

(3d Cir. 2001). All reasonable inferences are drawn in favor of the jury's verdict. A defendant carries a heavy burden when challenging the sufficiency of the evidence. See United States v. Lore, 430 F.3d 190, 205 (3d Cir. 2005).

Pursuant to Rule 33, the court may grant a new trial "if the interest of justice so requires." The standard of review under Rule 33 is different than under Rule 29. Here, the evidence is not evaluated in the light most favorable to the Government. Instead, a new trial may be granted if in the view of the court the verdict is against the weight of the evidence. See United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002). The court must consider whether there is "a serious danger that a miscarriage of justice has occurred." See United States v. Silveus, 542 F.3d 993, 1004-05 (3d Cir. 2008).

II

The evidence presented at trial, taken in the light most favorable to the Government, established the following facts.

On or about October 26, 2015, a Philadelphia based attorney named Dolores M. Troiani ("Troiani") filed a complaint for defamation in the United States District Court for the Eastern District of Pennsylvania on behalf of Andrea Constand ("Constand") against the former Montgomery County District Attorney, Bruce Castor. See Constand v. Castor, No. 15-5799

(E.D. Pa. Oct. 26, 2015). The case was assigned to The Honorable Eduardo C. Robreno.

On January 3, 2016, Troiani received three emails with various attachments from the email address of devoutplayerhater@yahoo.com. These emails threatened the release of certain personal information of Constand, who had previously accused former actor and comedian Bill Cosby of sexual assault. Evidence presented at trial also established that an individual employing the username "Devout Player Hater" generated several internet postings voicing support for Bill Cosby and questioning the motives of Cosby's accusers.

On February 1, 2016, an unknown individual hand-delivered to the Clerk's Office in the Eastern District of Pennsylvania an envelope containing a document that read "PRAECIPE TO ATTACH EXHIBIT "A" TO PLAINTIFF'S COMPLAINT" ("praecipe"). The praecipe appeared to be signed by Troiani. The attachments to the praecipe mirrored the attachments to the series of January 3, 2016 emails to Troiani that were generated from the devoutplayhater@yahoo.com account. Troiani testified at trial that she had neither submitted nor authorized the filing of the document in question and had not signed it. She immediately informed Judge Robreno of the fraudulent document, and he struck it from the record.

Pursuant to a grand jury subpoena, Yahoo provided subscriber records for the "devoutplayerhater" email, which included an Internet Protocol ("IP") address used to establish the account. Evidence was also presented of records from Verizon, the Internet Service Provider ("ISP") for the IP address. Verizon identified devoutplayerhater's subscriber username as "jjohnson531@dslextreme.com." Verizon revealed that during the relevant time frame, the subscriber account had been maintained by a third-party ISP, IKANO d/b/a DSL Extreme.

DSL Extreme provided records associated with its registered customer "jjohnson531," who was identified as Joe Johnson, with an alternate email address jjohnson531@gmail.com and a residential address of 2600 Brinkley Road, Fort Washington, Maryland. Maryland Department of Motor Vehicles ("DMV") records identify Joe Johnson of 2600 Brinkley Road, # 611, Fort Washington, Maryland, with a date of birth of May 31, 1971. The photograph on the DMV records for Joe Johnson depicts defendant Johnson.

The Government also presented records from the United States Courts' electronic document filing system, Public Access to Court Electronic Records ("PACER") for a registered user named Joseph Johnson, Jr. with a username of "jjohnson531." Johnson admitted to FBI special agent Kurt Kuechler ("Kuechler") prior to his arrest that he had a PACER account. The

"jjohnson531" account had accessed the Constand docket at issue before and after the praecipe was filed. The "devoutplayerhater" email account was deleted shortly after "jjohnson531" accessed Judge Robreno's February 2, 2016 order striking the praecipe as fraudulent.

The Government also identified another IP address used by the "jjohnson531" PACER account to access the Constand docket as belonging to Alion Science and Technology ("Alion"), where defendant Johnson was employed. Alion confirmed that the IP address was registered to it and connected Johnson's employee profile at Alion with the PACER access. Alion also provided Johnson's internet history, which showed that Johnson had searched for the words "Cosby" and "Constand" over 10,000 times.

