

make mortgage payments on the house, and was having continued difficulty collecting rent from his tenants. He had flown to Liberia, his native country, in March of 2013, to pursue various business ventures and settle family affairs, and left his friend Shevlin Grant in charge of collecting rent. Grant's testimony confirmed that this difficulty collecting rent increased during Karmue's absence.

Several witnesses testified that in October 2013, Karmue spoke with them about a potential plan to make money by setting fire to the house and collecting insurance proceeds. These individuals included Grant and Karmue's friend, Gbabia Kollie, among others. According to Kollie's testimony, Karmue offered him a cut of the money, about \$30,000, in exchange for his help enacting the plan, and repeatedly contacted Kollie to urge him to go through with it. Ultimately, Kollie agreed to the plan, and contacted his brother-in-law, Nakele Freeman, who agreed to the scheme, in exchange for half of the \$30,000 promised to Kollie. Freeman in turn recruited his friend Abraham Kerkula, to drive him to the necessary locations.

On November 1, 2013, Freeman and Kollie spoke on the phone repeatedly about the planned arson, as demonstrated by their testimony and by phone records. Following instructions given to him by Kollie, Freeman picked up keys to 31-33 Ida Street from a trailer belonging to Defendant Karmue. That day, video

surveillance and witness accounts showed that Kerkula drove Freeman to a Family Dollar Store, where they bought gloves and a one-gallon jug of water, to a Benny's to purchase a red five-gallon gasoline container, and to a Stop & Shop to fill the container with gasoline. Later that night, after making these purchases, Kerkula drove Freeman to 31-33 Ida Street. There, as confirmed by surveillance footage and witness testimony, Freeman emerged from Kerkula's gold Toyota Camry carrying his arson supplies and entered the building using the recently acquired key. Kerkula drove to a street nearby to await Freeman's return.

After Freeman entered the third-floor apartment of 31-33 Ida Street, he spoke with Kollie again, and began pouring gasoline onto the floor of the kitchen and a carpeted bedroom. He was still on the phone with Kollie and pouring when the gasoline unexpectedly burst into flames. Freeman fled the house, leaving behind, among other items, the five-gallon container and the Family Dollar Store bag containing a receipt with his bank card information on it. He returned to Kerkula's car, and told him that things had gone wrong. According to Kollie's testimony and phone records, Freeman remained in contact with Kollie, who in turn remained in contact with Karmue, then in Liberia.

Shortly after Freeman fled, the fire alarm went off in the house, and the tenants awoke. One resident went upstairs and put out the fire, while another called the police and reported that someone had lit a fire in the third floor. The Providence Fire Department was summoned, and after a fire lieutenant observed the red gasoline container and burn patterns on the carpet of the bedroom, he in turn summoned the Arson Squad, which began its investigation.

Karmue held a property loss policy on 31-33 Ida Street with Allstate Insurance Company, which insured the house for \$725,583, and covered temporary housing. After Karmue returned from Liberia in early November, Performance Adjusting, a public adjusting company, filed insurance claims on his behalf, calling Allstate's claims center in Indianapolis, and sending a fax of its contract with Karmue to Allstate's offices in Pennsylvania in connection with his claimed fire loss. Karmue signed advanced payment agreements to be reimbursed for temporary housing, which were sent to Allstate, but according to witnesses, he was staying with his half-brother in Providence and was not paying rent. Karmue nonetheless submitted a "lease agreement" showing that he was paying \$400 a week in rent, using a made-up landlord's name. Allstate sent Karmue three checks from its Texas-based check center to cover the rent payments Karmue represented he was making.

II. Analysis

Karmue moves for acquittal based on his argument that the jury reached an inconsistent verdict, and that there was insufficient evidence against him. He likewise argues that he is entitled to a new trial because the verdict reached was "contrary to the weight of the evidence," and due to a purported Confrontation Clause violation that occurred prior to his trial. The Court addresses Karmue's arguments in turn.

A. Inconsistent Verdicts

Karmue argues that because the jury acquitted him of the substantive crime of arson with which he was charged, its determination that he was guilty of the arson conspiracy charge and the wire fraud charges was inconsistent and warrant acquittal. Karmue contends that he could not be guilty of defrauding Allstate Insurance if he was not found guilty of the substantive act of arson. He also claims that the conspiracy count itself is inconsistent with his acquittal on the substantive offense. While the logic behind the alleged inconsistency in Karmue's case is questionable, an inconsistent verdict would not entitle Karmue to acquittal regardless.

