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FILED
S. DISTRICT COURT
2016 MAR 21 P 12:17
DISTRICT OF UTAH

Pro se

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JEREMY JOHNSON, et al.,

Defendants.

Case No. 2:11-CR-501

Redacted

MOTION TO DISMISS (OR FOR
MISTRIAL) FOR PROSECUTORIAL
MISCONDUCT DURING CLOSING
ARGUMENT

Judge David Nuffer

Magistrate Judge Paul M. Warner

DEPUTY CLERK

BY: DEPUTY CLERK

DISTRICT OF UTAH

2016 MAR 22 P 11:17

FILED
U.S. DISTRICT COURT

Defendant Jeremy Johnson, *pro se*, moves the Court for dismissal of the charges against him, or, in the alternative, for a mistrial, on the ground of prosecutorial misconduct during closing argument.

FACTS

Prior to, and during, closing arguments on March 17 and 18, 2016, Attorney's for the United States made the following untrue statements:

- A. At the request of the court, and in the presence of the court reporter and Johnson's stand-by counsel, Johnson agreed to end his defense and to rest his case prematurely in exchange for the promise and understanding that "chargebacks," "domain names," and web sites would not be considered in determining Johnson's guilt or innocence and that the jury instructions would not contain any reference to websites, domain names, etc. In contravention of that

understanding, AUSA Jason Burt made references to “domain names,” in his closing argument. Moreover, the jury instructions include, by direct reference, substantive discussion of web sites, domain names, chargebacks, etc., by their inclusion of the Third Superseding Indictment and its references to web sites at Paragraphs 6, 16, 32, 36, 37 38, 39 and 43 of the Third Superseding Indictment (Docket No 584).

- B. The jury instructions refer the jury’s attention to the Third Superseding Indictment in Paragraphs 2, 3, 4, 5, 16, 17, 18, 19, 31, 33, 35, 36, 37, 38, 40, 42, 50, 51, 53, 58, 60, 61, 65 and 72 of the Jury Instructions. Through the jury instructions’ references to the Indictment, the jury will consider matters to which Johnson has not presented a defense. As to each of those jury instructions, Johnson has been impaired in the presentation of his defense because he presented no defense in reliance upon the agreement that “domain names,” chargebacks, marketing, and websites would not be considered by the jury.
- C. During closing argument AUSA Burt referred to Cardflex saying: “Why would they (Cardflex) do this—they didn’t know, they were told a lie (by I Works).” However, in two separate recorded interviews, lead government prosecutor Rob Lunnan admitted that “Cardflex knows about it, and so they are culpable.”¹ In another recording Mr. Lunnan referenced Andy Phillips statement to Mr. Lunnan that he didn’t know that they were all IWorks accounts, Mr. Lunnan said, “Did I believe that, No.”² In spite of that knowledge and belief they called as government witnesses Cardflex employees that they knew would lie under oath, testifying that they were “conned” by Jeremy Johnson and the defendants.
- D. AUSA Burt then continued in his closing argument to say that “Cardflex had no motivation to do this (I Works processing structure).” In addition, he said, “It was not Andy Phillips’ idea.” Thus, the government knowingly and intentionally led the jury to believe

¹ See [REDACTED]

² See [REDACTED]

allegations that the government knew to be false.

- E. Knowing that Cardflex witness Will Swaim was lying, the government called Mr. Swaim to testify. During his closing argument, AUSA Burt quoted Will Swaim, "He (Jeremy Johnson) straight up lied to me."
- F. AUSA Burt stated "If iWorks had wanted to contact Wells Fargo, could they have done it?". Mr. Burt made this statement knowing full well that iWorks had contacted Wells Fargo, that the calls were recorded, that defendants attempted to admit the recordings as evidence, and that the United States successfully kept them out. Mr. Burt was further aware that in the calls, Wells Fargo agents referred iWorks back to Cardflex for any questions and told iWorks that the application was not a Wells Fargo application,³ rather it was a Cardflex application.⁴
- G. AUSA Burt also stated that "Wells Fargo terminated the iWorks accounts." Mr. Burt made this statement to the jury knowing that Wells Fargo only asked to have the accounts terminated *after* the FTC has made the request to do so. Mr. Johnson was not permitted to admit evidence of the FTC's involvement of the iWorks account closure during trial.
- H. On March 18, 2016, AUSA Robert Lunnen gave the Government's rebuttal argument. In his argument Mr. Lunnen stated that "Wells Fargo was fined millions of dollars". Mr. Lunnen's statements were designed to mislead the jury into believing that iWorks had caused a loss to Wells Fargo bank when in fact Mr. Lunnen is well aware that no such loss ever occurred⁵.

