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United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,
v.
Mikhail ZEMLYANSKY, Defendant-Appellant.*
Docket No. 16-409
|
August Term 2017
|
Argued: September 12, 2017
|
Decided: November 5, 2018

Opinion

Wesley, Circuit Judge:

Twice—in 2013 and 2015—the Government tried defendant-appellant Mikhail Zemlyansky for his alleged involvement in criminal activity. The first jury did not convict him, but the second jury did. On appeal, Zemlyansky argues that the second conviction amounted to double jeopardy, because the Government secured the conviction by proving an issue the first jury had already decided in his favor. We are asked to decide whether the issue-preclusion component of the Double Jeopardy Clause prohibits the Government from predicating a Racketeer Influenced and Corrupt Organizations Act ("RICO") conspiracy charge on acts mirroring the defendant's earlier substantive and conspiracy acquittals. We conclude it does not. We also reject Zemlyansky's other arguments regarding constitutional error in his second trial. Accordingly, the judgment is **AFFIRMED**.

BACKGROUND

I. Zemlyansky's Criminal Schemes[1]

Zemlyansky was involved in several criminal schemes from before 2007 until his first indictment in 2013. These schemes included Lyons Ward; the Rockford Group; the Illegal Gambling Ring; and the No-Fault Insurance Organization.

A. Lyons Ward

In 2007, Zemlyansky started a fraudulent investment firm, "Lyons, Ward & Associates." The firm purported to invest in insurance-settlement claims, and it received almost $7 million from investors by guaranteeing them an 18% yearly return. But their money was never invested; instead, it was embezzled and then laundered through shell companies. To perpetuate the scheme, Zemlyansky issued false account statements and small interest payment checks to investors.

B. Rockford Group

In 2009, Zemlyansky started "Rockford Funding Group LLP." Like Lyons Ward, the Rockford Group was built on falsehoods and ultimately garnered approximately $10 million in investments. The proceeds from the two securities fraud schemes were wired to and from shell companies located in the United States and overseas.

C. Illegal Gambling Ring

Around the time Zemlyansky ran the Lyons Ward and Rockford Group securities fraud schemes, he also operated an illegal, high-stakes poker ring in Brooklyn, New York.

D. No-Fault Insurance Organization

Between 2009 and February 2012, Zemlyansky and his co-defendant Michael Danilovich owned and controlled medical professional corporations ("P.C.s"). These P.C.s fraudulently billed insurance companies for millions of dollars under New York's No-Fault Comprehensive Motor Vehicle Insurance Reparations Act, N.Y. Ins. Law § 5101 *et seq.*

Under the No-Fault Act, individuals injured in car accidents assign their statutory benefits to licensed medical professionals, who submit claims for medically "necessary" treatments directly to the injured party's insurance carriers. *See id.* § 5102; N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.11 (providing for assignment). Zemlyansky and Danilovich, who were not medical professionals, owned and controlled more than ten P.C.s in Brooklyn. The claims the P.C.s submitted to insurance companies were misleading, both because they often were for unnecessary treatments and because they represented that medical professionals owned and controlled the

P.C.s. Zemlyansky and Danilovich profited from insurance payments, fee-sharing arrangements, and kickbacks for referrals. They collected their profits from this no-fault insurance scheme, in part, through a series of wire transfers to and from shell companies overseas.

II. The S13 Indictment and First Trial

In May 2013, a federal grand jury returned the Superseding Indictment S13 ("S13 Indictment," or "first indictment"), charging Zemlyansky, Danilovich, and others with nine counts relating to the No-Fault Insurance Organization. The S13 Indictment did not include allegations relating to the Lyons Ward or Rockford Group securities fraud schemes, or to the Illegal Gambling Ring.

Count One of the S13 Indictment charged Zemlyansky with conspiring to participate in the affairs of a RICO enterprise, 18 U.S.C. § 1962(d). The charged racketeering enterprise was the No-Fault Insurance Organization, and the pattern of racketeering consisted of mail fraud, 18 U.S.C. § 1341, and money laundering, *id.* §§ 1956–57.

The S13 Indictment also charged Zemlyansky with eight counts that mirrored the RICO conspiracy's predicate offenses: conspiracy to commit healthcare fraud, 18 U.S.C. § 1347, 1349 (Count Two); substantive healthcare fraud, *id.* §§ 2, 1347 (Count Three); conspiracy to commit mail fraud, *id.* § 1349 (Count Four); mail fraud, *id.* §§ 2, 1341, 1349 (Count Five); conspiracy to commit money laundering, *id.* §§ 1956(h), 1957 (Count Six); and substantive money laundering, *id.* §§ 1956–57 (Counts Seven, Eight, and Nine).