As the Supreme Court explained in United States v. Powell, even where a jury reaches inconsistent conclusions, neither the Government nor the defendant is entitled to a review of the verdict on that basis. 469 U.S. 57, 63 (1984). While an

inconsistent verdict may be viewed as an error favoring the Government, it is equally possible that the inconsistency worked in the defendant's favor. Id. at 65. Allowing a defendant to argue that the inconsistent verdict shows reversible error would require speculation as to the jury's decision-making process, which is disfavored. Id. at 66. A defendant's protection against an irrational or illogical jury lies rather in the courts' review of the sufficiency of the evidence. Id. at 67; United States v. Lopez, 944 F.2d 33, 41 (1st Cir. 1991) (a defendant is protected from jury irrationality by reviewing courts' questioning whether enough evidence was presented to justify a rational fact-finder in reaching a guilty verdict); see also United States v. Rios-Ortiz, 708 F.3d 310, 317 (1st Cir. 2013). Thus, any inconsistency in the jury's verdict here cannot serve as a basis for an acquittal. The Court turns next to the question of sufficiency of the evidence.

B. Insufficient Evidence

Karmue points to the insufficiency of the evidence both in arguing for acquittal and for a new trial. On a Rule 29 motion for judgment of acquittal, the Court must view the evidence in the light most favorable to the verdict. United States v. Reeder, 170 F.3d 93, 102 (1st Cir. 1999). The Court must determine whether "a rational trier of fact could have found guilt beyond a reasonable doubt," id., and questions of

credibility "must be resolved in favor of the verdict," United States v. Rivera Calderon, 578 F.3d 78, 88 (1st Cir. 2009) (quoting United States v. Pérez-Ruiz, 353 F.3d 1, 7 (1st Cir. 2003)).

Karmue sets forth his own version of events in his motion for acquittal, implicitly calling into question the testimony of several key witnesses, and pointing to "attenuated" inferences and facts that favor his version of what transpired. Karmue points to the circumstantial nature of the phone evidence tying Kollie to Karmue, Kollie's initial lack of initiative in going through with the arson plan, and a possible issue Kollie had with one of Karmue's tenants - which Karmue implies may have independently fueled Kollie's fire-starting tendencies. He questions the relevance of an incriminating voicemail left by Karmue on Kollie's phone, and points out that two witnesses who spoke of Karmue's arson plans claimed to have had no active involvement in carrying them out, showing that at least they were not involved in any conspiracy with Karmue. He also calls into question the fraudulent nature of the insurance claims he made for temporary housing because according to Karmue, no evidence showed that he did not live at the address he listed on the "lease agreement."

However, with respect to a motion for acquittal, the standard does not allow for any self-serving spin by the movant.

Kollie testified that he spoke with Karmue repeatedly about the arson plan, and phone records showing contact between Kollie and Liberian phone numbers corroborates this testimony. Likewise, the accounts of the two witnesses who spoke with Karmue about his arson plan but declined to participate substantiate Kollie's testimony that Karmue indeed conspired to commit arson. Additionally, evidence shows that Karmue submitted claims for living expenses he was not incurring, regardless of his address.

Viewing the facts in the light most favorable to the verdict, and resolving questions of credibility in the Government's favor, there is abundant evidence by which a rational trier of fact could have found Karmue guilty of all of the offenses for which the jury convicted him: conspiracy to commit arson, and three counts each of wire fraud and mail fraud.

As for whether any evidentiary shortcoming warrants a new trial, the Court must determine whether "the interest of justice so requires." Fed. R. Crim. P. 33. The Court considers the evidence presented at trial but remains mindful that "the remedy of a new trial is sparingly used, and then only where there would be a miscarriage of justice and where the evidence preponderates heavily against the verdict." United States v. Merlino, 592 F.3d 22, 32 (1st Cir. 2010) (quoting United States v. Wilkerson, 251 F.3d 273, 278 (1st Cir. 2001)).

