

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

UNITED STATES	:	
	:	
v.	:	04-CR-493
	:	
STEPHEN BENSON,	:	
	:	
Defendant	:	

MEMORANDUM AND ORDER

Anita B. Brody, J.

August 22, 2006

On April 15, 2005, a federal jury convicted defendant Stephen Benson (“Benson”) of robbery affecting interstate commerce, knowingly possessing a firearm in furtherance of a crime of violence, and possession of a firearm by a felon. Before me is Benson’s motion pursuant to Federal Rule of Criminal Procedure 33 for a new trial on all three counts of the indictment based on failure to substitute counsel before trial, trial counsel’s ineffectiveness, and improper supplemental jury instructions. For the reasons that follow, the motion is denied.

I. FACTS

On August 24, 2004, Benson was charged by a three count indictment with robbery affecting interstate commerce in violation of 18 U.S.C. § 1951(a) (Count One), knowingly possessing a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Count Two), and possession of a firearm by a felon in violation of 18 U.S.C . § 922(g)(1) (Count Three). The charges related to a robbery of Ugo’s Market in West Philadelphia on

March 17, 2004.

Initially, Kai Scott of the Federal Public Defender was appointed to represent Benson. In September, 2004, she requested discovery from the government, which it provided. After Benson requested to have his counsel removed because of a breakdown in the attorney-client relationship, Attorney Thomas Ivory (“Ivory”) was appointed on October 29, 2004.

At Benson’s preliminary hearing in state court, a witness named Michael Gesualdo¹ had testified that he was standing in front of Ugo’s Market the morning of the robbery when a man showed him a gun and tried to rob him. After Gesualdo told the man that he did not have any money, the two stood in front of the store waiting for it to open. When the store opened, the man attempted to rob it. At the preliminary hearing, Gesualdo testified that Benson was not the man who tried to rob him and the store.

A. Pretrial and Trial Proceedings

Ivory did not subpoena Gesualdo for trial, which was scheduled for April 12, 2005. At the pretrial conference on April 8, 2005, Ivory made an oral motion to move Gesualdo’s testimony from the preliminary hearing into the record at trial. (Tr. 4/8/05 at 3-6.) He said he had thought that the government would subpoena Gesualdo, and that he “was going to subpoena him [his] self,” but his understanding was that Gesualdo “is unavailable because he’s deathly ill.” (Id. at 4.) Ivory characterized Gesualdo’s testimony as stating an inability to identify Benson in court. (Id.) Counsel for the government said that she would not be using Gesualdo’s testimony

¹ The witnesses referred to Mr. Gesualdo as Michael Gesualdo. His death certificate identifies him as Michele Gesualdo.

at all. (Id. at 5.) I denied the motion. (Id. at 6.)

On April 12, 2005, the day that trial was scheduled to begin, Benson expressed his dissatisfaction with Ivory's representation of him, specifically complaining that Ivory had inadequately prepared for trial, had not gone over any of the discovery with Benson, and had failed to request discovery.² (Tr. 4/12/05 at 3-6.) When Benson said that Ivory had not gone over the discovery documents with him, I asked him if "that's what you want to happen?" (Id. at 6.) In response, Benson said "Yeah." (Id.) Ivory admitted that he had not "gone through [the discovery documents] in minute detail." (Id.)

I told Benson that "unless you want to represent yourself, I'm not going to pick other counsel." (Id. at 7.) Instead, I said that after jury selection, Ivory and Benson would have the afternoon to discuss the discovery documents, and the trial would begin the following morning. (Id.) Benson agreed to this arrangement in the following exchange:

THE COURT: ...Okay? Is that –

MR. BENSON: Fair enough.

THE COURT: I have to hear from you.

MR. BENSON: Fair enough.

THE COURT: Okay?

MR. BENSON: Yes.

(Id.) Ivory represented Benson at trial.

That same day, before jury selection, Ivory renewed his motion to enter Gesualdo's

² Benson brought a motion with him to court, but I asked to hear the motion orally as well. (Tr. 4/12/05 at 3.)

testimony. (Tr. 4/12/05 at 10.) He read aloud a portion of Gesualdo's testimony from the state preliminary hearing, in which Gesualdo said he saw the man who tried to rob him go into the store and point a gun at the storekeeper, and that Benson was not that man. (Id. at 12-14.) I found the testimony itself to be different from how it had been characterized by counsel for the government at the pretrial conference, and said "This is not his not being able to identify him. This is actually saying this was not the man." (Id. at 14.) Counsel for the government stated that she was told by the staff of Ugo's Market that Gesualdo was sick, but never confirmed it for herself, so she could not agree that he was legally unavailable for purposes of admitting his testimony. (Id.) Ivory admitted that he had not subpoenaed Gesualdo because he thought that he was on the government's witness list, saying that "frankly, I mixed up the Italian names." (Id.) I asked both parties to try to subpoena Gesualdo, and ruled that if he could not be made to appear, his testimony could be read into evidence. (Id. at 15, 18.)

The next day, before opening arguments began, the government represented to the court that Gesualdo was not available because he was in the hospital, and it was decided that government counsel would read the questions and an agent would read Gesualdo's answers. (Tr. 4/13/05 at 6-7.) In her opening statement, counsel for the government outlined the testimony that the prosecution would present and explained to the jury that "by committing a robbery inside [the] market, it is alleged that the defendant has interfered with commerce, because the ability of the market to continue operating, at least for that moment, was affected." (Id. at 19.) In his opening statement, Ivory argued that Benson was not the perpetrator of the robbery, and that Gesualdo's testimony should at least create reasonable doubt as to the identity of the robber. (Id. at 22-26.) He did not mention the element of interstate commerce.