On November 13, 2013, after a trial that lasted eight weeks, the jury acquitted Zemlyansky of the non-RICO conspiracy and substantive counts, Counts Two through Nine. The jury was unable to reach a verdict with respect to the RICO conspiracy count, Count One. The District Court declared a mistrial on that Count.

III. The S18 Indictment and Second Trial

Following the mistrial, a grand jury in 2015 returned the Superseding Indictment S18 ("S18 Indictment," or "second indictment") against Zemlyansky and others. The S18 Indictment contained six counts. Count One charged Zemlyansky with conspiring to violate RICO as a member of an expanded enterprise: the "Zemlyansky/Danilovich Organization." Like the racketeering enterprise alleged in the first indictment, the Zemlyansky/Danilovich Organization encompassed conduct relating to the No-Fault Insurance Organization. But the Zemlyansky/Danilovich Organization also encompassed conduct relating to Lyons Ward, the Rockford Group, and the Illegal Gambling Ring.

The S18 Indictment also charged Zemlyansky with five substantive counts relating to Lyons Ward. Those charges were: conspiracy to commit securities fraud, 18 U.S.C. § 371, 15 U.S.C. § 78j(b) (Count Two); substantive securities fraud, 15 U.S.C. §§ 78j(b), 78ff, 17 C.F.R. § 240.10b–5 (Count Three); conspiracy to commit mail and wire fraud, 18 U.S.C. §§ 1341, 1349 (Count Four); mail fraud, *id.* § 1341 (Count Five); and wire fraud, *id.* §§ 1343, 1349 (Count Six).

Zemlyansky moved to dismiss the RICO conspiracy count (Count One) and to preclude the Government from offering evidence of his involvement in the No-Fault Insurance Organization to prove that Count. He argued that under the issue-preclusion component of the Double Jeopardy Clause, the Government could not offer evidence of the insurance-fraud-related crimes of which he had been acquitted to prove the new RICO conspiracy charge. The District Court initially denied Zemlyansky's motion. *United States v. Zemlyansky*, No. 12-CR-171-1 (JPO), 2016 WL 111444 (S.D.N.Y. Jan. 11, 2016). Ultimately, however, it granted the motion in part, precluding the Government from arguing Zemlyansky was guilty of insurance fraud, while allowing "evidence of Mr. Zemlyansky's involvement in the alleged no-fault scheme insofar as such conduct [went] to his alleged guilt on the RICO conspiracy charge." Joint App. 358.

Two occurrences at Zemlyansky's second trial are the focus of his other challenges on appeal: the prosecution's comments in summation and the introduction of an audio-recording transcript. First, during rebuttal summation, the prosecution mentioned to the jury that Zemlyansky had cried during the testimony of a government witness. The District Court ordered the Government to "move on" and later issued a curative instruction. Joint App. 549–50. The District Court subsequently denied Zemlyansky's motion for either a mistrial or to reopen the proceedings to allow defense counsel to present an alternative explanation of Zemlyansky's demeanor. Second, the District Court admitted, over Zemlyansky's objection and subject to a limiting instruction, a government-prepared transcript that identified Zemlyansky as the declarant in an incriminating audio recording. The District Court further allowed the jury to use the transcript as an aid during deliberations.

After a month-long trial, the jury convicted Zemlyansky of all six counts. The special verdict form reflected the jury's determination that Zemlyansky was liable for all five of the RICO conspiracy count's predicate acts.

The District Court denied Zemlyansky's motion for a new trial and sentenced him principally to 180 months'

imprisonment and three years' supervised release. It also ordered him to forfeit $29,575,846 and to pay restitution of $27,741,579.67. Zemlyansky timely appealed his conviction and sentence.[2]

On appeal, Zemlyansky renews his argument that his conviction of the RICO conspiracy count charged in the second indictment violated his Fifth Amendment right to be free from double jeopardy. He also maintains that the prosecution's rebuttal summation comments on his courtroom demeanor violated his Fifth and Sixth Amendment rights against self-incrimination, to adverse witness confrontation and conflict-free counsel, and to a fair trial. He further argues that the District Court's evidentiary ruling admitting the transcript violated his Sixth Amendment right to a fair trial. These errors, Zemlyansky urges, amount to cumulative error.

