

03-1561-cr

To Be Argued By:
BRIAN E. SPEARS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1561-cr

UNITED STATES OF AMERICA,

Appellant,

-vs-

CEDRIC BURDEN, aka Sid,

Defendant-Appellee,

(For continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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REPLY BRIEF
FOR THE UNITED STATES OF AMERICA

=====

KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

BRIAN E. SPEARS
WILLIAM J. NARDINI
Assistant United States Attorneys

TERRENCE BOYD, TODD SUMMERVILLE, KELVIN BURDEN, aka Waffle, aka Uncle, aka Unc, DAVID 4 BURDEN, aka DMX, aka David X, ANTHONY BURDEN, aka Tony, WILLIE PREZZIE, aka Prez, aka Dog, ANTHONY BUCHANAN, aka Jungle, TERRENCE THOMPSON, aka Creed, MICHAEL SAWYER, aka Michael Moss, TERRA NIVENS, aka Stink, aka Stinkfinger, FRED KNIGHT, aka Ace, aka Groovy, DWIGHT MASCHECK, aka Shorty, JERMAINE MARTIN, aka Psycho, ANDRE MCCLENDON, aka Popsicle, MICHAEL GLENN, aka Rockafella, ROBERT JONES, aka Swinger, DAVID 17 BURDEN, aka Quinten, aka Sid, JOSEPH DANIELS, aka Digital, LAVON GODFREY, ALVIN WHITE, aka Uncle Lee, ANDRE DAWSON, aka Yup Yup, JEFFREY FREDERICKS, aka JL, aka Dahmer, JAHOD NASH, aka Hottie Jig, MARK CALDWELL, aka Sparks, KEVIN HAMLETTE, aka Fresh, PATRICE ST. SURIN, aka Patrick, aka Watty Wat, THOMAS HOLMAN, aka Uno, ADAM SANDERS, aka AD, KENDAL MULLINS, aka K-Nice, THOMAS FAGAN, JOSEPH DARDEN, JEFFREY LOCKHART, LAMONT BROWN, aka L, ST. CLAIR BURDEN, aka Gowser, aka Boo Boo, aka GP, JERMAINE BUCHANAN, aka Ski, ANTONIO WILLIAMS, aka Lo Lo,

Defendants.

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REPLY BRIEF FOR THE UNITED STATES OF AMERICA

The government submits this Reply Brief in response to various assertions raised in the defendant’s brief. As a general observation, the defendant’s response strays far beyond the question presented on appeal, namely whether the district court failed to adequately consider evidence establishing the defendant’s *membership* in a RICO enterprise through which he committed the crime of conspiracy to commit murder. The district court’s decision to grant a new trial was not based on concerns

about whether the defendant conspired to commit murder. In fact, the district court expressly stated that there was “no question” that the jury could find that he did. (GA 1015.) The issue was and is whether the evidence proved the defendant’s membership in a RICO enterprise.

As set forth below, the defendant’s assertions reflect a misreading of the trial record and a misunderstanding of the manner in which a jury verdict should be reviewed post trial. As this Court is well aware, a district court’s authority to grant a new trial should be “a rarely used power.” *United States v. Ferguson*, 246 F.3d 129, 131 (2d Cir. 2001). The district court must take pains not to “usurp” the role of the jury and “generally must defer to the jury’s resolution of conflicting evidence and assessment of witness credibility.” *Id.*

In his response, the defendant not only has failed to accord due deference to the jury’s verdict but has distorted the trial evidence in an effort to defend the district court’s decision to grant him a new trial. Going still further, the defendant now argues that he is entitled to a judgment of acquittal. His position is wholly without merit.

REPLY ARGUMENT

I. THE DEFENDANT MISREADS THE TRIAL RECORD AND IGNORES A WEALTH OF EVIDENCE PROVING HIS MEMBERSHIP IN THE CHARGED RICO ENTERPRISE.