The first witness was Gesualdo, through the notes of testimony from Benson's preliminary hearing. Government counsel read the questions, and Special Agent Uvena from the ATF read Gesualdo's answers. Ivory did not object to this arrangement.³ In the testimony read to the jury, Gesualdo said that the man who tried to rob him outside the store was "a few feet away from [him.] Very close." (Id. at 30.) When asked by the government "Do you see that man today in court?" Gesualdo answered "No, I don't see him," even though Benson was sitting at the defense table. (Id.) Gesualdo then stated that the man who tried to rob him was the same man who tried to rob the store when it opened. (Id. at 31.)

Next the government called Ann Giacomucci, the manager of Ugo's Market. She identified Benson as the man who showed her a gun when she opened the store on March 17, 2004. (Id. at 49.) She testified that he pushed her down, she fell in front of the counter, and then he jumped over the counter. (Id. at 51.) She ran out the door, flagged down a police car on the corner, and watched the policeman go to the door of the store and grab the robber. (Id. at 53.) She said that there was no doubt in her mind that Benson was the person who showed her the gun, pushed her, and jumped over the counter. (Id. at 57.) On cross-examination, Giacomucci stated that there is another door to the store from the back room onto Callowhill Street, and a window. (Id. at 71.) On redirect she said that the door and window were kept locked. (Id. at 74-75.)

Third, the government called Ugo Umile, the owner of Ugo's market. He testified that he sold items from other states and other countries. (Id. at 79-80.) He also said that there were two

³ At a later hearing on April 6, 2006, Ivory said that counsel for the government "stole [his] thunder" by reading the notes in herself, because he "would have read them a whole lot differently." (Id. at 47.)

locks on the back door, and the window was so small that “no one could fit through it, it’s very little.” (Id. at 82.) Both were still securely locked when he arrived at the store after he was notified of the incident. (Id.)

Fourth, Terence DiBernardino, president of D & M Sales Company, testified for the government. He said that he supplies Ugo’s Market with “[c]igarettes, tobacco, cigars and candy items,” which are shipped to him from different warehouses around the country. (Id. at 86-87.) Ivory had no questions for him on cross-examination.

Finally, the government called several police officers. Officer Anthony Jones testified that he saw Ms. Giacomucci run out of Ugo’s market saying that there was a man with a gun robbing the store. (Id. at 92.) As he made a radio call for backup, he saw Benson exit the store, walk back in, and come right out again. (Id.) He placed Benson in handcuffs, put him in the car, and took statements from Gesualdo and Giacomucci. (Id. at 93-96.) Officer Edwin Vaughn testified that he responded to Officer Jones’s radio call, arriving on the scene about a minute later, and searched the store without finding anything. (Id. at 114.) Officer Christopher Egan testified that he responded to Officer Jones’s radio call and found the gun behind some loaves of bread on a shelf near the door, then disarmed it and took it to the Firearms Identification Unit. (Id. at 125-26.) On cross-examination, he admitted that he put his fingerprints all over the gun, which was unloaded, because he assumed that the man then in custody was the one who had handled the gun.⁴ (Id. at 130.)

⁴ The government’s last witness was officer Adrienne Williams, who was qualified as an expert in the field of firearms identification. (Tr. 4/13/05 at 139.) She testified that the gun recovered by Officer Jones was manufactured in the Lorcin factory in California, and that she was unable to test fire it because certain parts were missing. (Id.)

The charging conference took place while the jury was recessed for lunch. Prior to trial, the government had submitted proposed points for charge, which I substantially adopted. The parties received the charge before the charging conference. At the conference, neither party objected to my proposed instructions relating to the charge of robbery affecting interstate commerce.

When the jury returned from lunch, counsel presented their closing arguments. Counsel for the government argued, in part, that the robbery interfered with interstate commerce because it made the store unable to buy or sell products from other states for several hours. (Id. at 156.) Ivory, counsel for the defendant, argued that Benson was not the robber, based on Gesualdo's testimony and the possibility that another person may have robbed the store and left through another exit. (Id. at 162-63.) Ivory did not mention the interstate commerce element in his closing argument.

After closing arguments, I instructed the jury. The segment defining effect on interstate commerce read:

If you decide that the defendant attempted to obtain another's property by means of robbery, you must then decide whether there was **actual or potential effect on interstate commerce**, that is, commerce between any two states [. . .] If you decide that there was **any effect at all on interstate commerce**, then that is enough to satisfy this element.

The effect can be minimal. For example, if a successful robbery of money would prevent the use of those funds to purchase articles which travel through interstate commerce, that would be sufficient effect on interstate commerce. Or if a successful robbery would prevent the use of those funds to provide goods and services to out-of-state guests, that would be sufficient effect on interstate commerce.

The defendant need not have [. . .] intended or anticipated an effect on interstate commerce, you may find that the effect is a natural consequence of his actions. If you find that the defendant intended to take certain actions, that is, he did the acts charged in the indictment in order to obtain property and you find that those actions **have been**

cause [sic] . . . or would probably cause an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

(Id. at 182-83) (emphasis added). The jury began deliberations that afternoon, April 13, 2005.