The original envelope including its contents, which was received by the Clerk's Office, was sent to the Federal Bureau of Investigation ("FBI") for fingerprint analysis. The FBI's analysis revealed the presence of at least six fingerprints belonging to "Joseph Johnson Jr." on the envelope and on the adhesive side of the tape used to affix the address label to the envelope.

On June 28, 2019 Johnson was arrested by the FBI. During processing, Johnson was fingerprinted and provided his May 31, 1970 birthdate. Johnson's fingerprints matched the

fingerprints recovered from the envelope and adhesive tape recovered in this investigation.

III

Johnson was charged with one count of making false statements and aiding and abetting in violation of 18 U.S.C. §§ 1001 and 2. Section 1001 provides:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined . . . imprisoned not more than 5 years. . . .

18 U.S.C. § 2 provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The second count of the indictment charged that Johnson "knowingly and without lawful authority used a means of identification of another person, and aided and abetted the use of a means of identification of another person, that is, [Troiani's] name" during and in relation to the false statements charged in Count I, in violation of 18 U.S.C. §§ 1028A(a)(1), (c)(4) and (c)2.

Section 1028A(a)(1) provides that "[w]hoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." The statute further defines "felony violation enumerated in subsection (c)" to include any violation of the United States Code Title 18, Chapter 47, "Fraud and False Statements," which includes a violation of 18 U.S.C. § 1001 as charged in Count I of the indictment.

Under Rule 29, a judgment of acquittal may not be granted unless the evidence, reviewed in light most favorable to the Government, is insufficient to sustain a conviction. The Government presented overwhelming circumstantial evidence—as noted above—that Johnson was the one who masterminded the crimes in issue. We find that there was more than sufficient evidence

for a rational jury to find that: (1) defendant knowingly and willfully made, and aided and abetted the knowing and willful making of, materially false, fictitious, and fraudulent statements; and (2) defendant knowingly and without lawful authority transferred, possessed, or used a means of identification or identification document that belonged to another person.

Accordingly, the motion of defendant for judgment of acquittal will be denied.

IV

In his alternative motion for a new trial, Johnson asserts that he is entitled to a new trial under Rule 33. Johnson makes five supporting arguments.

First, Johnson contends that the government failed to produce any evidence showing specific intent required to prove he aided and abetted the making of a false statement or the state of mind of the unknown person who delivered the false statement. Johnson argues that this Court should grant his motion for a new trial since the prosecution is without "any proof, direct or circumstantial, as to Johnson directing another person to make these false statements."

With respect to an aiding and abetting theory of liability under 18 U.S.C. § 2, the Government must prove: "(1) that another committed a substantive offense; and (2) the

one charged with aiding and abetting knew of the commission of the substantive offense and acted to facilitate it." United States v. Mercado, 610 F.3d 841, 846 (3d Cir. 2010).

Additionally, the defendant must have the specific intent to facilitate the crime. Id. "One can aid or abet another through use of words or actions to promote the success of the illegal venture." Id. Indeed, "only some affirmative participation which at least encourages" the offense is required. United States v. Frorup, 963 F.2d 41, 43 (3d Cir. 1992).

Section 2 specifically provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense is liable as a principal. See 18 U.S.C. § 2(a). It is well-established that a defendant may be convicted for a crime performed through an "innocent dupe." See United States v. Bryan, 483 F.2d 88, 92 (3d Cir. 1973). A defendant can also be convicted under an aiding and abetting theory where the individual who actually carried out the criminal act is unidentified or has been acquitted of the charge. See id.

Considering the standard stated above, the government produced ample circumstantial evidence connecting Johnson to the envelope at issue, including prior emails sent by Johnson, the steps he took to delete his email account, and his fingerprints on the tape sealing the envelope.

