

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division

UNITED STATES OF AMERICA)	
)	Criminal No. 2:07CR00015
v.)	
)	Sentencing: September 9, 2008
DANIEL DOVE,)	
)	Judge James P. Jones
Defendant.)	

**GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION
FOR ACQUITTAL OR NEW TRIAL**

The UNITED STATES OF AMERICA, by its attorneys, Julia C. Dudley, Acting United States Attorney for the Western District of Virginia, Tyler G. Newby, United States Department of Justice Trial Attorney, Jay V. Prabhu and Randy Ramseyer, Assistant United States Attorneys respectfully submits this response to Defendant's Motion for New Trial and for Judgment of Acquittal.

I. INTRODUCTION & BACKGROUND

On June 26, 2008, a jury found Defendant Daniel Dove guilty of both counts of an August 28, 2008 Indictment charging him with conspiracy to commit criminal copyright infringement, in violation of 18 U.S.C. § 371, and criminal copyright infringement, in violation of 18 U.S.C. § 2319(b)(1), 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2. Over the course of a two day trial, the government presented extensive evidence that Defendant had been a high-ranking member in a private and well-organized Internet based group known as Elite Torrents, which had as its sole purpose the illegal reproduction and distribution of hundreds of thousands of pirated copies of copyrighted movies, software programs and video games.

The government presented testimony from three former members of Elite Torrents – Grant Stanley, Scott Harvanek and An Duc Do – who explained that Defendant, using the alias “Duffman,” recruited and managed individuals with very fast Internet connections to serve as “Uploaders” in the group.¹ These Uploaders were responsible for introducing pirated content to the group. Harvanek, who was an Uploader, testified that Defendant ensured that new, pirated content was quickly available within the group by promoting and retaining only those Uploaders who performed their jobs regularly and according to the group’s rules. When an Uploader, such as An Do, failed to Upload as frequently as Defendant demanded, Defendant demoted him, effectively curtailing his access to other pirated content. Harvanek and Stanley also described how the Defendant rented at least one high-speed computer server, which he controlled remotely and used to disseminate new pirated movies to Uploaders for further distribution to the hundreds of thousands of Elite Torrents members.

Substantial evidence also showed Defendant copied and distributed pirated movies and software for his own benefit. Stanley, who knew and worked with Defendant in the offline world, testified that Defendant uploaded pirated movies using the alias “McCalister.” Federal Bureau of Investigation Supervisory Special Agent Kiffa Shirley also testified about the voluminous amounts of pirated movies and software recovered from Defendant’s home and home computer, all of which were admitted into evidence. (GX 26, 30, 42, 43) In addition, computer logs from Elite Torrents’ database showed that Defendant had uploaded numerous pirated movies, which were subsequently downloaded tens of thousands of times by other Elite Torrents members. (GX 20, 36, 37, 40, 41)

¹ The government does not yet have a transcript of the trial.

Finally, the jury heard evidence showing that Defendant knew his and other Uploaders' actions violated copyright law. For example, the government presented evidence that Defendant personally wrote and used the phrase "duffman@has.9million.gigs.of.illegal-warez.net" to identify himself to other members in the Elite Torrents chat forum. (GX 3 at 3) As witnesses testified at trial, including convicted co-conspirator Grant Stanley and Federal Bureau of Investigation Supervisor Special Agent Kiffa Shirley, "warez" refers to pirated digital copies of copyrighted works. The jury also heard, through FBI Special Agent Doug Fender, that Defendant acknowledged in a voluntary statement that his conduct had been "theft." In addition to Defendant's own contemporaneous statements, co-conspirators Stanley, Harvanek and Do all testified that they were aware that distributing and copying pirated copies of copyrighted works without paying for them violated copyright law.

The jury weighed this evidence with Defendant's own testimony that he did not know his conduct was illegal and reached a guilty verdict on all counts. Defendant now requests that the Court ignore the jury's verdict and enter a judgment of acquittal or grant a new trial. For the reasons set forth below, substantial evidence supported the verdict, which the jury reached at the conclusion of a fair and just process and after being properly instructed on the law. Accordingly, the jury's verdict should be preserved, and Defendant's motions should be denied.

II. ARGUMENT

A. Legal Standard

Defendant alternatively seeks a post-trial judgment of acquittal and a new trial under Fed. R. Crim. P. 29(c) and 33. With respect to his Rule 29(c) motion, "there is only one ground for a motion for a judgment of acquittal. This is that the evidence is insufficient to sustain a conviction of one or more

of the offenses charged in the indictment or information.” Charles Alan Wright, 2A Fed. Prac. & Proc. Crim. 3d § 466. Thus, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The sufficiency standard is a low one. The Fourth Circuit has found on several occasions that the uncorroborated testimony of a single witness, even when that witness was an accomplice, is sufficient to support a conviction. *See, e.g., United States v. Wilson*, 115 F.3d 1185, 1189-90 (4th Cir. 1997); *United States v. Manbeck*, 744 F.2d 360, 392 (4th Cir. 1984).

