NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued November 7, 2023
Decided December 6, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 21-3195

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY BATIO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16 CR 425

Rebecca R. Pallmeyer,
Chief Judge.

O R D E R

Jeffrey Batio was sentenced to 96 months' imprisonment, plus restitution exceeding $5 million, after a jury convicted him of mail and wire fraud. 18 U.S.C. §§ 1341, 1343. The indictment charged Batio with a long-running scheme to induce people to part with their money by representing that he had innovative computer products in late stages of development. But he and his firms (Armada Systems LLC and Ideal Future, Inc.) never delivered any products, and the jury evidently concluded that none of the promised products came anywhere near release.

Batio presents three arguments on appeal: that the evidence is insufficient; that the district judge should have ordered a new trial; and that the district judge's

calculation of a $5 million loss is not adequately supported. We take up these arguments in order.

1. The district court issued a thorough opinion denying Batio's motion for acquittal or a new trial. 2020 U.S. Dist. LEXIS 235337 (N.D. Ill. Dec. 15, 2020). Batio concedes that he and his firms never delivered any products but contends that events outside his control account for this. He maintains that some suppliers went bankrupt and that the recession beginning in fall 2008 made fulfillment of his promises impossible. But as the district judge observed:

> His argument that the 2008 recession explains the failure of the Radian [one of the products] does not make chronological sense: Mikal Greaves stopped working as a consultant for Armada in May of 2008 because he had not been paid, and Matthew Vanderzee left the company in July of 2008 for the same reason—but the market did not crash until September of 2008. A rational jury could have concluded that the Radian failed not because of the recession, but because Mr. Batio was nowhere near completion of the product's engineering and had already run out of money by the summer of 2008.
>
> Despite these circumstances, Mr. Batio continued to tell investors that the Radian's launch was imminent between 2009 and 2012, even though Armada had no other employees and was not making significant progress on the Radian's design. Those statements could have induced investors like Gregory Cazel, Daniel Leo-Toulouse, David Schultz, and Susan Sklade to invest not once but multiple times.

2020 U.S. Dist. LEXIS 235337 at *11 (footnotes omitted). The judge also observed that Batio's promise to begin delivering the Dragonfly (another product) by the end of 2015 was fantasy and that "two companies he had hired to conduct feasibility studies, Fidus and Finn Sourcing, had determined that such a timeline was unrealistic." *Id*. at *12.

One more example. Batio promoted the Dragonfly to investors (and advance purchasers) as a combination laptop, tablet, and phone that was as thin as a dime. He produced a promotional video that purported to show how thin the device was. But all the video displayed was an empty shell—and even that shell was more than an inch thick, made to appear thin because the table on which it rested had been hollowed out so that only the top of the casing was visible. *Id*. at *15.

We could go on, but that is unnecessary. Batio was free to argue his position to the jury. He insisted that if there was any fraud there was more than one scheme, but the jury heard enough evidence to find that there was one decade-long scheme.

2. Batio offers two arguments in support of his request for another trial: first that the "good faith" instruction was erroneous, and second that an important witness was not allowed to testify.

a. The good-faith instruction given to the jury told it:

> If the defendant acted in good faith, then he lacked the intent to defraud required to prove the offenses of mail and wire fraud charged … . The defendant acted in good faith if, at the time, he honestly believed the truthfulness and validity of the representations and promises that the government has charged as being false or fraudulent, as described in the portion of the indictment setting forth the scheme.
>
> The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud … .
>
> A defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.

This language comes straight from item 6.10 of the circuit's pattern criminal jury instructions. Batio nonetheless insists that the third paragraph spoils the first two by implying that even a single lie negates good faith. One court of appeals has removed language of this kind from its pattern instructions, deeming it potentially confusing.

We do not see a problem with this paragraph in this case, since "good faith" in a colloquial sense is not a defense to fraud. The sort of instruction that the judge gave here just restates, from the defense perspective, that the prosecution must prove intent to defraud—and that making a statement that turns out to be wrong differs from fraud, a crime of specific intent. Batio does not take issue with any of the instructions telling the jury what the prosecution had to prove beyond a reasonable doubt.