DISCUSSION

* * * *

B. The Government Was Not Precluded from Using Acquitted Non-RICO Conspiracy Offenses as Racketeering Predicates in the Second RICO Conspiracy Charge

Zemlyansky next argues that the Government may not predicate a RICO conspiracy charge on acquitted conspiracy counts from a previous trial. At his first trial, Zemlyansky was acquitted of "basic" conspiracies to commit insurance-related mail fraud and money laundering. At his second trial, the expanded RICO conspiracy count listed insurance-related mail fraud and money laundering as predicate acts. While this is a closer call, we again disagree. We come to this conclusion by comparing the elements of "basic" and RICO conspiracy charges—in particular, how those elements differ as a result of the distinct objects of each.

The "basic" conspiracies at issue here require proof of: (1) an agreement between at least two people to commit an unlawful act, and (2) the defendant's knowing engagement in the conspiracy with the specific intent that the object of the conspiracy be committed. *See United States v. Mahaffy*, 693 F.3d 113, 123 (2d Cir. 2012); *see also United States v. Roy*, 783 F.3d 418, 421 (2d Cir. 2015) (per curium) (no overt act requirement for conspiracy under 18 U.S.C. § 1349); *Whitfield v. United States*, 543 U.S. 209, 214, 125 S.Ct. 687, 160 L.Ed.2d 611 (2005) (no overt act requirement for money laundering conspiracy, 18 U.S.C. § 1956(h)).

RICO conspiracy requires proof that the defendant "agree[d] to conduct or to participate in the conduct of [an] enterprise's affairs through a pattern of racketeering activity." *United States v. Pizzonia*, 577 F.3d 455, 462 (2d Cir. 2009). To prove the agreement element, the government must show that the defendant "knew about and agreed to facilitate [a racketeering] scheme." *Salinas*, 522 U.S. at 66, 118 S.Ct. 469; *see also Pizzonia*, 577 F.3d at 459 ("[T]he object of a racketeering conspiracy is to conduct the affairs of a charged enterprise through a pattern of racketeering, not to commit discrete predicate acts."). To prove the pattern element, the government must show that two or more "predicate acts were, or were intended to be, committed as part of [the] conspiracy." *United States v. Cain*, 671 F.3d 271, 291 (2d Cir. 2012) (quoting *Yannotti*, 541 F.3d at 129 n.11). As we have already observed, the government need not establish that the defendant "committed or agreed to commit two predicate acts himself." *Salinas*, 522 U.S. at 63, 118 S.Ct. 469. Rather, the government may prove the pattern element through evidence that "the co-conspirators, not solely the defendant, agreed to conduct the affairs of the enterprise through a pattern of racketeering." *Yannotti*, 541 F.3d at 129 n.11. In short, RICO conspiracy requires proof: (a) of an agreement to join a racketeering scheme, (b) of the defendant's knowing engagement in the scheme with the intent that its overall goals be effectuated, and (c) that the scheme involved, or by agreement between any members of the conspiracy was intended to involve, two or more predicate acts of racketeering.

A comparison of "basic" and RICO conspiracy makes clear that acquittal of the former does not compel the conclusion that a jury necessarily decided an essential element of the latter in Zemlyansky's favor. Unlike "basic" conspiracy, RICO conspiracy does not require proof that a defendant knowingly agreed to facilitate a specific crime (*e.g.*, mail fraud). So long as the defendant knowingly agreed to facilitate "the general criminal objective of a jointly undertaken [racketeering] scheme," *Yannotti*, 541 F.3d at 122, the government need not prove that he or she knowingly agreed to facilitate any specific predicate act. Similarly, unlike "basic" conspiracy, RICO conspiracy does not require proof that the defendant intended that specific criminal acts be accomplished. Instead, it suffices to show that he intended that the broad goals of the racketeering scheme be realized, along with evidence that some (or any) members of the conspiracy intended that specific criminal acts be accomplished.[6] RICO conspiracy and "basic" conspiracy thus have qualitatively different *mens rea* requirements as to agreement and intent.[7] A jury's finding that a defendant did not conspire to commit a particular predicate act does

not necessarily preclude a subsequent finding that he or she knowingly agreed to facilitate a racketeering scheme that involved, or was intended to involve, that same predicate act.

Having thus determined in the abstract that an acquittal on "basic" conspiracy does not in all cases preclude a subsequent trial for RICO conspiracy predicated upon the same conduct, we must now determine whether a retrial was permissible in Zemlyansky's case. The question we must answer is whether a "rational jury" could have acquitted Zemlyansky in the first trial for similar, non-preclusive reasons. *See Ashe*, 397 U.S. at 444, 90 S.Ct. 1189. We determine what a rational jury could have done by examining the record of the prior proceeding "in a practical frame and viewed with an eye to all [of its] circumstances." *Id.* (quoting *Sealfon v. United States*, 332 U.S. 575, 579, 68 S.Ct. 237, 92 L.Ed. 180 (1948)). This inquiry is "realis[tic] and rational[ ]," not "hypertechnical and archaic"; we evaluate the evidence in light of what was proven at trial and will not contort the analysis to find that a jury could have based its decision on alternate grounds when it clearly did not. *Id.* & n.9.

