IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 2:99CR10078
	)	
v.	)	**OPINION AND ORDER**
	)	
RICHARD CHARLES NORTON,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

In this opinion and order, I deny the defendant's post trial motion for a judgment of acquittal, or in the alternative, a new trial.

I

The defendant, Richard Charles Norton, a physician, was indicted along with James Luther Davis, Charles D. Fugate, and Michael Redman, for violating and conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961-1968 (West Supp. 2000) ("RICO"), relating to the Lee County Community Hospital. In addition, the defendants were charged with substantive crimes arising out of their alleged activities. Davis, Fugate, and Redman pleaded guilty pursuant to plea agreements with the government, and Norton went to trial. After a multi-day trial, the jury found Norton guilty of all counts. Norton thereafter filed a

timely motion for judgment of acquittal or for a new trial, *see* Fed. R. Crim. P. 29(c), 33, on the grounds that (1) the court erred in allowing evidence of a similar kickback scheme of which the defendant was not aware; (2) there was insufficient evidence to convict; and (3) the charge to the jury was erroneous. The issues have been briefed and the motion is ripe for decision.

II

Prior to his trial, Norton filed a motion in limine to exclude evidence of a kickback scheme between Davis and Redman, arguing that because the arrangement did not involve Norton, evidence regarding it would be of little probative value and would have an unfairly prejudicial effect of guilt by association. The motion was denied.

At trial, over the defendant's objection, both Davis and Redman testified about their scheme. The defendant argues that the admission of testimony regarding the Davis-Redman scheme was unfairly prejudicial to him.

Rule 402 of the Federal Rules of Evidence provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority." Fed. R. Evid. 402. "Relevant evidence" is defined as

that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Thus, the power of the court to admit evidence as relevant is generally broad. *See* 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5165 (1978).

Complementary to this broad power to admit evidence is the power to exclude evidence. Rule 403 provides that

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403. Thus, in determining whether to exclude something offered as evidence, the court must first find the proffered evidence to be relevant, then evaluate its probative value on one hand, and the potential danger of unfair prejudice on the other hand. The court may exclude the evidence only where the danger of unfair prejudice "substantially outweigh[s]" its probative value. *See* Fed. R. Evid. 403. "The trial court has wide discretion in addressing an argument under [Rule] 403, and its decision not to exclude evidence under Rule 403 will be reversed only in 'the most extraordinary circumstances.'" *United States v. Aragon*, 983 F.2d 1306, 1309-10 (4th Cir. 1993) (quoting *United States v. Heyward*, 729 F.2d 297, 301 n.2 (4th Cir. 1984)).

I find that the relevance and probative value of the evidence at issue was not substantially outweighed by the danger of unfair prejudice to the defendant.

Evidence regarding the Davis-Redman scheme was relevant in that the jury could find that it made the possibility of a Davis-Norton kickback arrangement "more probable or less probable." Fed. R. Evid. 401. Being relevant, the evidence also had probative value. Specifically, the evidence was helpful in the determination of the legitimacy of the Davis-Norton arrangement and the credibility of Davis as a witness.

A central issue before the jury was whether the payments to Davis by Norton constituted a legitimate business or professional arrangement or an illegal kickback scheme. The fact that Davis was admittedly engaged in another kickback scheme with another medical provider in the community could lead the jury to find it more probable that Norton's deal with Davis was likewise illegal. Evidence of a co-conspirator's other crimes, not involving the defendant, is properly admissible "to furnish an explanation of the understanding or intent with which certain acts were performed." *See United States v. Coonan*, 938 F.2d 1553, 1561 (2d Cir. 1991) (quoting *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988)); *see also United States v. Sheeran*, 699 F.2d 112, 118 (3d Cir. 1983) ("Evidence [of other] bribes . . . was relevant to show the conspirators' intent and the nature of their scheme or plan."). On the other hand, the fact that the Davis-Redman scheme involved a specific, closed-door conversation

devising a kickback scheme, whereas the Davis-Norton arrangement involved no such express agreement, could lead the jury to find it less probable that Norton was guilty. Thus, the evidence was probative to the question of the legitimacy of the Davis-Norton arrangement.

Moreover, the evidence was properly admissible to help the jury determine Davis' credibility as a witness. Prior to trial Davis pleaded guilty, and because Davis' credibility was likely to be questioned, "it was appropriate for the prosecution to elicit testimony during direct examination that exposed details damaging to [his] credibility . . . to avoid the appearance that it was concealing impeachment evidence from the jury." *Coonan*, 938 F.2d at 1561. In fact, defense counsel did, upon cross-examination of Davis, seek testimony of Davis' other criminal activities not involving the defendant. (Tr. at 2-48-50.) Thus, Davis' other activities were probative to his credibility, and sought by both the government and the defense.

