoting United States v. Zarintash, 736 F.2d 66, 69-70 (3d Cir.1984) and citing United States v. Chrzanowski, 502 F.2d 573, 577 (3d Cir. 1974); United States v. Rabb, 453 F.2d 1012, 1013 (3d Cir.1971); and United States v. Chicarelli, 445 F.2d 1111, 1114-15 (3d Cir.1971)). The court's “discretion is limited by two considerations, however: (1) such requests may slow the trial where the requested testimony is lengthy; (2) when read only a portion of testimony, the jury may give undue weight to that portion.” Id.

Although Harper now contends that we should have instructed the jury not to give Muir's testimony greater weight than that of any other witness, he did not request such an instruction at trial. “In the absence of plain error, matters not called to the attention of the trial judge cannot be subsequently raised in the post trial stages of the proceeding.” United States v. Jones, 404 F. Supp.

529, 539 (E.D. Pa. 1975) (citations omitted). Federal Rule of Criminal Procedure 52 provides that “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Fed. R. Crim. P. 52(b). The plain error standard requires:

(1) an error was committed; (2) the error was plain; and (3) the error affected [the defendant’s] substantial rights. In most cases, the language about affecting substantial rights “means that the error must have been prejudicial,” that is, “[i]t must have affected the outcome of the district court proceedings.” If a forfeited error is “plain” and “affect[s] substantial rights,” a Court of Appeals “has the authority to order correction, but is not required to do so.” The Court should exercise its discretion to order such a correction only if the error “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.”

United States v. Stevens, 223 F.3d 239, 242 (3d Cir. 2000) (quoting United States v. Olano, 507 U.S. 725, 732-34 (1993)). Consequently, we consider whether our failure to instruct the jury that it should not give undue weight to Muir’s testimony affected the outcome of Harper’s trial.

Although we did not give the jury a special instruction when we replayed Muir’s testimony, we instructed the jurors, during our general charge, that they should consider Muir’s testimony “with great care and caution” because he had entered into a plea bargain with the Government and because he hoped that the Government would file a motion for departure from the sentencing guidelines and the statutory mandatory minimums at his sentencing as a result of his testimony during Harper’s trial. (3/9/07 N.T. at 127.) We also asked the jury to consider “to what extent if at all, [Muir’s] testimony may have been influenced by the plea agreements and [his] alleged involvement in the crime charged.” (Id.) Under these circumstances, even assuming, *arguendo*, that our failure to give the jury a special instruction when we replayed for them the portions of Muir’s testimony which were selected and agreed upon by counsel constituted plain error, we find that it did not affect the outcome

of Harper's trial. Harper's Post Verdict Motions are, accordingly, denied as to this ground for relief.

III. CONCLUSION

For the foregoing reasons, Harper's Post Verdict Motions are denied in their entirety. An appropriate order follows.

