UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA PLAINTIFF

v. CRIMINAL ACTION NO. 3:98CR-35-S

BRENNAN JAMES CALLAN DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the court on a motion by the defendant, Brennan James Callan, for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. This court previously denied the defendant's motion for a judgment of acquittal. A motion for a new trial, however, is governed by a broader standard. *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988). Although the government may have presented sufficient evidence to convict the defendant, the trial court may grant a new trial if the court disagrees with the jury's resolution of conflicting evidence. In a motion for a new trial, the trial court sits as a "thirteenth juror" and has discretion to consider the credibility of the witnesses and the weight of the evidence. *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998). However, the trial court should exercise this discretion "only in the extraordinary circumstances where the evidence preponderates heavily against the verdict." *Ashworth*, 836 F.2d at 266.

(1) Juror Misconduct

The defendant claims that Juror #55 was a musician in a band which played on the Belle of Louisville on at least two occasions during Saturday night cruises. The defendant claims that Juror #55 failed to disclose this information and that this failure constitutes juror misconduct which entitles him to a new trial or, at a minimum, a hearing, to determine the effect of the alleged nondisclosure. A trial court is only required to conduct a hearing if the defendant proves that: (1)

a juror failed to answer honestly a material question during jury selection; and (2) a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984).

By agreement of the parties, a questionnaire was sent to all prospective jurors in this case. Juror #55 answered all of the questions in the questionnaire. He disclosed that he had been on the Belle ten or more times in the years preceding the trial and that he was acquainted with a Belle staff member. All but one of the jurors who sat in this case disclosed on the questionnaire that they had been on the Belle. Three of those jurors had been on the Belle six or more times. None of those jurors, including Juror #55, were asked, in the questionnaire or at the suggestion of the parties during the jury selection process, why they had been on the Belle many times or in what context they had ridden on the Belle. *See Salinas v. Rodriguez*, 963 F.2d 791 (5th Cir. 1992). The jurors were not asked whether they had ever worked on the Belle.

In the questionnaire, Juror #55 was asked a "wrap-up" question that inquired: "Is there any additional information about you that the Court should know?" Although Juror #55 did not mention playing in a band on the Belle in response to this question, Juror #55's response was appropriate. Prospective jurors are given only minimal information regarding the nature of the litigation. They are not expected to predict the strategies the parties will use during litigation and to pose questions of themselves touching upon those strategies. It is the jurors' responsibility to answer those questions they are asked. It is the attorneys' responsibility to propose what those questions will be. Since no one asked Juror #55 why he had been on the Belle or if he had ever worked on the boat, he cannot be faulted for not asking himself, and then answering, those questions unprompted.

Juror #55 answered all questions that were asked completely and accurately. He did not fail to disclose any information. Accordingly, there is no juror misconduct here and neither a hearing nor a new trial is warranted on this ground.

(2) Denial of the Defendant's Motion to Contact Jurors

The defendant next claims that he is entitled to a new trial because this court erred in denying his motion to contact the jurors in this case.

Rule 606(b) of the Federal Rules of Evidence provides that, upon an inquiry into the validity of a verdict, a juror may not testify regarding the deliberation process or the jurors' mental processes or emotions in connection with the verdict. However, a juror may testify regarding whether extraneous prejudicial information was improperly brought to the jury's attention.[1] The cover letter that the defendant wished to send to the jurors proposed that jurors be contacted concerning the "jury deliberation process." Under Rule 606(b), juror testimony on this topic is prohibited. In his renewed motion, however, the defendant stated that he wished to inquire whether the jury had "extraneous prejudicial information" as a result of playing in a band aboard the Belle.

The questionnaire sent to all prospective jurors in this case was returned and available for the parties' use a number of days before the trial began. Juror #55 answered all of the questions in the questionnaire completely and correctly. Furthermore, during jury selection, the attorneys had the opportunity to suggest additional questions for the court to ask the jurors.

However, the defendant suggests that extraneous prejudicial information may have been introduced to the jury by Juror #55 because Juror #55 may have had knowledge of the procedure and time frame for employees leaving the boat after cruises and knowledge of the procedure used by band members to carry equipment off the boat at the end of a cruise. There is no evidence tending to show this happened, only the defendant's surmise. The request must be analyzed in the context of the facts that were actually in contention during the trial. The physical layout of the boat was not disputed. The configuration of the boat's plumbing system was not disputed.

[1]A juror may also testify whether any outside influence was improperly brought to bear upon any juror. FED. R. EVID. 606(b). However, outside influence is not in contention in this case.