The contested third paragraph reminds the jury of an important principle: a sincere belief that everything will work out does not authorize deceit. Take a mundane bank-fraud case. An entrepreneur obtains a loan of $1 million by representing that the

business's assets are worth $10 million. Actually they are worth only $100,000, but the entrepreneur is confident that the business will succeed and that he can repay the bank. The lie is still criminal fraud, because the borrower has deceived the bank about the available security and thus about the bank's ability to collect if the business fails. Indeed, the lie is criminal even if the business succeeds and the bank collects every penny. See, e.g., *United States v. Radziszewski*, 474 F.3d 480, 485–86 (7th Cir. 2007); *United States v. Chandler*, 98 F.3d 711, 716 (2d Cir. 1996). The bank is still exposed to more risk than it agreed to bear, for the rate of interest it charged (a rate doubtless reduced by the falsehood). That same idea justifies the use of the third paragraph in this case, for the investors and advance purchasers were deceived into taking more risk than they had agreed to bear.

The language in the third paragraph may not be the most felicitous way of making the point, but Batio did not propose any improvement. The committee in charge of supervising the circuit's pattern jury instructions may want to review the subject. It is enough for now to say that the third paragraph, as given, did not relieve the prosecution of its burden on any issue in the case.

b. Batio proposed to call Ron Braver, a forensic accountant, to testify about how much money the businesses received and how it was spent. Braver produced charts summarizing information in a QuickBooks database that Batio had furnished (and apparently altered while awaiting trial), plus statements that Batio made directly to Braver. The district judge ruled that the QuickBooks database represented Batio's preferred characterization of his financial transactions and that Braver could not serve as a means of getting Batio's statements about his finances into evidence, unless Batio himself testified. Batio declined to testify, and Braver said that he could not reconstruct the financial records from other sources in time for trial.

In the district court Batio characterized these events as ineffective assistance of counsel, and the district judge rejected his argument as so understood. 2020 U.S. Dist. LEXIS 235337 at *31–38. In this court Batio's new lawyer recasts this issue as a contention that he was denied compulsory process to obtain favorable evidence. That's hard to understand. Braver was willing to testify; Batio did not need compulsory process. The question is whether the proposed testimony satisfied the requirements of Fed. R. Evid. 702 for expert witnesses or Rule 1006 for summary witnesses. The district court ruled that using a forensic accountant to present what amounts to the defendant's own testimony, without putting the defendant on the stand, is not a reliable or appropriate use of either expert or summary testimony under the Rules of Evidence. That decision is sound. See, e.g., *Smith v. Illinois Department of Transportation*, 936 F.3d 554, 558 (7th Cir.

2019) (expert witnesses); *United States v. Oros*, 578 F.3d 703, 708 (7th Cir. 2009) (summary witnesses).

3. The district court adopted the presentence report's calculation of the loss as in the vicinity of $5 million. The PSR said $5.7 million, though the judge awarded only $5,086,269 in restitution and did not explain the difference. But the error, if any, runs in Batio's favor, so he cannot complain. And the fraud table in U.S.S.G. §2B1.1 treats any amount between $3.5 million and $9.5 million as equivalent for the purpose of calculating offense levels, so the judge did not need to pin down an exact loss.

Batio maintains that a figure in the neighborhood of $5 million depends on treating all of his business receipts between 2004 and 2016 as loss to the investors and buyers. Let us suppose that this is so. Why would that be error? The investors never saw a penny of return, and none of the customers received a product. From the perspective of the crime's victims, everything they sent to Batio vanished. Calling this a "loss" under the Sentencing Guidelines is straightforward. That Batio spent some of the money on employees, consultants, and subcontractors may show that his *profit* was under $5 million, but it does not diminish the *loss* that the investors and customers experienced.

Batio did not challenge the PSR's proposed restitution award; instead he asked for no prison time so that he could start paying restitution immediately. That strategic choice waives any objection to the award of restitution. Batio did object in writing to the PSR's calculation of loss, but at sentencing he did not mention that objection and argued only that his criminal history category had been overstated. Three times the district judge asked whether Batio had any other argument; three times counsel said no. The prosecutor maintains that this was waiver. Some decisions of this court support that characterization, while others imply that a written objection that is seemingly abandoned at sentencing still allows review for plain error. We need not attempt to reconcile those decisions, because they do not matter. If there was error at all (which we doubt), it does not meet the definition of plain error under *United States v. Olano*, 507 U.S. 725 (1993).

AFFIRMED