Under Rule 403, the trial judge must weigh the probative value of relevant evidence against the potential for unfair prejudicial effect. *See* Fed. R. Evid. 403. The Eighth Circuit has recognized that "[w]hen the government introduces every bad act of an enterprise, including those in which the defendant does not participate, it magnifies the potential for imputing guilt to a defendant solely on the basis of the company he keeps." *United States v. Flynn*, 852 F.2d 1045, 1054 (8th Cir. 1988).

Several courts, however, have found that the probative value of evidence regarding other criminal activities by non-defendant co-conspirators in RICO prosecutions is not substantially outweighed by unfair prejudicial effect. For example, in a RICO prosecution involving allegations of kickbacks, the Second Circuit found no error where the trial court admitted evidence of bribes not involving the defendants. *See United States v. Zichettello*, 208 F.3d 72, 100-101 (2d Cir. 2000). The court noted that the evidence was relevant to the conspiracy charges and the credibility of the witnesses. *See id.* at 101. The evidence did not cause unfair prejudice to the defendants because it was clear to the jury that the defendants were not involved in those particular bribes. *See id.*

Like the evidence at issue in *Zichettello*, it was clear to the jury in this case that Norton was not involved in the Davis-Redman scheme. On cross examination of Redman, defense counsel elicited the following exchange:

> Q. Your relationship with Jim Davis, your paying a kickback to Jim Davis had absolutely nothing to do with Dr. Norton, did it?
>
> A. No, it did not.

(Tr. at 2-210.) Furthermore, defense counsel took the opportunity in closing argument to distinguish the Davis-Redman scheme and to dispel ideas of guilt by association. (Tr. at 4-181-83.) Therefore, the introduction of this evidence did not create unfair

prejudice; in fact, it provided an opportunity for the defendant to argue that his activities were legitimate in comparison.

RICO prosecutions frequently involve the introduction of evidence of other crimes by co-conspirators that do not involve the defendant. Because such evidence is often highly probative of the alleged scheme and the credibility of witnesses, challenges asserting that the evidence was unfairly prejudicial have been rejected. *See United States v. Weiner*, 3 F.3d 17, 22 (1st Cir. 1993); *United States v. DiNome*, 954 F.2d 839, 843-44 (2d Cir. 1992)*; Coonan*, 938 F.2d at 1561; *Sheeran*, 699 F.2d at 117-19. In light of this precedent and the facts of this case, I find that the probative value of the evidence of the Davis-Redman scheme was not substantially outweighed by unfair prejudice.[1]

[1] To support his argument that the Davis-Redman evidence was unfairly prejudicial, the defendant points to *United States v. Flynn*, 852 F.2d 1045 (8th Cir. 1988), in which the court held that it was error to admit unfairly prejudicial evidence regarding murders planned by other members of the RICO enterprise that did not involve the defendant. *See Flynn*, 852 F.2d at 1054. The court went on to find, however, that the error did not warrant a new trial, in part because the jury instructions made it clear that the defendant could only be convicted under RICO for certain predicate acts alleged in the indictment. *See id.* Likewise, it was clear from the court's instructions to the jury in this case that Norton could only be convicted under RICO for certain predicate acts alleged in the indictment. (Tr. at 4-212-36.) Therefore, even if evidence of the Davis-Redman scheme was unfairly prejudicial to the defendant, it would not warrant a new trial.

III

The defendant also argues that there was insufficient evidence to support convictions on all counts of the indictment. Specifically, Norton claims that the government's evidence was not sufficient for a jury to find the requisite intent for certain counts, a "meeting of the minds" for conspiracy, materiality for mail fraud, and knowledge of the RICO enterprise. In addressing these post-conviction claims, I must view the facts in the light most favorable to the government. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.").

The determination of a defendant's intent belongs to the jury. *See Morissette v. United States*, 342 U.S. 246, 274 (1952). Once a jury has decided from all of the facts and circumstances that a defendant acted with the requisite intent, that determination is not lightly overturned. *See United States v. Aubrey*, 878 F.2d 825, 827 (5th Cir. 1989). I find that the evidence presented at trial was sufficient to support the jury's determination that Norton possessed the requisite intent for each of the crimes with which he was charged and convicted.