As with a motion for a judgment of acquittal, the burden of justifying a new trial under Rule 33 rests with the defendant. *United States v. Geders*, 624 F.2d 31, 33 (5th Cir. 1980). Furthermore, “the trial court’s discretion [to grant a new trial] should be exercised sparingly, and a new trial should be granted *only when the evidence weighs heavily against the verdict*.” *United States v. Arrington*, 757 F.2d 1484, 1486 (4th Cir. 1985) (emphasis added).

B. Substantial Evidence of Willfulness Supports the Jury Verdict

1. Sufficient Evidence Showed Defendant’s Willful Copyright Infringement

The government presented substantial evidence that Defendant intended to violate copyright law when he copied and distributed hundreds of thousands of dollars worth of pirated movies and software. To meet its burden on the criminal copyright infringement charge in Count 2 of the Indictment, the government was required to prove beyond a reasonable doubt that Defendant willfully infringed 10 or more copies of one or more copyrighted works, with a retail value exceeding \$2,500, in a 180 day period. *See* 17 U.S.C. 506(a)(1)(A); 18 U.S.C. 2319(b)(1). The jury was properly

instructed on the legal standard for willfulness – a voluntary and intentional violation of a known legal duty. *See* Jury Instruction (JI) 12.

Sufficient evidence supported the jury's verdict of willful infringement, including contemporaneous statements made by the Defendant acknowledging the illegality of his conduct and corroborative testimony of co-conspirators. The jury was presented with evidence that Defendant used the phrase "duffman@has.9million.gigs.of.illegal-warez.net" to identify himself to others in Elite Torrents' private Uploaders chat room. (GX 3 at 3) The jury also heard testimony of FBI Agent Fender that Defendant described his conduct as "theft" in his voluntary statement. Defendant's own contemporaneous description of his activity as "illegal" and "theft" was powerful evidence of willfulness. Corroborating this evidence was the testimony of three of Defendant's co-conspirators' that they knew their own participation in Elite Torrents was illegal.

While Defendant testified he did not know his conduct was illegal, there were ample grounds for the jury to discount that testimony as a self-serving attempt to justify his actions. For example, on cross-examination, Defendant acknowledged that he was aware of the of the original Napster service being shut down by court order for copyright infringement. In addition, although Defendant had testified on direct that he had never seen any discussion in the Elite Torrents forums of the illegality of uploading pirated content, on cross-examination Defendant was shown chat communications in which Uploaders discussed facing prosecution for their actions. While Defendant claimed he did not see those communications, the evidence showed that he was actively communicating in the chat room seconds before and after those communications.

Finally, the jury heard evidence of Defendant's lack of trustworthiness on cross-examination, including a prior felony conviction for fraud (GX 47) and a false statement on his employment application. (GX 48) Against this backdrop, the jury had ample basis to discredit Defendant's testimony about his state of mind. The Court should not, as Defendant's motion tacitly suggests, look behind those credibility determinations, but must assume the jury resolved all contradictions in the government's favor. *See, e.g., United States v. Romer*, 148 F.3d 359, 364 (4th Cir. 1998).

2. Sufficient Evidence Supported the Jury's Finding That Defendant Knew the Purpose of Elite Torrents Was Willful Copyright Infringement

Evidence of Defendant's own willful copyright infringement, as discussed above, supported the jury's verdict that Defendant knew an object of the Elite Torrents conspiracy was willful infringement. Indeed, the evidence showed that purpose was the very reason for Defendant's involvement and managerial role in the group. Defendant boasted that because of his administrative role, he was able to get access to all the pirated software, games and movies he wanted. (GX 12 at 3-4) Similarly, as discussed above, the jury was presented with evidence that other members of Elite Torrents knew their conduct was illegal, and that Defendant had witnessed other members of the group discussing the illegality of their actions. Accordingly, sufficient evidence supported the jury's verdict of guilty of conspiracy to commit criminal copyright infringement, as alleged in Count 1.

C. There Are No Grounds for a New Trial

1. The Court Properly Instructed the Jury on Willful Blindness

As the last witness before the close of evidence, Defendant testified that he did not know at the time of his participation in Elite Torrents that distributing tens of thousands of copyrighted works worth

millions of dollars was illegal. Because this testimony contradicted previously admitted evidence, the government proposed a jury instruction on willful blindness the following morning. That instruction was modified at the charging conference following arguments of counsel and incorporated as Jury Instruction 25A. The timing and necessity of including this instruction was occasioned entirely by the timing and substance of Defendant's testimony.

Regardless of the timing, there was no prejudice to the Defendant, because Jury Instruction 25A properly stated the law. Contrary to Defendant's argument, Jury Instruction 25A does not improperly suggest that only an "objectively reasonable" misunderstanding of the law negates willfulness, as was the case with the instruction at issue in *Cheek v. United States*, 498 U.S. 192, 198 (1991). Instead, the instruction provided that the jury had to find the Defendant "deliberately closed his eyes to what would have otherwise been obvious to him. That is, that he had a conscious purpose to avoid enlightenment." Therefore, the instruction properly references Defendant's own knowledge and deliberate avoidance of knowing what would have been obvious *to him*, not an objectively reasonable person.