The timing and the cause of the sinking were not disputed. All of the evidence, including photographs, drawings, and diagrams of the Belle, was admitted without objection or admitted over an objection that did not pertain to the accuracy of the exhibit. Rather, the defendant contended at trial that he did not sink the Belle because he was at home when the water valve was opened. He also disputed evidence of motive. Therefore, even if Juror #55 had acquired knowledge of the timing and procedure for employees leaving the boat, this would not have prejudiced the defendant since there was no factual issue raised at trial regarding this matter.

Requests to contact jurors are granted only when a substantial showing is made that prejudicial information was improperly conveyed to the jury. *See Green Construction Co. v. Kansas Power & Light Co.*, 1 F.3d 1005 (10th Cir. 1993); *United States v. Gravely*, 840 F.2d 1156 (4th Cir. 1988); *United States v. Davila*, 704 F.2d 749 (5th Cir. 1983); *King v. United States*, 576 F.2d 432 (2nd Cir. 1978); *O'Rear v. Fruehauf Corp.*, 554 F.2d 1304 (5th Cir. 1977). It is not enough that the information be extraneous to the contentions made at trial; it must also be prejudicial. There has been no showing of prejudice, much less a substantial showing. Therefore, this court properly denied the defendant's motions to contact the jurors in this case and a new trial will not be granted on this ground.

(3) <u>The Verdict is not Contrary to the Weight of the Evidence</u>

Callan asserts that he is entitled to a new trial because the verdict is contrary to the weight of the evidence. The trial court has discretion to evaluate the credibility of witnesses and the weight of the evidence to determine whether the jury's verdict was contrary to the weight of the evidence. However, the trial court should exercise its discretion to grant a new trial "only in the extraordinary circumstances where the evidence preponderates heavily against the verdict." *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988).

Although the government had no direct evidence, it introduced sufficient circumstantial evidence to prove that Callan committed the charged crime. Circumstantial evidence alone is sufficient to sustain a conviction. *United States v. Vincent*, 20 F.3d 229, 232-33 (6th Cir. 1994). The government proved that Callan knew the location and function of the flood valve and that he knew how and when to enter the boat. The government also introduced evidence that Callan attempted to create a false alibi for the night of the sinking.

Callan argues that there was no evidence of motive or intent. The government, however, introduced evidence that Callan had a motive to retaliate against the Belle's management and engineering crew. After his termination, Callan reapplied for employment but was denied three years in a row. Furthermore, Callan's personal webpage on the internet was critical of the Belle's management and engineering department.

Callan argues that there was no evidence of his intent to injure the Belle. However, if the government proved circumstantially that Callan opened a valve which he knew would allow water into the hull of the boat, the jury may reasonably infer that he intended the natural and probable consequences of that act knowingly done. *United States v. Johnson*, 756 F.2d 453, 454 (6th Cir. 1985).

Accordingly, the jury's verdict was not contrary to the weight of the evidence presented in this case and a new trial will not be granted on this basis.

(4) <u>Prosecutorial Misconduct</u>

The defendant also argues for a new trial on the ground of prosecutorial misconduct. The defendant argues that the government asked inappropriate questions of witnesses and attempted to admit inadmissible evidence. Whether an impropriety is flagrant and, therefore, warrants a new trial is determined with reference to the following factors: (1) whether the remarks tended to mislead the jury or to prejudice the accused; (2) whether they were isolated or extensive; (3)

whether they were deliberately or accidentally placed before the jury; and (4) the strength of the evidence against the accused. *United States v. Carroll*, 26 F.3d 1380, 1385 (6th Cir. 1994).

The defendant first argues that there was prosecutorial misconduct with regard to the questioning of witness Kerry Nichols. Nichols testified that she went to the wharf on August 24, 1997 and a man whom she did not know told her that an intake valve from the city water line could have caused the Belle to begin sinking. In order the get Nichols to identify the defendant as the person she had that conversation with, the prosecutor asked Nichols to "look to her right." The defendant argues that this identification procedure was unduly suggestive and warrants a new trial.

We disagree. During trial, the court denied the defendant's motion to strike Nichol's testimony, noting that Nichols had "picked Mr. Callan out as opposed to the Defense Attorney or something." Furthermore, Nichols's identification was reliable. She had ample time to view Callan on August 24 during their conversation. She first identified the man she had spoken with as Brennan Callan before the trial when she was watching television coverage of the defendant's arrest and recognized him as the man she had spoken to on August 24. The defendant also argues that the government alluded to inadmissible evidence during its cross-examination of the defendant's mother. At trial, the government asked the defendant's mother whether, during a previous meeting with investigators, she had responded that some of the evidence against her son would not be admissible. The defendant argues that the jury could have inferred that the inadmissible evidence to which the defendant's mother referred was polygraph evidence. However, the government never mentioned or alluded to the fact that this evidence was polygraph evidence. The court struck the question and admonished the jury not to consider the testimony because it was irrelevant. The government's question did not bring to the jury's attention specific facts that were not in evidence.