To support his argument that the verdict is contrary to the weight of the evidence, Karmue points to evidence that he had invested a great deal of money into 31-33 Ida Street, that he treated it as a home, that he was not without assets to pay his mortgage, and that the property was not actually in foreclosure. He points out that based on prior insurance claims for damage, he would not have expected to get any direct insurance proceeds, given that he knew Bank of America was the loss payee, not himself. He further points to inconsistencies in Kollie's testimony which indicate that Kollie's involvement in the arson plan was far more active and aggressive than Kollie himself admitted. He highlights Grant's motivation to lay blame elsewhere, shortcomings in the fire investigators' analysis, and alternative interpretations of a recorded conversation between Grant and Karmue.

In sum, Karmue's evidentiary basis for a new trial turns on the credibility and inconsistency of witness statements, and on interpreting the evidence in a manner that favors his version of events. While these points served very well in Karmue's closing argument, in light of the substantial evidence and interpretations that contradict them, Karmue falls short of demonstrating that "the evidence preponderates heavily against the verdict" or that any miscarriage of justice occurred.

C. Confrontation Clause Claim

Karmue contends that the Court's failure to grant his request to continue the Daubert hearing pending his presence was a significant error warranting a new trial. The Confrontation Clause of the Sixth Amendment guarantees the accused in a criminal case the right to be present at every stage of his or her trial. Illinois v. Allen, 397 U.S. 337, 338 (1970). The Due Process Clause protects the right to be present at proceedings "where the defendant is not actually confronting witnesses or evidence against him." United States v. Gagnon, 470 U.S. 522, 526 (1985). In such instances, the accused has a due process right to be present "to the extent that a fair and just hearing would be thwarted by his absence." Id. (internal citation and quotations omitted). Likewise, Rule 43(a) of the Federal Rules of Criminal Procedure provides that while a defendant must be present at the initial appearance, arraignment, and plea, and "every trial stage, including jury empanelment and return of verdict," a defendant need not be present when "[t]he proceeding involves only a conference or hearing on a question of law." Fed. R. Crim. P. 43(a)(2) and 43(b)(3).

A Daubert hearing typically entails a preliminary screening of proffered expert testimony for reliability and relevance. United States v. Diaz, 300 F.3d 66, 73 (1st Cir. 2002)

(explaining the Supreme Court's decision in Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)). While the outcome of such a hearing turns on facts, admission of expert testimony is ultimately an evidentiary question of law to be determined by the Court. Thus, even assuming that the Daubert hearing constituted a "trial stage," allowing the hearing to continue in Karmue's absence did not run afoul of Rule 43. See United States v. Gonzales-Flores, 701 F.3d 112, 116 (4th Cir. 2012) (finding that even if a hearing on a discovery violation constituted a "trial stage," and involved a factual inquiry, the relevant issue was a matter of law).

Moreover, in Karmue's case, the hearing took place outside the presence of the jury, and served as a precursor to the evidence that Karmue would confront at trial. At his trial, Karmue "had the opportunity for full and effective cross-examination" of the expert witness before the jury. Kentucky v. Stincer, 482 U.S. 730, 744 (1987) (no Confrontation Clause violation where witnesses examined at competency hearing outside of defendant's presence were subsequently cross-examined by defendant at trial). Thus, proceeding with the Daubert hearing in Karmue's absence did not violate his confrontation rights.

It is likewise clear that no due process violation occurred. Karmue provides no theory by which his absence may have impeded the hearing's fairness. Karmue's counsel

extensively questioned the expert witness during the hearing, and there is no basis for the Court to conclude that Karmue's presence would have made any difference whatsoever at the Daubert hearing. See United States v. Sanchez, 917 F.2d 607, 619 (1st Cir. 1990) (no due process violation where defendant's presence would not have contributed to the fairness of a hearing on a legal issue involving nondisclosure of evidence at trial). Any indication that Karmue's absence in any way led to a "miscarriage of justice" is therefore distinctly lacking, and a new trial not warranted. See Merlino, 592 F.3d at 32.

III. Conclusion

Karmue has not demonstrated any inconsistency or evidentiary deficiency that would merit acquittal, nor has he shown that the weight of the evidence or Karmue's absence from a Daubert hearing support granting him a new trial. For the reasons set forth in this Order, Karmue's motions for acquittal and for a new trial are DENIED.

IT IS SO ORDERED.



William E. Smith
Chief Judge
Date: July 31, 2015