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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL LACEY; JAMES LARKIN; SCOTT SPEAR; JOHN BRUNST; ANDREW PADILLA; JOYE VAUGHT,

Defendants-Appellants.

No. 22-10000

D.C. Nos.
2:18-cr-00422-DJH-1
2:18-cr-00422-DJH-2
2:18-cr-00422-SMB-3
2:18-cr-00422-SMB-4
2:18-cr-00422-SMB-6
2:18-cr-00422-SMB-7
2:18-cr-00422-SMB

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Argued and Submitted September 2, 2022
San Francisco, California

Before: W. FLETCHER, BYBEE, and VANDYKE, Circuit Judges.

The parties are familiar with the facts and proceedings, which will not be recited here except as necessary to explain our decision.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

This is an interlocutory appeal of the district court's denial of Defendants' motion to dismiss under the Double Jeopardy Clause. Defendants appeal the denial of the motion to dismiss and the motion judge's denial of an evidentiary hearing. We have jurisdiction under 28 U.S.C. § 1291. *See Abney v. United States*, 431 U.S. 651, 662 (1977) (for the purposes of appellate review, denial of a motion to dismiss on double jeopardy grounds constitutes a final decision). We affirm.

We review the denial of a motion to dismiss on double jeopardy grounds de novo. *United States v. Zone*, 403 F.3d 1101, 1104 (9th Cir. 2005). However, "factual findings, including those on which [the] denial may be based" are reviewed for clear error. *United States v. Lopez-Avila*, 678 F.3d 955, 961 (9th Cir. 2012) (quoting *United States v. Ziskin*, 360 F.3d 934, 943 (9th Cir. 2003)). We afford such deference to the district court's findings of fact even when they are based on deductions and inferences from a written record. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). We review the denial of a motion for an evidentiary hearing for abuse of discretion. *United States v. Hagege*, 437 F.3d 943, 951 (9th Cir. 2006).

A defendant who moves for mistrial may only "raise the bar of double jeopardy to a second trial" if the mistrial was instigated by prosecutorial conduct

that was "intended to 'goad' the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). "The only relevant intent is intent to terminate the trial, not intent to prevail at this trial by impermissible means." *United States v. Lopez-Uvula*, 678 F.3d 955, 962 (9th Cir. 2012) (quoting *United States v. Perlaza*, 439 F.3d 1149, 1173 (9th Cir. 2006)).

Defendants argue that the government sought a mistrial in order to regroup and reorganize its case in light of (1) Defendants' compelling arguments regarding specific intent and the First Amendment, (2) the trial judge's pretrial ruling that escort services are legal, and (3) the government's poor showing at trial up to that point. We address each reason in turn.

1. Defendants' arguments regarding specific intent and the First Amendment were of no surprise to the government; Defendants briefed these issues extensively throughout the motion-to-dismiss stage. In response to these arguments, the trial judge had held that the indictment alleged facts that, "taken as true, establish [D]efendants had the specific intent to promote prostitution in violation of the Travel Act." *United States v. Lacey*, 423 F. Supp. 3d 748, 764 (D. Ariz. 2019). Defendants have failed to show that their arguments in support of jury instructions on these issues were so convincing as to require the government to rethink its case.

2. The trial judge's pretrial ruling that escort services are legal would not reasonably deter the government from trying its case. The indictment recognizes that escort services are lawful, but goes on to allege that the vast majority of advertisements for escort services on Backpage were thinly-veiled prostitution ads.

3. As to Defendants' argument that the government sought mistrial because the trial had been going poorly, the government's case-in-chief was still in its infancy. Of seventy-six government witnesses, only four had testified. At minimum, the government still had a clear path to prevailing at trial.

Accordingly, the record supports the motion judge's conclusion that the government had no reason to sabotage its own trial.

We also conclude that the government's misconduct was not so egregious as to compel a finding of an intent to goad. Though the record shows that the government did elicit prejudicial evidence in violation of pretrial rulings, the record also shows that the government generally had good-faith reasons to believe its questions were within the contours of the trial judge's rulings. On several occasions, the government asked questions within the parameters set by the trial judge, and a witness provided prejudicial testimony that went beyond the scope of the question. In the few instances where the government asked a question that clearly violated a pretrial ruling, the government had a cogent reason for doing so.

Lastly, we note that the government vigorously opposed Defendants' motions for mistrial. Though the government's opposition is "not conclusive," it does "support[] the district court's finding of a lack of intent." *United States v. Fowlkes*, 804 F.3d 954, 972 (9th Cir. 2015).

For the foregoing reasons, we find that the motion judge did not clearly err by finding the government did not intend to goad Defendants into moving for a mistrial. We therefore affirm the motion judge's denial of the motion to dismiss.

Additionally, we find that the motion judge did not abuse her discretion by declining to hold an evidentiary hearing on Defendants' motion to dismiss. Defendants claim that the motion judge should have held an evidentiary hearing to force the government to explain under oath its "repeated and brazen rule breaking at trial." However, the record supports the motion judge's finding that the government did not act with an intent to goad a mistrial. The motion judge did not abuse her discretion by refusing to make counsel for the government explain as much in an evidentiary hearing.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

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95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

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- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
  - ► and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

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The Clerk is requested to award costs to *(party name(s))*:

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