As discussed previously in this court's memorandum denying defendant's motion to dismiss the indictment (Doc. # 24), it is of no import that the Government did not present evidence that Johnson actually dropped off the envelope or provided any instruction to the Clerk's Office himself. It is also irrelevant that a Clerk's Office employee is the individual who actually filed the documents at issue. Johnson may be prosecuted under § 2 even where the individual who actually filed the false documents is innocent or unidentified. See Bryan, 483 F.2d at 92. Accordingly, the Government is not required to show that the unknown principal who brought the fraudulent document to the Courthouse had any criminal intent. Johnson's request for a new trial on this basis will be denied.

Second, Johnson maintains that Kuechler provided expert opinion without proper qualification, which confused the jury. Specifically, Johnson argues that Kuechler's testimony regarding IP address tracing was "beyond his day-to-day life experience." According to Johnson, since Kuechler was "only able to establish an IP address and not an actual person," the jury was confused, and thus a new trial is required. We disagree. Rule 701 governs opinion testimony by lay witnesses:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of

the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. This does not mean that an expert is always necessary whenever the testimony is of a specialized or technical nature. When a lay witness has particularized knowledge by virtue of his experience, he may testify even if the subject matter is specialized or technical because the testimony is based upon the layperson's personal knowledge rather than on specialized knowledge within the scope of Rule 702. See Notes to 2000 Amendments; Donlin v. Philips Lighting N. Am. Corp., 581 F.3d 73, 81 (3d Cir. 2009).

Kuechler's testimony was based on his observations within the context of his training and experience. He testified regarding his understanding of IP addresses and his role in the investigation as it relates to IP addresses. Such testimony did not require specialized knowledge and is clearly within his day-to-day life experience. The motion of defendant for a new trial based on the expert opinion theory will be denied.

Third, Johnson argues that documents relating to "Yahoo Emails, the Internet Postings, IKANO, and PACER Records" should not have been admitted under the business records exception to the hearsay rule. Johnson asserts that these

documents had a "substantial influence on the outcome of the trial."

Hearsay is defined as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). "Statement means a person's oral assertion, written assertion, or nonverbal assertion, if the person intended it as an assertion." Fed. R. Evid. 801(a).

The business records exception permits admission of documents containing hearsay provided foundation testimony is made by "the custodian or other qualified witness," that:

(1) the declarant in the records had personal knowledge to make accurate statements; (2) the declarant recorded the statements contemporaneously with the actions that were the subject of the reports; (3) the declarant made the record in the regular course of the business activity; and (4) such records were regularly kept by the business.

Fed. R. Evid. 803(6). Furthermore, it has long been established that "[i]f a party does not offer a statement into evidence for the purpose of establishing the statement's truth, such statement does not constitute hearsay." See United States v. Reynolds, 715 F.2d 99, 101 (3d Cir. 1983).

The Yahoo emails sent to Troiani from devoutplayerhater@yahoo.com email address were not presented to

prove that Johnson was the owner of the account. Indeed, defendant's name does not appear anywhere in the records of devoutplayerhater@yahoo.com account. Evidence shows that a fictitious "Tre Anthony" was listed as the subscriber of the account. The Yahoo emails were not admitted to prove the truth of the content within the emails. Instead they were admitted to show the sender's exact registered IP address, as well as to demonstrate that the account existed, that the emails from the account were sent to Troiani, and that the account was deactivated during a timeframe relevant to the investigation. The totality of the circumstance ultimately established that Johnson was the actual person responsible for operating the Yahoo account. See United States v. Alper, 449 F.2d 1223 (3d Cir. 1971).

Similarly, the internet comments and postings by an individual identifying himself as "The Devout Player Hater" were not presented for the truth of their assertions. Throughout the trial, the Government did not contend that any of the comments within the postings was true. Rather, the Government presented the internet postings to prove the motive of the Devout Player Hater, whose username and postings showed that he was the same person responsible for sending the Yahoo emails to Troiani using the devoutplayerhater@yahoo.com account.