To begin with, the defendant has failed to defuse the full impact of the November 1998 letter that he sent to the lieutenant of the Burden Organization, a letter which itself establishes the defendant's membership in the charged RICO enterprise. The defendant, for example, wrongly asserts that there is nothing in the letter that indicates that the defendant served or desired to serve as an enforcer. (Defendant's Brief ("Def. Br" at 5.)) The text of the letter proves otherwise:

Motha fuckas think shit sweet now days cause we keep letting shit go unanswered. But dat shit about ta cease Dats my word.... *If niggas on da other team want war, umm da best at dat shit!!* I want you to wait till I get out so we can handle dat nigga MF once and for all... Shit ain't over till' its fuckin over.

(GA 70; emphasis added.) The tenor of this excerpt more than supports the government's theory of the case, i.e., that the defendant viewed himself as an enforcer for the Burden Organization.

The defendant also insinuates that the November 1998 letter is merely an effort by the defendant to "sternly lecture [David "DMX" Burden] about family unity and

strength.” (Def. Br. 5.) For support, the defendant notes his reference to various ancestors and relatives of the Burden family. The jury was free to draw a contrary inference.

When speaking of his interest in performing acts of violence upon his release from jail, the defendant addressed his remarks to members of the Burden Organization, not distant relatives. The defendant asked the organization’s lieutenant to convey his message to Kelvin Burden, Keith Lyons, Charles Lyons, Anthony Buchanan, Willie Prezzie, Terrence Burden, and David “QB” Burden (to whom he referred by nickname). The evidence established that these individuals were integral members of the organization’s drug trafficking business. Indeed, Kelvin Burden, David “DMX” Burden, and David “QB” Burden were core members who engaged in acts of violence, as the jury found. Consistent with the defendant’s statements in the letter, these individuals comprised the “team” -- the organization -- of which the defendant considered himself a member. The defendant did *not* ask in the letter that his message be relayed to any relatives who were not involved in the drug organization. The jury could reasonably infer from the defendant’s statements that he held a position in the enterprise which he desired to and did maintain upon his release from jail. (GA 69-71.)

Relatedly, the defendant baldly asserts that “the defendant did none of the things contemplated in the letter and instead, changed his entire way of life.” (Def. Br. 6.) Focusing on the period of the conspiracy to commit murder, i.e., from August 1999 through October 1999, the

defendant indeed did what he said he would do in the November 1998 letter.

The defendant involved himself in the activities of the organization. (*See, e.g.*, GA 69-70, 410-14, 638-43.) He concerned himself with the various turf wars that existed, particularly the dispute involving the Hill Crew. (GA 69-71.) He told Anthony Burden that he wanted to kill Hill Crew member Michael Dawson. (GA 513-15, 544-47.) He spent time at the Burden Organization's stash house, cleaning weapons that he and others used in a shooting incident on October 10, 1999. (GA 638-43.) When the organization's leader, Kelvin Burden, asked the defendant, David "DMX" Burden and David "QB" Burden to locate and gun down Hill Crew members Fred Hatton and Rodrick Richardson, the defendant agreed, armed himself and participated in the shooting. (GA 638-43.) Contrary to the defendant's argument, these actions are remarkably consistent with the defendant's stated intentions in his November 1998 letter. (GA 70-71.)

Apart from mischaracterizing the thrust of the November 1998 letter, the defendant makes several flawed assertions as to the lack of evidence against him. Notably, the defendant asserts that there "is no evidence that Cedric Burden planned acts of violence against the Hill Crew or agreed to such acts." (Def. Br. 6-7.) This claim defies the evidence.

The defendant stated to Anthony Burden, another member of the organization, that he wanted to kill Michael Dawson. (GA 513-515, 544-47.) Anthony Burden testified that he agreed with the defendant. (GA 514.)

The defendant cleaned weapons at the stash house on the same day that he and other members of the organization participated in a shooting involving Hill Crew members. (GA 640-41.) Immediately following the shooting incident, the defendant met at the stash house with other core members of the organization to map out a strategy to cover up their violent actions. (GA 642-43.)