When the jury resumed deliberations the morning of April 14, they asked for and received copies of the written instructions about the effect on interstate commerce of robbery. (Tr. 4/14/05 at 2-3.) At 3:24 p.m., the jury sent out a question noting the different standards in the first and third paragraphs defining the element of effect on interstate commerce, and asking whether they had to consider both.⁵ The government took responsibility for proposing unclear instructions, and suggested that I instruct the jury that the element was satisfied “if it is the intention of the actor to take money from a business involving interstate commerce.” (Id. at 6-8.) I refused to give that instruction, saying that it would be “reversible error.” (Id. at 8.) The jury was dismissed for the day around 4 p.m., and the parties were told to advise me of their position on the charge the following morning. (Id. at 12-13.)

On the morning of April 15, 2005, court reconvened and the defense objected to any change in the jury instructions, arguing that any inconsistencies between two jury instructions submitted by the government should be resolved in favor of the defense. (Tr. 4/15/05 at 5.) In addition, Ivory argued that changing the instructions after closing would violate Federal Rule of Criminal Procedure 30. (Id. at 6.) The government urged me to use an instruction consistent with United States v. Haywood, 363 F.3d 200 (3d Cir. 2004), which states that “if a defendant’s

⁵ The question read:
Concerning the third element. The first paragraph uses the wording “potential effect on interstate commerce.” The third paragraph seems to provide a more detailed definition but uses the wording “probably cause.” These have different meanings. If we are satisfied with the understanding in the first paragraph, do we need to consider the third? (Jury Question #4.)

conduct produces any interference with or effect upon interstate commerce whether slight, subtle, or even potential, it is sufficient to uphold the prosecution under 1951.” (Id. at 22.) At 10:15 a.m., the jury sent out another note asking for clarification on the interstate commerce element.⁶

After considering the government’s argument that the jury should be instructed in conformity with the recent Third Circuit case Haywood, and the defense’s argument that the more lenient standard from the original instructions should be used because they had been proposed by the government in the first place, I decided that I had to give the jury instructions that accurately reflected my interpretation of the law under Haywood. I said “I want you to know, Mr. Ivory, that if you get an adverse verdict, I will be very receptive to a new trial.” (Tr. 4/15/05 at 27.) For the record, Ivory reiterated his objection to the instruction. (Id. at 28.) The jury returned to the courtroom and I gave them the following supplemental instruction:

To sustain a conviction for interference with commerce by robbery under Section 1951, that is the 18 U.S.C. 1951, the Government must prove the element of interference with interstate or foreign commerce by robbery.

The charge that interstate commerce is affected is critical, since the Federal Government’s jurisdiction of this crime rests only on that interference. The Government must prove beyond a reasonable doubt that the defendant’s conduct produces **any interference with or effect upon interstate commerce whether slight, subtle, or even potential.**

(Id. at 29) (emphasis added).

The jury soon returned guilty verdicts on Counts One and Two. (Id. at 32.) That same afternoon, after receiving a stipulation that Benson had been convicted of a felony punishable by

⁶ The question stated:
We asked a question regarding Regarding [sic] the third element of Affecting Interstate Commerce by Robbery . . . Could we have clarification from the question asked yesterday.
(Jury Question #7.)

more than a year in prison, the jury also convicted Benson on Count Three of being a convicted felon in possession of a firearm. (Id. at 54.)

B. Post-Trial Proceedings and Evidentiary Hearing

After Benson was convicted, he wrote a letter to court stating that he intended to appeal his conviction on the basis of ineffective assistance of counsel, and requested substitute counsel to argue his appeal. On August 11, 2005, Benson's present counsel Ellen C. Brotman was appointed. On February 7, 2006, Benson filed a pro se motion for new trial or judgment of acquittal (Doc. #77), which Ms. Brotman supplemented later that month (Doc. #78).

An evidentiary hearing was held on April 6, 2006, at which Ms. Brotman called Mr. Ivory to testify. Ivory testified that Benson's trial was his first federal trial, although he had tried fifteen to twenty jury trials in state court. (Tr. 4/6/06 at 4.) Ivory said that he thought that Gesualdo "was a very, very important witness," but that he did not do any followup investigation beyond speaking to the lawyers who conducted the preliminary hearing and reviewing the discovery.⁷ (Id. at 8-9.) He testified that he was satisfied with the discovery he received and did not request any further discovery, did not request an expert fingerprint test of the gun, did not attempt to interview Ms. Giacomucci, did not visit the store prior to the night before trial, did not investigate the police officers involved in Benson's arrest, and did not subpoena their personnel records. (Id. at 9-11.)

Ivory was aware that the statement given to police by Gesualdo was translated by

⁷ Gesualdo died about a month after the trial, on May 19, 2005. (Gesualdo Death Certificate, Ex. A to Gov.'s Supp. Br. in Resp. to Post Trial Mot.)

Giacomucci, the victim, but did not attempt to interview Gesualdo himself. (Id. at 13.) He said that he had assumed Gesualdo would be at the trial as a government witness until the final pretrial conference, when he learned that the government did not subpoena him. (Id. at 19.) Ivory had “conflated the two Italian names” - Ugo Umile and Michale Gesualdo. (Id. at 20.) At the time, he “had information that [Gesualdo] was very, very sick, to the point of being nearly dead,” and assumed that it would be best to get the transcript of testimony admitted. (Id. at 25.) After I denied Ivory’s motion to admit Gesualdo’s testimony on April 8, 2005, Ivory did not make any attempt to find Gesualdo; instead he argued the motion again, this time successfully. (Id. at 26.)