Lastly, the IKANO and PACER records were properly admitted under the business records exception to the hearsay rule. Erwin Tjoe, a customer service agent for IKANO, provided the necessary foundation to establish that the "customer information sheet" was: (1) made at or near the event; (2) by someone with personal knowledge of the event; (3) made in the ordinary course of business; and (4) kept in the ordinary course of business. Johnson objected to the IKANO records being admitted and his objection was overruled at trial. Similarly, Anna Marie Garcia, the Chief of the PACER Help Desk and custodian of the records presented, provided the necessary foundation to show that the PACER records presented to court: (1) were made at or near the event; (2) by someone with personal knowledge of the event; (3) made in the ordinary course of business; and (4) kept in the ordinary course of business. Indeed, Johnson did not raise an objection to the admission of the PACER records under the business records exception to the hearsay rule at trial. Overall the court is satisfied that the evidence presented regarding the IKANO and PACER records provides sufficient indicia of trustworthiness to satisfy the business records exception.

Accordingly, since the Yahoo emails and the internet postings presented at trial did not constitute hearsay, and the PACER and IKANO records were properly admitted under the

business records exception to the hearsay rule, the motion of defendant for a new trial based on the hearsay theory will be denied.

Fourth, Johnson contends that he is entitled to a new trial because this court refused to give his requested alibi instruction. Johnson further asserts that while the indictment charged him as a "principal" and as an "aider and abettor," it is unclear whether the jury's verdict was based "upon the theory of personal participation or merely aiding and abetting."

"If the accused requests an instruction as to the burden of proof on his alibi, an instruction on the subject must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case." United States v. Marcus, 166 F.2d 497, 504 (3d Cir. 1948). However, "a defendant is not entitled to a judicial narrative of his version of the facts." United States v. Hoffecker, 530 F.3d 137, 156 (3d Cir. 2008). A district court has discretion to refuse or deny a jury instruction with respect to the defendant's theory of the case. United States v. Wiltshire, 568 F. App'x 135, 140(3d Cir. 2014).

Johnson requested an alibi instruction to allow the jury to determine that he was not present in Philadelphia when the fraudulent Constand praecipe was filed and thus did not personally hand the envelope with his fingerprints to the deputy

clerk. This court refused the alibi instruction because the Government conceded that Johnson was not present in Philadelphia when the fraudulent praecipe was filed. Throughout the trial, the Government consistently told the jury that Johnson did not deliver the false document to the court and that it was prosecuting the defendant under an aiding and abetting theory. Accordingly, an alibi instruction was unnecessary and would have been confusing to the jury. The motion of defendant for a new trial based on lack of alibi instructions will be denied.

Finally, Johnson maintains that the fingerprint evidence introduced by the Government was insufficient to support his convictions. He relies on a series of cases which stand for the proposition that fingerprint evidence, standing alone, is insufficient to support a conviction.

Our Court of Appeals has held that in a sufficiency of the evidence claim, the court should examine the totality of evidence presented. United States v. Park, 505 F. App'x 186, 188 (3d Cir. 2012). Johnson's cited case law supports this exact viewpoint: fingerprint evidence is sufficient to support a conviction when "it is accompanied by additional incriminating evidence." United States v. Strayhorn, 743 F.3d 917, 923 (4th Cir. 2014).

Fingerprint evidence was not the only incriminating evidence establishing Johnson's guilt in this matter. The

Government presented a plethora of circumstantial evidence including, but not limited to, internet postings, IP addresses, emails, motor vehicle records, defendant's birth date, internet queries, and his admission that he had a PACER account. Accordingly, the motion of defendant for a new trial based on the "fingerprint" theory will be denied.

We reiterate that a defendant bears a heavy burden when challenging a jury's verdict against the weight of the evidence. Furthermore, motions for a new trial under Rule 33 are granted "sparingly." See Silveus, 542 F.3d at 1005. Johnson has not met this burden or shown that a miscarriage of justice has occurred so as to grant a new trial.

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JOSEPH R. JOHNSON, JR.	:	NO. 19-367

ORDER

AND NOW, this 20th day of February, 2020, for the reasons set forth in the foregoing memorandum, it is hereby ORDERED that this motion of defendant for a judgment of acquittal or in the alternative for a new trial (Doc. # 60) is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

J.