As to the cleaning of weapons, the defendant suggests that it was just a coincidence that the weapons were cleaned on the same day as the shooting incident. (Def. Br. 21.) He draws this conclusion by ignoring powerful contextual evidence to the contrary. It is undisputed that just days before the defendant cleaned the guns, Hill Crew member Fred Hatton fired several rounds at a car driven by David “QB” Burden. (GA 638-39.) From this act of aggression by Hatton, along with the defendant’s expressed intent to kill Dawson and the fact that the defendant stated while in jail that he wanted to participate in acts of violence against the organization’s enemies, the jury could reasonably conclude that the defendant’s cleaning of weapons at the stash house was not merely a coincidence. Rather, the defendant was preparing himself and other members of the RICO enterprise for an eventual confrontation with members of the Hill Crew -- a confrontation that in fact occurred that same day.

Next, the defendant suggests that the October 10, 1999, shooting incident in which he participated is not relevant to his conspiracy conviction, because he was acquitted of the underlying substantive count. (Def. Br. 12.) As a legal matter the defendant is wrong. This Court has held that an acquittal on a substantive charge is not inconsistent with

the jury convicting a defendant on a conspiracy charge stemming from the same nucleus of facts. *See United States v. Chen*, 378 F.3d 151, 163 (2d Cir. 2004) (noting that acquittal on substantive charge does not prevent conviction on substantive conspiracy charge), *pet'n for cert. filed*, No. 04-6816 (Aug. 5, 2004); *United States v. Clemente*, 22 F.3d 477, 480-81 (2d Cir. 1994) (same); *see also Dunn v. United States*, 284 U.S. 390, 393-94 (1932) (even where jury verdict is inconsistent, defendant cannot attack conviction on such grounds).

Finally, in seeking to rationalize the district court's decision to set aside the verdict, the defendant claims that the decision furthers the interests of protecting a potentially innocent man. (Def. Br. 28, 30.) This argument is flawed. The district court was satisfied that a RICO enterprise existed. Furthermore, as to the October 10, 1999, shooting, the district court had "no question that [a] jury could convict this defendant and others" on a state charge of conspiracy to commit murder. (GA 1015.)

In setting aside the verdict, the district court focused solely on one element of the offense, namely whether the defendant held a position in the enterprise. On this score, as noted, there was ample evidence from which the jury concluded that the defendant was a member of the enterprise. Given the evidence of membership, in particular the November 1998 letter -- the full import of which the district court disregarded, -- there is no danger that the jury convicted an innocent person.

II. THE DEFENDANT WRONGLY RELIES ON THE COURT'S JURY CHARGE AND THE GOVERNMENT'S CLOSING ARGUMENT IN CLAIMING THAT HIS CONVICTION WAS THE RESULT OF MERE GUILT BY ASSOCIATION.

The defendant argues that the jury charge allowed the jury to convict him on the basis of his mere association with the Burden Organization. (Def. Br. 25.) These concerns are unfounded.

The court's instructions expressly prohibited the jury from convicting the defendant because of his associations with members of the Burden Organization. (GA 844.) The district court tailored its general instructions to the facts of this case, making it clear that the defendant's mere family relationship with other defendants could not form a basis for a conviction. (GA 844.) The court reiterated the point when discussing the meaning of "enterprise" for purposes of RICO offenses. (GA 860-61.)

Apart from attacking the jury charge, the defendant claims that the government's closing arguments encouraged the jury to convict the defendant solely because of his associations with drug-dealing family members. (Def. Br. 2, 27.) The record undercuts his argument. In fact, the government candidly explained to the jury that the defendant was "not charged with the drug offense." The government explained that Cedric Burden was "part of the team," that he wanted to be part of the violence, and that he "want[ed] the team to fight for respect." (GA 725-26.) In rebuttal, the government

reiterated to the jury that some of the defendants were involved in drug trafficking, but “obviously Cedric Burden is not such a defendant.” (GA 790.) At no point during the trial did the government suggest to the jury that the defendant involved himself in the sale of narcotics.

The defendant also claims that the government’s closing arguments failed to emphasize the VCAR purpose element of the offense, i.e., that the defendant engaged in violent crime for the purpose of maintaining or increasing his position in the enterprise. (Def. Br. 26.) Again, the defendant has misread the record. When summarizing evidence regarding the manner in which the defendant and others responded to Kelvin Burden’s orders to shoot Hatton and Richardson on October 10, 1999, government counsel explained to the jury as follows:

What happens? They come through. It was expected of them to step up and perform acts of violence, to put down the Hill Crew. That’s what we’re talking about, maintaining or increasing the position in the enterprise.