At the hearing on April 6, 2006, Ivory recollected that when trial began and Benson made his request for new counsel, Ivory agreed with him that he was not completely prepared, although he did not say so at the time.⁸ (Id. at 28.) After I instructed him to attempt to locate Gesualdo after jury selection, Ivory went with his investigator to the store, and was told that Gesualdo was in the hospital and had had a heart attack. (Id. at 29.) He did not investigate further by going to the hospital. (Id. at 30.)

Ivory testified that after I gave the jury the supplemental instruction on interstate commerce, the fact that I said I would be “very receptive to a new trial” “went over [his] head.” (Id. at 34.) He did not understand that I was referring to a Rule 33 motion for a new trial, but instead was thinking about a state procedure under which a trial judge files an opinion before an appeal is considered by the Pennsylvania Superior Court. (Id. at 37-38.)

⁸ On cross-examination, Ivory explained that he did not spend much time with Benson preparing for trial, and felt that Benson could have given him more information and input if he had. (Id. at 58.)

On cross-examination, Ivory testified that his theory of the case, as presented in his opening and closing arguments, was that Benson was not the robber, and that the real robber left through the back door or a window. (Id. at 51-53.)

II. DISCUSSION

Benson argues three grounds in support of his motion for new trial or judgment of acquittal. First, he argues that it was an abuse of discretion to deny Benson’s request for substitute counsel as trial was about to begin. Second, he argues that his trial counsel was ineffective in failing to interview or subpoena Gesualdo or otherwise prepare for trial. Finally, he claims that the supplemental jury instructions given on the interstate commerce element constituted a violation of due process of law. I consider each of these arguments in turn.⁹

A. Refusal to Appoint Substitute Counsel

Benson expressed dissatisfaction with his appointed counsel twice. I granted his first attorney’s motion to withdraw because of a breakdown in communication, and appointed Ivory as counsel on October 29, 2004. When Benson again requested substitute counsel the day his

⁹ Federal Rule of Criminal Procedure 33(a) allows a district court to “vacate any judgment and grant a new trial if the interest of justice so requires,” but a motion for a new trial based on grounds other than newly discovered evidence must be filed within seven days after the verdict “or within such further time as the court sets during the 7-day period.” Rule 33(b)(2). The Supreme Court recently ruled that failure to file a motion under Rule 33 within the statutorily prescribed time period does not deprive a district court of jurisdiction to hear the claim. Eberhart v. United States, 126 S. Ct. 403 (2005) (per curiam). In Eberhart, the Court held that “claim-processing rules” such as Rule 33 “assure relief to a party properly raising them, but do not compel the same result if the party forfeits them.” Id. at 407. Here, as in Eberhart, the government did not challenge the defendant’s motion for new trial on timeliness grounds, and I may consider the claims on the merits.

trial was scheduled to begin, I did not grant his request, but told him that he would have time to discuss his case with his attorney that afternoon before trial began the following day. Benson argues that my refusal to appoint substitute counsel was an abuse of discretion requiring a new trial. I disagree.

Unhappiness with appointed counsel expressed on the eve of trial does not automatically require that a scheduled trial be postponed so that new counsel may be appointed. Although the Sixth Amendment right to counsel is absolute, criminal defendants do not have an absolute right to counsel of their choice. Jones v. Zimmerman, 805 F.2d 1125, 1133; United States ex rel. Carey v. Rundle, 409 F.2d 1210, 1215 (3d Cir. 1969). The right to choose a particular lawyer “must be balanced against the requirements of the fair and proper administration of justice.” United States v. Rankin, 779 F.2d 956, 958 (3d Cir. 1986). In this case, Benson’s trial had already been postponed for five months after I granted his first request for substitute counsel. By the time of Benson’s second request, the lawyers and witnesses were prepared for trial and I had already held a final pretrial conference. Benson had been in pretrial detention for seven months. These considerations weighed against yet another substitution of counsel and continuance.

More importantly, Benson’s complaints did not constitute good cause requiring substitution of counsel. A request to change counsel just before trial requires a court to “ascertain the defendant’s reasons for his dissatisfaction with counsel.” United States v. Peppers, 302 F.3d 120, 132 (3d Cir. 2002) (citing United States v. Welty, 674 F.2d 185, 187 (3d Cir. 1982)). If good cause for dismissal of counsel is found to exist, the court must grant a continuance and appoint new counsel unless the defendant wishes to proceed pro se. Peppers, 302 F.3d at 132. Good cause for substitution of counsel is defined as a “conflict of interest, a

complete breakdown of communication, or an irreconcilable conflict with the attorney.” United States v. Goldberg, 67 F.3d 1092, 1098 (citing Welty, 674 F.2d at 188.) If there is no good cause, however, “the court must inform the defendant that he can either proceed with current counsel, or represent himself.” Id. In this case, I inquired into Benson’s reasons for requesting substitute counsel, and found that they did not constitute good cause, because there did not appear to be a complete breakdown in communication.¹⁰ Accordingly, I gave Benson a choice between proceeding with his counsel or representing himself.

A trial court is not required to grant a continuance in these circumstances, but must consider the efficient administration of justice and the rights of the accused, including the right to prepare a defense. United States v. Kikumura, 947 F.2d 72, 78 (3d Cir. 1991). While a “myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality,” the Supreme Court has said that a denial of a continuance is an abuse of discretion only when it is “so arbitrary as to violate due process.” Ungar v. Sarafite, 376 U.S. 575, 589 (1964). My denial of a continuance was not arbitrary because Ivory asserted that he and Benson had discussed the case and the documents, and I offered them more time to talk and prepare for trial that afternoon.