Both the defendant and the government have acknowledged that convictions on many, if not all, of the counts of the indictment are contingent upon a finding that the financial arrangement between Norton and Davis was in fact an illegal kickback scheme in violation of the health care anti-kickback statute, 42 U.S.C.A. § 1320a-7b(b)(2) (West Supp. 2000). (*See* Def.'s Mem. at 9.) The anti-kickback statute makes it a felony for a person to "knowingly and willfully offer[] or pay[] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, . . . to any person to induce such person" to provide services or payments in return involving a federal health care program. *See* 42 U.S.C.A. § 1320a-7b(b)(2).

The jury could find from the evidence presented that Norton knowingly and willfully participated in such a kickback scheme. First, two witnesses testified that Norton made statements to them characterizing the arrangement as a kickback. Special Agent Phil Barnett of the Internal Revenue Service testified that Norton told him that "he paid Davis so he would be paid[;] he had to insure that he would get his money from the hospital." (Tr. at 3-34.) Dr. Roy Shelburne also testified that after a change in administration removed Davis from power at Lee County Community Hospital, Norton said that he no longer needed to receive his $150,000 director's fee which had been previously routinely turned over to Davis. (*See* Tr. at 3-10.) When asked why, Norton "alluded that [the payment] was part of the cost of doing business with Mr.

Davis in Lee County." (*Id.*) Finally, several expert and fact witnesses testified that Davis was grossly overpaid by Norton for any legitimate professional services he may have rendered. The jury could infer from the facts of the exchange that Norton intended the payments to be kickbacks. Thus, they could also find that Norton acted "knowingly and willfully" within the meaning of the statute. 42 U.S.C.A. § 1320a-7b(b)(2); *see United States v. Starks*, 157 F.3d 833, 838 (11th Cir. 1998) ("Indeed, the giving or taking of kickbacks for medical referrals is hardly the sort of activity a person might expect to be legal.").

Because the evidence was sufficient to support a jury finding of illegal kickbacks, it was sufficient to support findings that Norton possessed the requisite intent on the other counts as well. For the federal program bribery count, 18 U.S.C.A. § 666 (West 2000), the Fourth Circuit has held that the requisite "quid pro quo" evincing a "corrupt intent" can be inferred by looking at the facts of the monetary exchange. *See United States v. Jennings*, 160 F.3d 1006, 1018 (4th Cir. 1998) (holding that the jury could conclude from the amount of money exchanged that "there was a course of conduct involving payments flowing [between the parties] sufficient to convict [the defendant] of bribery"). The jury could likewise find from the evidence that Norton acted with a specific intent to defraud in violation of the mail fraud statute, 18 U.S.C.A. § 1341 (West 2000), and as such, possessed the requisite mens rea for

conviction under 18 U.S.C.A. § 2314 (West 2000), which prohibits the interstate transportation of fraudulently obtained money.

As the jury could conclude that Norton's payments to Davis constituted illegal kickbacks, it also could conclude that Norton and Davis had an understanding between them to engage in such criminal activity. Thus, Norton and Davis had a "meeting of the minds" sufficient to support a finding of conspiracy to violate 18 U.S.C.A. § 1956 (West 2000). It is immaterial that no direct evidence was presented of an express agreement between Norton and Davis. "No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). Thus, the jury was justified in its inference that a conspiracy existed.

Finally, Norton's argument that the mailings presented by the government to support the mail fraud charge were in fact legitimate business correspondence is without merit. "[I]t is no defense that the papers sent through the mail are innocent in themselves if they are part of a scheme to defraud." *United States v. Brewer*, 528 F.2d 492, 496 (4th Cir. 1975). To be convicted under the mail fraud statute, 18 U.S.C.A. § 1341, "[i]t is sufficient for the mailing to be incident to an essential part of the

scheme, or a step in the plot." *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (internal citations and quotations omitted).

Here, the mailings of the rent checks from the hospital and of Medicare and Medicaid checks to the hospital were incident to an essential part of Norton's fraudulent kickback scheme. Over the life of the relationship between Norton and Davis, more than $880,000 was kicked back to Davis and disguised as "consulting fees" or the like, constituting a "material falsehood" as required by the mail fraud statute. *See Neder v. United States*, 527 U.S. 1, 25 (1999) (holding that materiality of falsehood is an element of federal mail fraud). The contracts between Norton's clinic and Lee County Community Hospital included $150,000 a year to be paid by the hospital to Norton as a director's fee, which he would immediately turn back over to Davis as a kickback. The mailings of rent and federal program checks between Norton and the hospital under these fraudulently-obtained contracts were incident to the entire scheme. Therefore, the mail fraud conviction is supported by sufficient evidence.