(GA 752.)

In short, the district court and the government took appropriate precautions to ensure that the jury did not convict the defendant on the basis of his mere associations with family members. The jury is presumed to have followed the court’s instructions, thereby minimizing the danger that the jury assigned guilt to the defendant solely on the basis of his association with other members of the RICO enterprise. *See Greer v. Miller*, 483 U.S. 756, 766

n.8 (1987) (jury presumed to follow court's instructions); *United States v. Salameh*, 152 F.3d 88, 144 (2d Cir. 1998) (same).

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT; THE DEFENDANT'S REQUEST FOR JUDGMENT OF ACQUITTAL IS WITHOUT MERIT.

Going well beyond the question presented in this appeal, the defendant seeks to re-litigate claims that the district court rejected, regarding the sufficiency of the evidence. The defendant directs his sufficiency claim to various elements of the offense, i.e., whether the defendant conspired to murder members of the Hill Crew and whether the defendant engaged in violent crime in order to maintain or increase his position in the enterprise. The defendant's request that this Court reverse the district court's denial of his motion for judgment of acquittal is misplaced. (Def. Br. 18-20, 32.)

To begin with, the issue raised in this appeal concerns the propriety of the district court's decision to grant the defendant a new trial, a ruling that the government appealed. (GA 227.) The defendant did not file a cross-appeal. Because the district court granted his motion for a new trial, there is not presently a judgment of conviction from which the defendant may pursue an appeal as a final order. Hence, this Court lacks jurisdiction over his challenge to the sufficiency of the evidence. *See Ferguson*, 246 F.3d at 137-38 (finding no appellate jurisdiction over defendant's purported cross-appeal from denial of Rule 29 motion, where government filed appeal

from grant of Rule 33 motion); *cf. Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 714 (2d Cir. 2001) (appellee who has failed to file a notice of cross-appeal cannot attack judgment with a view toward enlarging his own rights thereunder); *Burgo v. General Dynamics Corp.*, 122 F.3d 140, 145 (2d Cir. 1997) (same).

Moreover, on its merits, the defendant's sufficiency of the evidence claim is baseless. The standard for post-trial review of a jury verdict is well-settled. The Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses are matters for argument to the jury, not grounds for legal reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See, e.g., United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir.), *cert. denied*, 124 S. Ct. 272 (2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002); *United States v. Downing*, 297 F.3d 52, 56 (2d Cir. 2002). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find.*" *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original).

Here, the district court properly recognized that the jury's verdict was adequately supported by the evidence. Having determined that the evidence sufficiently established the existence of a RICO enterprise, the

defendant's membership in it, and the defendant's involvement in a conspiracy to commit murder, the court denied the defendant's motion for judgment of acquittal. (GA 211, 226.)

The trial record fully supports the jury's verdict. The November 1998 letter reveals the defendant's intent to engage in violent crimes, as does his statement to Anthony Burden that he wanted to murder Michael Dawson. (GA 69-71, 513-15, 544-47.) Similarly, the defendant's participation in the October 10, 1999, shooting of Hill Crew members reveals the existence of a murder conspiracy. In this regard, Kelvin Burden ordered that members of his enterprise locate and shoot members of the Hill Crew. The defendant, along with David "DMX" Burden and David "QB" Burden, responded to the call. The defendant was armed with a loaded handgun. The defendant pointed his gun at Hatton and Richardson. When they ran, the defendant, along with David "DMX" Burden and David "QB" Burden, chased after Hatton and Richardson. Shots were fired at Hatton and Richardson, but neither was able to determine if the defendant fired any of the shots. (GA 339-42, 638-43; Tr. 1941-50, 2600-18.)