The defendant argues that the prosecution also attempted to present inadmissible evidence to the jury through the testimony of Detective Denny Butler. Specifically, the defendant argues that Detective Butler testified that: (1) the stories of Belle crew members were "very believeable" and (2) attempted to testify regarding hearsay of other witnesses.
The court gave appropriate curative instructions regarding this testimony. The court instructed the jury that a witness's opinion as to someone's credibility is not relevant. Although Detective Butler began to give hearsay testimony, the court quickly stopped him after the defendant's objections. The challenged questions did not cause prejudicial information to be introduced to the jury.

In sum, the government's questions were not flagrantly improper. The defendant cites only isolated remarks in a week long trial. There is no evidence that the government deliberately intended to place inadmissible evidence before the jury. If the impropriety is not flagrant, a court should grant a new trial only if: (1) proof of the defendant's guilt is not overwhelming, and (2) defense counsel objected and the trial court failed to cure the error with an admonishment to the jury. *United States v. Bess*, 593 F.2d 749 (6th Cir. 1979). The court gave curative instructions where appropriate. Furthermore, the prosecution admitted sufficient evidence against Callan to sustain a guilty verdict. *United States v. Leon*, 534 F.2d 667 (6th Cir. 1976).

(5) Character Evidence was not Improperly Admitted

The defendant argues that the court improperly admitted character evidence when it admitted the defendant's statement that he was at Kinko's from 2:30 a.m. to 5:30 a.m. on August 24. Because the crime was committed between 11:30 p.m and 12:00 midnight, the defendant argues that this evidence was not relevant to the charged crime and was only offered to prove that he lied about his whereabouts at 2:30 a.m.

This evidence was relevant to prove the defendant's consciousness of guilt because it proves that he attempted to create an alibi. When the defendant was first questioned, police had not yet pinpointed the time the sinking began. Therefore, they asked him generally where he was on the night of August 24, not specifically where he was at midnight. The defendant responded that he was home asleep all night. The defendant then went to Kinko's to verify his whereabouts. He later told investigators: "I could not have committed the crime because I was at Kinko's at 2:30." This indicates that the defendant wanted to create an alibi for 2:30 a.m. because he thought that the police thought the sinking began at 2:30. Although evidence of "other crimes, wrongs, or acts" is not admissible to prove the character of the defendant, it is admissible to prove consciousness of guilt. R. EVID. 404(b). *See United States v. Okayfor*, 996 F.2d 116, 120 (6th Cir. 1993).

(6) <u>Witness did not Improperly Testify after Watching Three Days of Trial</u>

The defendant argues that Jack Custer was improperly allowed to testify for the government after he had watched several days of the trial. Before the trial began, the court ordered that all witnesses were to be excluded from the courtroom. *See* FED. R. CRIM. P. 615. After the third day, however, Custer contacted the prosecutor because he realized there was some uncertainty regarding Callan's whereabouts on August 24 and he had information that could "fill in this gap." The government instructed Custer to leave the courtroom and notified the court that it wanted to call Custer as a witness.

At trial, Custer testified that he had talked to Callan on the wharf the day of the sinking and that Callan had told him a valve had sunk the boat. The defendant argues that Custer's testimony was tainted because he had heard opening statements and witness testimony. The

defendant also argues that Custer was biased because he was writing articles for a steamboat magazine that covered the trial and wanted to attain notoriety for himself and his publication.

A violation of the rule directing a separation of witnesses does not automatically bar a witness from testifying. This is a matter within the discretion of the trial court. *United States v. Gibson*, 675 F.2d 825 (6th Cir. 1982), *cert. denied*, 459 U.S. 972. During the first three days of trial, the government was not aware of Custer as a potential witness. As soon as Custer came forward, the prosecutor instructed Custer to leave the courtroom and notified the court that he wanted to call Custer as a witness. Before permitting Custer to testify, the court conducted a *voir dire* examination to determine whether Rule 615 had been breached by determining whether Custer had some independent information that was untainted by his presence in the courtroom. Custer testified that he had an independent recollection of his encounter with the defendant on August 24. He had never met Callan but recognized him from a steamboat article. Furthermore, Callan had given Custer his business card when they met on August 24. *See United States v. Rugiero*, 20 F.3d 1387 (6th Cir. 1994). The court permitted the defendant to cross-examine Custer about his three days in the courtroom. There is no evidence that Custer came forward as a witness as a result of collusion with the government and no evidence that the substance of Custer's testimony was fabricated as the result of the testimony he heard during the trial.

Accordingly, after considering the credibility of the witnesses and the weight of the evidence, we find that the evidence in this case does not "preponderate[] heavily against the verdict." *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988). Therefore, the defendant's motion for a new trial is **DENIED**.

IT IS SO ORDERED this _____ day of _____, 1998.

CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record