³ A transcript of one call Exhibit 1875, the Wells Fargo Agent states the following "That would be Cardflex because unfortunately, unless you're dealing specifically, or directly, with Wells Fargo Merchant Services, we're not going to be able to really assist in terms of completing an application for you even though they may have some affiliation with Wells Fargo. Unfortunately, it would be a 3rd party you would be working with for that. Now, if you're interested in talking with the Wells Fargo merchant representative, that may be a different option. Unfortunately, that would be specifically with Cardflex that you would have to contact." See Exhibit 1, p.5

⁴ Three of the recorded calls and associated transcripts with Wells Fargo are marked as exhibits 1873, 1875, 1876, 1878, 1979, 1881 and can be downloaded here [\[REDACTED\]](#)

⁵ The United States has admitted in multiple occasions prior to trial in this case that there was no loss and no victim related to iWorks actions.

Mr. Lunnen made the statement knowing that the defendants were barred from presenting any evidence in this case showing that Wells Fargo had not suffered any loss.⁶

LEGAL STANDARD AND ARGUMENT

In *United States v. Gabaldon*, 91 F.3d 91 (10th Cir. 1996), the defendant sought a mistrial, alleging that the prosecution had made untrue statements during the prosecution's opening and closing statements. Although the appellate court upheld the conviction on the ground that the prosecution's false statements were inconsequential, the court clarified the standard for appellate review for claimed prosecutorial misconduct as follows:

When prosecutorial misconduct deprives a criminal defendant of a fair trial, the defendant's due process rights are violated, and reversal is warranted. When a defendant believes that prosecutorial misconduct has occurred, he or she may move for a mistrial. While the Federal Rules of Criminal Procedure offer little guidance when judges should grant mistrial motions, we have focused on "whether . . . [the defendant's] right to a fair and impartial trial was impaired." The defendant may also move for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. "The court . . . may grant a new trial to that defendant if required in the interest of justice." Fed. R. Crim. P. 33. In other words, if after weighing the evidence and the credibility of the witnesses the court determines that "the verdict is contrary to the weight of the evidence such that a miscarriage of justice may have occurred," it may grant the defendant's motion. Both motions for mistrial and new trial call for an examination of the prejudicial impact of an error or errors when viewed in the context of an entire case. (citations omitted). (emphasis added).

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure and the 10th Circuit's standard for prosecutorial misconduct as set forth in *Gabaldon*, Johnson moves this court for a mistrial on the ground that the untrue statements made by Assistant U. S. Attorney's Burt and Lunnen substantially impaired Johnson's right to a fair and impartial trial. When considered in the context of the entire case and against the backdrop of the importance of the credibility of

⁶ See DE 944

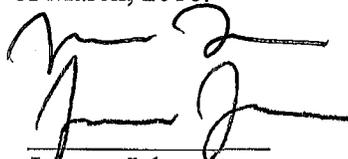
witnesses, Johnson alleges and argues here that the untrue statements made by Assistant U. S. Attorney's Burt and Lunnen had, and have, a high likelihood of misleading the jury and that such statements substantially impaired Johnson's right to a fair and impartial trial.

The conduct of the United States attorneys was improper, and was known by them to be improper. It can be presumed, therefore, that the prosecution had actual intent to mislead the jury with statements they knew to be untrue. The misconduct was therefore flagrant.

Unlike the *Gabaldon* case where the prosecution's case was overwhelming, there is substantial evidence to support Johnson's innocence in this case. Therefore, the misconduct cannot be presumed to be harmless or inconsequential. Instead, the misconduct can be determined to be flagrant on the additional ground, as stated above, that both Burt and Lunnen had notice and knowledge that their statements to the jury were false. As stated in *Gabaldon*, the trial court should ". . . consider the trial as a whole, including the curative acts of the district court, the extent of the misconduct, and the role of the misconduct within the case . . . To warrant reversal, the misconduct must have been flagrant enough to influence the jury to convict on grounds other than the evidence presented." *Id. at 94.*

Therefore, Johnson respectfully requests that the court dismiss this case or, in the alternative, that the court declare a mistrial.

Respectfully submitted this 21st day of March, 2016.



Jeremy Johnson
Pro Se Defendant
Assisted by Richard H. Casper
Utah State Bar No. 3773

EXHIBIT 1

Audio

File URL Wells Fargo Business Department (18008693557) .mp3
Length 11 min

Speaker 1: Welcome to Wells Fargo. For account access, or questions, say your account or card number, or enter it followed by pound. For anything else say, "Other options."

Jeremy: Other options.