The defendant now argues that the defendant's alleged failure to fire a shot at the moment of the initial encounter with Hatton and Richardson indicates the absence of an intent to kill. (Def. Br. 13-14.) However, the jury could have reasonably inferred that if the defendant indeed failed to shoot at that point, it was because when he pointed the gun at Hatton and Richardson, the gun was inches away from his brother's face. (Tr. 1941-50, 2600-18.) In either case, under all of the circumstances, the jury could

reasonably conclude that the defendant participated in the shooting incident as a member of a conspiracy to commit murder. In denying the defendant's request for a judgment of acquittal, the district court properly recognized that there was "no question" that the jury could have found the defendant guilty of conspiracy to commit murder. (GA 1015.)

The defendant's claim that his actions were not designed to maintain or increase his position in the enterprise is likewise untenable. The government's theory at trial was that the defendant conspired to commit murder in an effort to stake out his position as an enforcer for the organization. Similarly the government asked the jury to infer that the defendant engaged in the conspiracy to commit murder because it was expected of him by virtue of that position. (GA 725-26, 752.) The evidence supports the government's theory.

The defendant's own statements evince a desire to play the role of an enforcer for the organization. For example, the jury could reasonably draw such an inference from the defendant's statements to another member of the enterprise that he wanted to kill Michael Dawson. (GA 513-15, 544-47.) A similar inference can fairly be drawn from the defendant's statement to David "DMX" Burden that "If niggas on the other team want war, umm da best at dat shit." (GA 70.) See *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992) (VCAR purpose satisfied where defendant commits underlying crime with "motive of retaining or enhancing [his] position"); *United States v. Pimentel*, 346 F.3d 285, 295 (2d Cir. 2003) (same).

The evidence also proves the defendant's involvement in the conspiracy to commit murder because it was expected of him. For example, the defendant's involvement in the October 10, 1999, shooting occurred in response to direction from Kelvin Burden, the leader of the enterprise. Kelvin Burden called David "DMX" Burden and told him that members of the Hill Crew were in the vicinity of Les' New Moon Café. In response, the defendant, along with other core members of the organization, responded by engaging in a running gun battle with Hill Crew members Richardson and Hatton. (GA 339-42, 638-43.) From this sequence of events, the jury could rationally conclude that the defendant conspired to commit murder because Kelvin Burden expected him to engage in such violent actions against a rival gang. *See United States v. Polanco*, 145 F.3d 536, 540 (2d Cir. 1998) (VCAR motive requirement satisfied if violent crime is committed because it was expected of defendant's membership in the enterprise or because he committed it in furtherance of that membership); *see also United States v. Bruno*, 383 F.3d 65, 85 (2d Cir. 2004) (defendant who committed violent crimes "in contravention of [enterprise's] protocols," without authorization from leadership, and to settle "simply personal matters," did not act with requisite VCAR purpose).¹

¹ The government notes that since the filing of its initial appellate brief, this Court decided the case of *United States v. Bruno*, 383 F.3d 65 (2d Cir. 2004), referenced in the text herein. In *Bruno*, the Court reversed VCAR murder and attempted murder convictions because the violent acts were not committed "for the purpose of maintaining or increasing
(continued...)

In short, the district court properly concluded that the evidence was sufficient to support the jury's verdict; the district court, however, improperly intruded on the jury's province by granting the defendant a new trial.

¹ (...continued)

position in the enterprise.” The facts at issue in *Bruno* are readily distinguishable. Unlike the defendants in *Bruno*, the defendant here engaged in a conspiracy to commit murder at the request of Kelvin Burden, the leader of the enterprise. The defendant joined forces with core members of the enterprise to carry out Kelvin Burden's orders. The defendant, moreover, was not tending to “simply personal” matters. Rather, he was acting on concerns shared by other members of the enterprise, specifically that Hill Crew members were threatening members of the drug organization. *Id.* at 82.

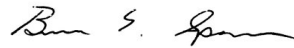
CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the jury's verdict finding the defendant Cedric Burden guilty on Count Nine should be reinstated.

Dated: November 2, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

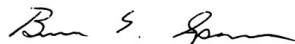


BRIAN E. SPEARS
ASSISTANT U.S. ATTORNEY

William J. Nardini
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 7,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 3,525 words, exclusive of the Table of Contents, Table of Authorities, and this Certification.



BRIAN E. SPEARS
ASSISTANT U.S. ATTORNEY