Numerous courts, including the Fourth Circuit, have repeatedly upheld the use of willful blindness instructions like Jury Instruction 25A in cases involving specific intent crimes after *Cheek*. As the Fourth Circuit noted in *United States v. Campbell*, 977 F.2d 854, 857 (4th Cir. 1992) (money laundering), a nearly identical willful blindness instruction did not improperly instruct the jury that the standard of Defendant's knowledge is objective reasonableness. *See also United States v. Collins*, 372 F.3d 629, 634 (4th Cir. 2004) (willful blindness instruction proper in money laundering case requiring proof of subjective knowledge). Similarly, in *United States v. Guay*, 108 F.3d 535, 551

(4th Cir. 1997), a case requiring proof of knowledge with intent to distribute, the Fourth Circuit held that a willful blindness instruction “is appropriate when the defendant asserts a lack of guilty knowledge but the evidence supports an inference of deliberate ignorance.” Even more recently, the First Circuit found that willful blindness instructions are appropriate where there is evidence the defendant deliberately avoided knowledge of the law. *See United States v. Dean*, 487 F.3d 840, 851 (1st Cir. 2007) *citing Cheek*, 498 U.S. at 206. Given the ample evidence of Defendant’s willfulness, which Defendant contradicted in his own testimony, a willful blindness instruction was justified.

2. Jury Instructions 13, 15, and 17 Properly Stated the Law Regarding Defendant’s Intent

Defendant’s argument that use of the term “knowingly” in Jury Instructions 15 (line 6) and 17 (line 1) regarding Defendant’s state of mind when joining the Elite Torrents conspiracy “weakened” the willfulness element of the criminal copyright charge misstates the elements of conspiracy, and ignores the entire context of Jury Instructions 15, 16 and 17. These instructions are standard jury instructions on the elements of proving conspiracy, in violation of 18 U.S.C. § 371. *See, e.g., United States v. Tedder*, 801 F.2d 1437, 1446 (4th Cir. 1986); 2 O’Malley, Grenig and Lee, *Federal Jury Practice and Instructions*, §§ 31.03 - 31.05 (5th ed. 2000). Instruction 15 provided a general outline of the elements of conspiracy. Taken together, Instructions 16 and 17 then explain that it was the government’s burden to prove Defendant knew that the purpose of the conspiracy was *willful* copyright infringement for personal financial gain, and that he “knowingly and deliberately” joined the conspiracy intending to further that purpose. (JI 16, lines 1-5; JI 17, lines 1-11). Far from weakening the willfulness *mens rea* requirement of criminal copyright infringement, Instructions 15-17 required the

government to prove that the Defendant knew the purpose of the conspiracy was to violate copyright law and that he deliberately joined the conspiracy to advance that purpose.

Finally, while Defendant correctly points out that he objected to the use of the term “knowingly” and not “willfully” at line 13 of Jury Instruction 25 on aiding and abetting, he overlooks the fact that the Court’s final Instruction 25 *did* use the term “willfully.” Specifically, lines 13 and 14 of Instruction 25 provide: “Second, that the defendant knowingly and willfully did some act for the purpose of aiding the commission of the copyright infringement.” Accordingly, there is no factual basis for Defendant’s argument that Jury Instruction 25 requires a new trial.

3. The Court Properly Excluded Hearsay Statements of Rudy Corella

At trial, Defendant sought to introduce certain unknown statements allegedly made to Defendant by Rudy Corella, who was believed to have been a member of Elite Torrents who used the alias “Krylon.” The court properly excluded those hearsay statements.

First, Defendant never established that Corella was, in fact, unavailable, under Federal Rule of Evidence 804. Instead, Defendant merely presented some evidence that he had not been able to locate Corella in the days leading up to trial. Although Defendant attempted to obtain Corella’s address by way of subpoenas to Internet Service Providers, he did not do so until less than two weeks before trial. These efforts to obtain Corella’s presence were not “reasonable”, as required by Rule 804(a)(5).

Second, Defendant has not shown any prejudice from his inability to introduce hearsay statements allegedly made by Corella to Dove. In fact, Defendant has not proffered what those statements would have been or how their exclusion prejudiced him. Defendant cannot, therefore, satisfy his burden of justifying a new trial. Even if those hearsay statements would have concerned

Dove's alleged – albeit unfulfilled – desire to exit the conspiracy, or Corella's role in the organization, such evidence would have been cumulative of the extensive evidence presented to the jury on those topics. Accordingly, their exclusion was not prejudicial.

III. CONCLUSION

For the reasons stated above, and for the reasons stated at trial, Defendant's post-trial motions should be denied, and the jury's guilty verdict should be preserved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF, which will then send a notification of such filing (NEF) to the following:

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