The record from the first trial makes clear that a rational jury could have grounded its "basic" conspiracy acquittals on reasons not essential to proving the later RICO conspiracy. For instance, the first jury could have found there was a conspiracy by individuals other than Zemlyansky to commit insurance-related mail fraud, while acquitting him on that count because he did not knowingly and intentionally agree to facilitate that particular conspiracy. Indeed, in acquitting Zemlyansky the jury could have found that he took great care to avoid agreeing to facilitate any specific "basic" conspiracies. Zemlyansky has acknowledged that his defense at the first trial was that, although he was involved in the P.C.s, he merely managed them in good faith, had nothing to do with patient care, and did not join any specific unlawful agreements with respect to their operation. The Government in the first trial also emphasized Zemlyansky's removed role in the no-fault insurance scheme, which might well have facilitated this jury finding. *See, e.g.*, Joint App. 313 (Tr. 4290) (describing Zemlyansky and Danilovich as operating "behind the scenes"). Thus, the second jury was not precluded from finding that Zemlyansky agreed to further the no-fault insurance scheme, notwithstanding the first jury's determination that he did not conspire to commit specific predicate acts.

Similarly, even if the first jury found that Zemlyansky's removed role left doubt as to whether he intended that specific crimes be committed, Zemlyansky could still be found guilty of RICO conspiracy if his co-conspirators had the requisite intent. This possibility exists because the first jury deadlocked as to whether two co-defendants in the first trial conspired to commit mail fraud and money laundering. The Government was, therefore, free to prove the pattern element through evidence that Zemlyansky's co-conspirators intended that the mail fraud and money laundering predicates be committed, even if Zemlyanksy lacked specific intent as to those individual predicates.

In acquitting Zemlyansky of the "basic" conspiracy counts, the first jury did not necessarily decide that he did not knowingly agree to further the no-fault insurance scheme or that the pattern of racketeering did not exist. As a result, the Government was not precluded from predicating the second RICO conspiracy count upon the insurance-related "basic" conspiracies of which Zemlyansky had earlier been acquitted.

* * * *

CONCLUSION

For these reasons, we **AFFIRM** the judgment of the District Court.

All Citations

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Footnotes

* The Clerk of the Court is directed to amend the caption as set forth above.

1 The following facts are drawn from the evidence presented at trial and described in the light most favorable to the Government. *See United States v. Litwok*, 678 F.3d 208, 210–11 (2d Cir. 2012).

2 On appeal, Zemlyansky makes arguments only with respect to his conviction; he has thus waived any challenges to his sentence. *See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) (arguments not raised in an appellant's opening brief are waived).

6 Though in many cases, evidence that the defendant agreed to further two specific predicate acts satisfies both the agreement and patter elements, proving RICO conspiracy in this manner is not required. RICO conspiracy could, for example, be proven by evidence that the defendant agreed to facilitate a scheme by providing tools, equipment, cover, or space; that the facilitation was knowing because the defendant was aware of the broader scheme, even if he was unaware of the particulars, or because the defendant knowingly benefitted from the scheme; and that other members of the enterprise intended to accomplish specific predicates.

7 That RICO conspiracy has a more removed *mens rea* requirement comports with the purposes for which RICO was enacted. RICO was to intended address the deliberately aloof positioning of organized crime leaders, who "buffer[ed]" themselves from the lower tiers of criminal conduct "to maintain insulation from the investigative procedures of the police." S. Rep. No. 91-617, at 37; *id.* at 42 ("Organized crime leaders moreover, have been notoriously successful in escaping punishment...."). RICO reflects this legislative concern by criminalizing an individual's indirect participation in, or conducting of, a racketeering enterprise. 18 U.S.C. § 1962(c); Organized Crime Control Act of 1970, Pub. L. 91-452, § 904(a), 84 Stat. 941, 947 (1970) ("The provisions of this title shall be liberally construed to effectuate its remedial purposes."); *see also, e.g.*, 116 Cong. Rec. S585, 586 (1970) (Sen. McClellan's remarks introducing bill) ("[T]he most serious aspect of the challenge that organized crime poses to our society is the degree to which its members have succeeded in placing themselves above the law."); 116 Cong. Rec. S600, 602 (1970) (remarks of Sen. Hruska) (explaining that Title IX was "designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses"); S. Rep. No. 91-617, at 79 (noting that RICO was targeted at "individuals" and "the economic base through which those individuals constitute such a serious threat").