¹⁰ In support of his motion, Benson argues that I did not inquire into the other grounds upon which Benson filed his motion for substitution of counsel: Ivory’s failure to request pretrial discovery in a timely manner, and his inaction in securing Gesualdo as a trial witness. (Def.’s Mem. of Law in Supp. of Pro Se Post-Trial Mot. at 8.) In fact, when I inquired into whether Ivory had gone over the discovery documents with Benson, neither one of them said that they were missing documents, only that they had not had a chance to review them together. As for Ivory’s failure to subpoena Gesualdo, I discussed this issue with the lawyers on April 8th, and was told that Gesualdo was unavailable because he was very ill. (Tr. 4/8/05 at 4.) Immediately after denying Benson’s motion for substitution of counsel, I entertained Ivory’s renewed motion to enter Gesualdo’s testimony, and granted it. (Tr. 4/12/05 at 10-15.) Thus I considered the facts behind each of Benson’s objections to Ivory’s representation of him.

The facts of this case are distinguishable from those in Welty, where the defendant also requested an opportunity to retain new counsel or, in the alternative, represent himself. Welty was represented by an assistant public defender, just as Benson had court-appointed counsel. As the district court did in Welty, I denied the defendant's request for substitute counsel and essentially gave him a choice between continuing with his assigned counsel or proceeding pro se. The district court in Welty was reversed, however, for failure to make any real inquiry into whether "the reasons for the defendant's request for substitute counsel constitute good cause and are thus sufficiently substantial to justify a continuance of the trial in order to allow new counsel to be obtained." Welty, 674 F.2d at 187. In contrast, I questioned Benson on his reasons for requesting substitute counsel, eliciting that he was unhappy with Ivory's level of communication with him, and with Ivory's failure to go over discovery with him. (Tr. 4/12/05 at 4-6.) Ivory agreed that he had been "terribly busy" and had not "gone through [the discovery documents] in minute detail."¹¹ (Id. at 6.) I decided that Benson's complaints did not constitute good cause to substitute counsel on the eve of trial, because they could be remedied by further communication between him and his lawyer. I proposed that after jury selection, Benson and Ivory could take the afternoon to discuss the documents, and the trial would begin the following morning. (Id. at 7.) Benson twice said that this proposal was "Fair enough." (Id.) Denying substitution and a continuance under the circumstances was within my discretion.

This case is also distinguishable from Pazden v. Maurer, 424 F.3d 303 (3d Cir. 2005), in which the Third Circuit granted habeas relief because the trial court had forced the defendant to

¹¹ After trial, at the hearing on Benson's motion for new trial, Ivory said that he did not spend very much time meeting with Benson to prepare for trial, and that it may have helped to have more information from Benson. (Tr. 4/6/04 at 58.)

choose between grossly unprepared counsel and proceeding pro se. The defendant in Pazden requested a continuance because his counsel needed to interview hundreds of witnesses and follow up on thousands of pages of discovery that the prosecution was late in providing. The defendant felt compelled to represent himself because he knew the voluminous facts of the case better than his appointed counsel. The Third Circuit held that “[a] defendant may not be forced to proceed with incompetent counsel; a choice between proceeding with incompetent counsel or no counsel is in essence no choice at all.” Pazden, 424 F.3d at 313 (citing Wilks v. Israel, 626 F.2d 32, 35 (7th Cir. 1980)). In the present case, Benson had a straightforward defense of mistaken identity, and his lawyer had already successfully argued for the admissibility of pretrial testimony supporting his defense. Unlike Pazden, this trial involved only a handful of witnesses. Although it was to be his first federal trial, Ivory had tried fifteen to twenty jury trials in state court. (Tr. 4/6/06 at 4.) Under the circumstances, Ivory was not incompetent counsel and forcing Benson to choose between continuing with his representation or proceeding pro se was not a denial of due process. There is no basis for granting a new trial based on my denial of substitute counsel.

B. Ineffectiveness of Trial Counsel

Benson also argues that his trial counsel’s failure to interview Gesualdo and other omissions in trial preparation rendered his representation constitutionally deficient, requiring a new trial. Because I find that Ivory’s alleged ineffectiveness did not prejudice the outcome at

trial even if it fell below an objective standard of reasonableness, this argument fails.¹²

The standard for ineffective assistance of counsel is well settled. The defendant must satisfy a two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). The defendant must show “(1) that counsel’s representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel’s error, the result would have been different.” United States v. Nino, 878 F.2d 101, 103 (3d Cir. 1989) (citing Strickland, 466 U.S. at 687-96). Benson cannot demonstrate that any failures of his counsel satisfy both prongs.

1. Performance

Although the “objective standard of reasonableness” stated in Strickland is not a license for courts to second-guess every decision of trial counsel, decisions not to investigate must be supported by a professional rationale. The Court in Strickland noted that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 690-91. In this case, Ivory testified at the post-trial motion hearing that he thought Gesualdo “was a very, very important witness,” but had no explanation for why he never attempted to contact Gesualdo.

¹² Benson acknowledges that Sixth Amendment ineffective assistance claims are usually raised through collateral proceedings, not in a motion for new trial or on direct appeal. United States v. Thornton, 327 F.3d 268, 271 (3d Cir. 2003). In this case, as Benson points out, resolution of his claim is appropriate because an evidentiary hearing on the ineffectiveness claim occurred at which trial counsel testified on his own preparation and effectiveness. The government does not oppose consideration of the issue at this time. Because the evidentiary hearing provides a factual record relevant to effectiveness at trial, the issue is ripe for determination and need not be deferred for consideration in a collateral proceeding.