Similarly, the defendant's challenge to his RICO convictions is unwarranted. Contrary to the defendant's argument, and as I have previously held in this case,[2] it is not necessary that the government prove that he knew or had reason to know of other

[2] This issue was discussed and resolved in my earlier opinion in the case disposing of certain pretrial motions. (Op. & Order, Jun. 28, 2000, at 4-8.)

predicate criminal activity beyond his own acts. Moreover, as earlier discussed in this opinion, the jury was justified in finding that Norton and Davis conspired to participate in a pattern of racketeering activity, even though there was no proof of any formal agreement.

IV

The defendant also contends that the court erred in several respects in its final jury charge. As with any such post verdict argument, the issue is "whether, taken as a whole, the [challenged] instruction fairly states the controlling law." *United States v. Cobb*, 905 F.2d 784, 788-89 (4th Cir. 1990). Jury instructions are not erroneous if they are accurate on the law, do not confuse or mislead the jury, and do not effectively direct a verdict for one side or the other. *See Hardin v. Ski Venture, Inc.*, 50 F.3d 1291, 1294 (4th Cir. 1995). In assessing the adequacy of jury instructions, the court should view the instructions as a whole, as there is "no ground for complaint that certain portions, taken by themselves and isolated, may appear to be ambiguous, incomplete or otherwise subject to criticism." *Smith v. Univ. of North Carolina*, 632 F.2d 316, 332 (4th Cir. 1980) (quoting *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975)). "[A]n error in jury instructions will mandate reversal of a judgment

only if the error is determined to have been prejudicial, based on a review of the record as a whole." *Wellington v. Daniels*, 717 F.2d 932, 938 (4th Cir. 1983).

Several of the issues raised by the defendant as to the charge were adequately answered in the prior portions of this opinion, or at trial. (Tr. at 4-145-48.) Accordingly, lengthy discussion is not required.

In connection with count five of the indictment, which charged Norton with violating the anti-kickback statute, the defendant offered three instructions that were refused. The defendant urges that the refusal of those instructions was prejudicial error.

The anti-kickback statute contains, by incorporated regulations, a number of "safe harbor" provisions that shield from criminal liability certain business practices in the medical field that otherwise might be misconstrued as illegal remunerations. *See United States v. Shaw*, 106 F. Supp. 103, 110-112 (D. Mass. 2000) (discussing history and purpose of safe harbor exceptions to anti-kickback statute). The defendant offered an instruction based on the safe harbor provision for "personal services and management contracts" contained in the applicable regulation, *see* 42 C.F.R. § 1001.952(d) (1999), that was refused.

Such an instruction was unnecessary, however, because the central issue in this case did not require a determination of the applicability of this safe harbor provision.

The payments made by Norton to Davis were either corrupt kickbacks or legitimate consulting fees, depending on whether the jury believed Davis and the other evidence supporting his testimony, or believed Mrs. Norton and the evidence supporting her testimony. The charge to the jury adequately set forth the proper method for the jury to determine this issue. For example, the jury was instructed that the payments to Davis must have been with the corrupt intent and purpose of influencing the benefits and that such purpose must have been the material or primary one. (Tr. at 4-226.)

Moreover, this proposed instruction would have unduly complicated the jury's task, with no corresponding benefit. The evidence and the parties' arguments made it clear to the jury the conflicting positions relating to Norton's payments to Davis and this additional instructions would not have assisted it in its factual determination.

Similarly, it was not necessary to grant the defendant's requested instruction giving a dictionary definition of the word "kickback." "What makes the activity illegal is not the label someone attaches to the form of the transaction . . . . The reason behind the transaction and the requisite state of mind underlying the criminal act are more significant than form and label." *United States v. Shaw*, 106 F. Supp. at 115-16 (describing anti-kickback statute). The question in this case was Norton's state of mind

and purpose, and the jury could only have been diverted from that determination by the instruction offered.[3]

Finally, it was not error to refuse the defendant's proposed "good faith" instruction relating to the anti-kickback statute. Norton did not testify, and there was no evidence that in his payments to Davis he had relied on any safe harbor exception or other innocent but mistaken view of the law. Accordingly, a good faith instruction would have injected an issue not otherwise present in the case.

V

For the foregoing reasons, it is **ORDERED** that the defendant's Motion for Entry of Judgment of Acquittal, or in the Alternative, for a New Trial (Doc. No. 112), is denied.

ENTER: November 14, 2000

United States District Judge

[3] Both the government and the defendant offered competing instructions defining the word kickback, and I refused both. (Tr. at 4-146.)