(Tr. 4/6/06 at 8-9.) Ivory's failure to investigate does not appear to be supported by a reasonable professional judgment.

In other cases where counsel failed to conduct any pretrial investigation of known exculpatory witnesses, the Third Circuit has flatly held that “[f]ailure to conduct any pretrial investigation is objectively unreasonable.” Rolan v. Vaughn, 445 F.3d 671, 682 (3d Cir. 2006); see also United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989). In this case, Ivory testified that in addition to not interviewing Gesualdo, he did not request any discovery beyond what was in the file, did not request a fingerprint test of the gun, did not attempt to interview the prosecution's witness Ms. Giacomucci, did not visit the store prior to the night before trial, did not investigate the police officers involved in Benson's arrest, and did not subpoena their personnel records. (Id. at 9-11.) Ivory admitted that he had assumed that the government would subpoena Gesualdo because he had “conflated the two Italian names” of Ugo Umile, owner of Ugo's Market, and Michele Gesualdo. (Id. at 19-20.) His complete failure to investigate a witness he considered very important, or to do any further pretrial investigation, fell below the objective standard of reasonableness.

2. Prejudice

It is not enough, however, for Benson to show that his counsel's performance was deficient. In order to show prejudice sufficient to satisfy the second prong of the Strickland test, Benson must show that there is “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. A reasonable probability is defined as a probability “sufficient to undermine confidence in the

outcome.” Hull v. Kyler, 190 F.3d 88, 110 (3d Cir. 1999). In this case, Benson argues that Ivory should have secured the attendance of Gesualdo at trial, and that his “live testimony before the jury would likely have made the difference between a guilty verdict and an acquittal.” (Def.’s Mem. of Law in Supp. of Pro Se Post-Trial Mot. at 16.) This argument is not supported by the facts of the case.

Unlike situations where counsel’s failure to investigate deprives a defendant of the opportunity to present exculpatory witnesses to the jury or to pursue a particular defense, here Gesualdo’s exculpatory testimony was presented to the jury and was part of the record. Therefore the cases cited by Benson are inapposite. See Gray, 878 F.2d at 712-714 (prejudice shown because defense counsel failed to investigate and present witnesses to support defendant’s self-defense claim); United States v. Kauffman, 109 F.3d 186, 190-91 (prejudice demonstrated where counsel’s failure to investigate insanity defense prevented guilty plea from being knowing, voluntary and intelligent); Thomas v. Lockhart, 738 F.2d 304, 308 (8th Cir. 1984) (failure to investigate led to defective guilty plea); Sullivan v. Fairman, 819 F.2d 1382 (7th Cir. 1987) (failure to investigate undermined confidence in trial because four disinterested eyewitnesses who would have said defendant was not the murderer were not presented); Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985) (defense counsel never contacted or presented alibi witnesses who could have corroborated defendant’s testimony); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (prejudice prong satisfied because attorney’s failure to investigate deprived jury of testimony in support of defendant’s alibi). In each of these cases where prejudice based on the trial attorney’s defective performance was found, the fact-finder was deprived of evidence that could have changed the outcome of the case. Here, Gesualdo’s complete testimony from the

pretrial hearing was read to the jury, which heard that the man who tried to rob Gesualdo and the store was “a few feet away...Very close” and said that he did not see the man in court even though Benson was sitting at the defense table. (Tr. 4/13/05 at 30.) Thus the jury heard that Gesualdo testified under oath that Benson was not the man who robbed the store.¹³

It is far from certain that Gesualdo could have been made to appear at trial in any case. After I ordered both counsel to try to subpoena Gesualdo before the trial started, Ivory went to Ugo’s Market and spoke to an employee there, who told him that Gesualdo was in the hospital because he had suffered a heart attack. (Tr. 4/6/06 at 29.) Gesualdo died about a month after trial. (Gesualdo Death Certificate, Ex. A to Gov.’s Supp. Br. in Resp. to Post Trial Mot.) Under the circumstances, it seems unlikely that Gesualdo would have been able to come to court at all. Even if Ivory had applied for a court order authorizing a deposition to take Gesualdo’s testimony pursuant to Federal Rule of Criminal Procedure 15(a), as Benson argues he should have, there is no indication that his testimony would have been any better. The preliminary hearing testimony read to the jury described how closely Gesualdo observed the robber and definitively stated that Benson was not the robber, which perfectly supported Benson’s defense of mistaken identity. Because the testimony was read in due to Gesualdo’s unavailability, the prosecution did not have a chance to cross-examine or impeach him in front of the jury, which could have hurt his credibility. Any prejudice that Benson argues he may have suffered from Ivory’s failure to interview Gesualdo and present his live testimony is speculative and does not undermine

¹³ Although Ivory’s failure to investigate Gesualdo before trial was unreasonable, it was his persistence that placed Gesualdo’s testimony before the jury. After learning that the government did not plan to subpoena Gesualdo, and believing Gesualdo too sick to testify, he moved twice to allow into evidence Gesualdo’s preliminary hearing testimony, and I granted his motion the second time.

confidence in the outcome of the trial.

Ivory's other omissions also fail to satisfy the prejudice prong of the Strickland test. Although Ivory did not himself request discovery, Benson's original counsel, the Federal Public Defender, requested and received discovery. Benson cannot point to any document or item that should have been produced to Ivory that would have made a difference in the outcome of the trial. Also, although Ivory failed to request that the gun be tested for fingerprints, the government avers that the gun was never preserved for fingerprints, and in fact has been handled by many people since its seizure at Ugo's Market. (See Letter from Arlene D. Fisk to court, June 13, 2006.) Benson cannot show prejudice from any of Ivory's acts or omissions.

Finally, the effect of Ivory's inadequate performance "must be evaluated in light of the totality of the evidence at trial: 'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" Gray, 878 F.2d at 711 (citing Strickland, 466 U.S. at 696). In this case, the guilty verdict is supported by the testimony of Ms. Giacomucci, the shopkeeper who had personal contact with the robber, flagged down a police car outside, and testified that there was no doubt in her mind that Benson was the person who showed her the gun and pushed her. (Tr. 4/13/05 at 49-57.) The arresting officer Anthony Jones testified that after Ms. Giacomucci ran out of the store saying that a man with a gun was robbing the store, he saw Benson exit the store, walk back in, and come right out again. (Id. at 92.) The gun was found behind some loaves of bread on a shelf by the door. (Id. at 125-26.) Given this ample record support for a guilty verdict, it is even less likely that any of Ivory's failures undermined faith in the outcome of the trial. The jury had Gesualdo's testimony to consider, but found these other witnesses more credible. Benson's claim of ineffective

assistance fails.

C. Supplemental Jury Instructions

Benson argues that the supplemental jury instructions given on the element of interstate commerce violated his right to a fair trial and denied him due process of law. (Supp. to Def.'s Mot. for New Trial at 2.) After careful consideration, I find that the supplemental instruction did not represent a substantive change in the instructions, nor did it prejudice Benson.

Jury instructions are governed by Federal Rule of Criminal Procedure 30, which allows the parties to request specific jury instructions in writing. Rule 30(a). The Rule requires the court to “inform the parties before closing arguments how it intends to rule on the requested instructions.” Rule 30(b). In order to preserve an objection for appellate review, a party “must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate.” Rule 30(d). While Rule 30 does not specifically address supplemental jury instructions, the Supreme Court has said that “[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.” Bollenbach v. United States, 326 U.S. 607, 612-13 (1946). Both “the form and extent of supplemental jury instructions are within the sound discretion of the court.” Beardshall v. Minuteman Press Int’l, Inc., 664 F.2d 23, 28 (3d Cir. 1981).

In this case, the government submitted the jury instruction explaining the required effect on interstate commerce that proved confusing to the jury. Neither party objected to the instruction, which they received prior to closing arguments. I originally instructed the jury that:

If you decide that the defendant attempted to obtain another’s property by means of

robbery, you must then decide whether there was **actual or potential effect on interstate commerce** [. . .] If you decide that there was **any effect at all on interstate commerce**, then that is enough to satisfy this element.

(Tr. 4/13/05 at 182) (emphasis added). The instruction continued to explain that:

If you find that the defendant intended to take certain actions, that is, he did the acts charged in the indictment in order to obtain property and you find that those actions **have been cause . . . or would probably cause an effect on interstate commerce**, then you may find the requirements of this element have been satisfied.

(Id. at 182-83) (emphasis added). After the jury pointed out the inconsistency between “potential effect” and “probably cause,” the government took responsibility for proposing the unclear instructions. (Tr. 4/14/05 at 6.) Benson suggests that the invited error doctrine should have prevented the government from arguing that the “probably cause” language was in error. See U.S. v. Console, 13 F.3d 641, 660 (3d Cir. 1993) (a party “cannot complain on appeal of alleged errors invited or induced by himself”). In this case, the government’s error led to the jury’s repeated requests for clarification. Instead of punishing the government for its inconsistent instruction, my duty at that point was to clarify the standard for the jury by giving them an accurate statement of the law.

The supplemental jury instruction I gave was legally correct. About a year before the trial in this case, the Third Circuit had noted that “[i]f the defendants’ conduct produces any interference with or effect upon interstate commerce, whether slight, subtle or even potential, it is sufficient to uphold a prosecution under [18 U.S.C. § 1951].” U.S. v. Haywood, 363 F.3d 200, 210 (3d Cir. 2004). The supplemental jury instruction given in this case tracked that language exactly. After the jury requested clarification, I instructed them that the “Government must prove beyond a reasonable doubt that the defendant’s conduct produces **any interference with**

or effect upon interstate commerce whether slight, subtle or even potential.” (Tr. 4/15/05 at 29) (emphasis added). Less than a week after I gave the jury the supplemental instruction in this case, the Third Circuit definitively approved a jury instruction very similar to mine: that the crime need only have “potentially caused an effect on interstate commerce to any degree” to find liability under § 1951.¹⁴ United States v. Urban, 404 F.3d 754, 761-66 (3d Cir. 2005). There was nothing incorrect or misleading about the supplemental instruction in Benson’s case.¹⁵

In addition, the supplemental instruction did not introduce a new theory of liability. In United States v. Smith, 789 F.2d 196, 202 (3d Cir. 1986), the Third Circuit held that a supplemental instruction that was a correct statement of the law, did not present a new theory of criminal liability, and was not a material modification of the original instructions did not violate Rule 30. The original instruction in the present case included a statement that “actual or potential effect on interstate commerce” was required for a violation of 18 U.S.C. § 1951. Thus “potential” was the lowest quantum of effect under the original instructions, which Benson did not object to. The supplemental instruction specified the same floor for effect on interstate commerce, that is, it must be at least “potential.” The supplemental instruction essentially chose

¹⁴ In Urban, the district court had instructed the jury that:

You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the extortion – of the money payment, potentially caused an effect on interstate commerce to any degree, however minimal or slight.

Urban, 404 F.3d at 762.

¹⁵ It is true that just before giving the supplemental instruction, I told Benson’s counsel Mr. Ivory that if he received an adverse verdict, “I will be very receptive to a new trial.” (Tr. 4/15/05 at 27.) I was indicating that a motion for new trial would be viewed with an open mind because I was unhappy with the government’s submission of conflicting points for charge necessitating a supplemental instruction. I was also impressed with the perspicacity of the jury. Obviously I was not promising how I would rule on such a motion.

one of the two standards presented in the original jury charge, which was given to the parties before the close of trial. According to Rule 30, Benson should have objected to the instruction before the jury retired to deliberate. Fed. R. Crim. P. 30(d). The supplemental instruction did not introduce a lower burden for the government than had already been articulated in the original jury instructions. Just like the supplemental instruction in Smith, it did not violate Rule 30.

Moreover, Benson is unable to show how the supplemental instruction prejudiced him in any way. As Benson notes, “[m]aterial modifications of instructions will give rise to a violation of Rule 30 because the defendant is not given an opportunity to address the charge.” Smith, 789 F.2d at 202. Two other Courts of Appeals have explained that when Rule 30 is violated, “reversal is required where the defendant can show that he was ‘substantially misled in formulating his arguments’ or otherwise prejudiced.” U.S. v. Eisen, 974 F.2d 246, 256 (2d Cir. 1992) (quoting U.S. v. Smith, 629 F.2d 650, 653 (10th Cir. 1980)). As discussed above, the supplemental instruction was not a material modification because it did not introduce a new standard or theory of liability. But even if the standard for effect on interstate commerce was somewhat altered from the previous instruction, Benson cannot show that he would have formulated any arguments differently.

Benson did not suffer prejudice from the selection of the “potential effect” over “probably cause” standard after the jury began deliberations because he did not argue either standard to the jury during trial. Benson’s theory of the case was that he was not the robber. (Tr. 4/6/06 at 51-53.) He did not mention interstate commerce in his opening statement. (Tr. 4/13/05 at 22-26.) Nor did Benson ask any questions of the business owner about interstate commerce on cross-examination. (Id. at 78-80.) Benson’s closing argument did not mention interstate commerce at

all. (Id. at 160-67.) At no time did Benson address whether the robbery had a potential or probable effect on interstate commerce. The supplemental jury instruction did not conflict with Benson’s theory of the case, and even in briefing this motion Benson does not suggest how he would have argued anything differently if the supplemental instruction had been provided to him before closing arguments.

The cases relied on by Benson in support of a new trial in fact support the requirement of prejudice before a conviction can be vacated for a Rule 30 violation. In United States v. Horton, 921 F.2d 540 (4th Cir. 1990), the trial court did not instruct the jury on aiding and abetting at all until it asked a question, so that a whole new theory of liability was introduced after jury deliberations began. Id. at 542-43. Even so, the court affirmed Horton’s conviction because he failed to show prejudice; the facts and arguments relevant to his guilt as a principal and as an aider and abettor “are essentially the same under both theories.”¹⁶ Id. at 547. The court held that a “violation of Rule 30 requires reversal only when the defendant can show actual prejudice.” Id. Similarly, in United States v. Gaskins, 849 F.2d 454 (9th Cir. 1988), the court framed its inquiry as “whether the district judge’s decision to give the aiding and abetting instruction during jury deliberations, after initially stating at the Rule 30 hearing that he would not, unfairly prevented Gaskin’s counsel from arguing against an aiding and abetting *theory* to the jury.” Id. at 460 (emphasis in original). In Gaskins, the court found prejudice because there were several

¹⁶ The court also rejected Horton’s argument that the government’s original decision not to request an aiding and abetting instruction prevented the court from providing one. Instead, it noted that “While appellant correctly states that when a party chooses not to advance a particular theory it is not *entitled* to an instruction on that theory even if there is evidentiary support for the theory in the record, the court is not *precluded* from giving any instruction for which there is evidentiary support.” Horton, 920 F.2d at 544 (emphasis in original). There, as here, the additional instruction was prompted by multiple questions from the jury.

arguments that defense counsel could have raised to refute the new theory of aiding and abetting if she had known that the jury would be instructed on it. In the present case, no new theory was introduced, and the defendant in his arguments did not even touch on the element of the offense that was the subject of the supplemental instructions.

The supplemental instruction was legally correct, did not introduce a new theory of liability, and did not prejudice the defendant, who did not even mention the element of interstate commerce at trial despite its inclusion in the original jury charge. Under the circumstances, there was no violation of Rule 30, and no basis for granting a new trial.

III. CONCLUSION

For the reasons set forth above, each of Benson's three arguments for a new trial fails. It was not an abuse of discretion to deny his request, made on the eve of trial, for substitute counsel to be appointed after one substitution had already been granted. His constitutional right to counsel was not violated by trial counsel's representation, because although Ivory's performance may have fallen below the standard of reasonableness, Benson could not show prejudice. The sworn testimony of the sole exculpatory witness was still read to the jury at trial. Finally, the supplemental jury instruction given in response to jury confusion over the interstate commerce element was correct and did not prejudice Benson. Therefore his motion for new trial pursuant to Rule 33 is denied. An appropriate order follows.

AND NOW, this _____ day of August, 2006, it is **ORDERED** that defendant's Motion for Acquittal and for New Trial (Doc. #77) and Motion to Supplement (Doc. #79) are **DENIED**.

S/Anita B. Brody

ANITA B. BRODY, J.

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