Speaker 1: All right, other options. You can say, "Open a new account, find a branch or ATM," or "Verify an account." Otherwise, to access your account, say or enter the account or card number you're calling about. I'll connect you to a banker, but first please use a short phrase to describe what you're calling about. You can say things like, "Order new checks," or "Change my pin." These are just examples. Tell me what you're calling about.

Jeremy: Merchant application.

Speaker 1: You're calling to check the status of an application. Is that right?

Jeremy: No.

Speaker 1: Sorry. You're calling to check the status of an application. Is that right?

Jeremy: Sure.

Speaker 1: I still didn't get that. You're calling to check the status ... All right. Please hold while I transfer you to a banker. This call may be monitored, or recorded.

Diana: Hi, Diana speaking. May I have your first and last name please?

Jeremy: Jeremy Johnson.

Diana: Thank you. Can you provide me your account number?

Jeremy: I don't actually have an account with you.

Diana: All right. What is your question?

Jeremy: I got this merchant account application here. On the top the logo says [00:02:00] Cardflex, and it's in bigger letters. In small letters, smaller it says, Sponsor bank Wells



Fargo Bank NA. I've got some questions about how we should fill out this account. Should I call CardFlex? Would this be something that Wells Fargo Bank I should call?

Diana: Can you read for me what the letter says? You said it says Wells Fargo Bank NA at the bottom?

Jeremy: Yeah. It's a Cardflex merchant account application. I guess the sponsor bank is Wells Fargo.

Diana: [crosstalk 00:02:37] I'm sorry. What is the type of card that it's offering you?

Jeremy: No, it's a merchant account to process credit cards.

Diana: Let me check that for you.

Jeremy: Thanks.

Diana: You're welcome. Are you a merchant?

Jeremy: Yes. We sell stuff on the internet. What they want us to do is set up a whole bunch of different entities to do our processing in, instead of just one.

Diana: Mm-hmm (affirmative)-

Jeremy: They want us to fill out new merchant account applications. There's a whole bunch of questions I have about how they want them filled out because they are essentially being filled out in shell companies.

Diana: It's okay, I understand. So I can better assist you, can you provide me your Social Security number?

Jeremy: Sure, it's 1-6-9.

Diana: I have 1-6-9.

Jeremy: Yes.

Diana: All right. Can you provide me your first and last name?

Jeremy: Jeremy Johnson.

Diana: Thank you. Do you have any type of account with us?

Jeremy: No. Mm-hmm (negative)-

Diana: Okay. I can help with that. [00:04:00] Is it okay if I ask you some questions? I'll give you the answers, and you will let me know what would be the best answer. Is that okay with you?

Jeremy: Yeah.

Diana: Thank you. The first question is: For a mortgage loan opened in, or around, February 2013, which of the following lenders is, or was your payment made to? City National Bank, Fifth Third Bank, Credit and Capital Mortgage Corp, SHLMC Freddie Mac, or does not apply.

Jeremy: Does not apply. I don't think I paid any mortgage payments.

Diana: Which of the following is a current or previous employers? [inaudible 00:04:47] Transfer and Storage, International Graphics Printing, Iworks, Bored Company, [inaudible 00:04:52]?

Jeremy: It used to be Iworks. That company doesn't exist anymore.

Diana: Which of the following states issued your Social Security number? New Mexico, Utah ...

Jeremy: Utah.

Diana: Which of the following is the model year of the vehicle you purchased, or leased prior to June 2014, 2009, 2010, 2011, 2012 ...

Jeremy: Probably 2009.

Diana: Thank you. Mr. Johnson, while we're waiting here for the system, is it okay if I place you on hold?

Jeremy: Sure.

Diana: Thank you, sir. [00:06:00] Hello?

Jeremy: Yes.

Diana: Again, thank you so much for holding. I would be able to transfer you to one of our specialists in the Business Department that will be able to give you more information about a merchant's account that we offer, okay?

Jeremy: Okay.

Diana: Actually, I just need to tell you a product that will benefit you as well. I'd like to share that with you really quick, okay?

Jeremy: Okay, what, wait, no. I don't want another product. You're transferring me to what division?

Diana: I'm going to transfer you to our Business Department. They will be able to give you more information about that letter, promotional, that you receive, okay? [00:08:00] In reference to that program, sir, it's okay if I let you know about a product that will benefit you as well?

Jeremy: No, I don't want to know about that.

Diana: Okay, thank you for calling Wells Fargo. My name is Diana. Please hold on the line.

Jeremy: Thanks.

Diana: Mr. Johnson?

Jeremy: Yes.

Diana: Thank you so much for holding. I have my specialist from the Business Department. He will be able to help you further with that letter that you received, okay?

Jeremy: Okay.

Diana: All right. Thank you for calling Wells Fargo. Have a beautiful day.

Jeremy: Thanks.

Diana: You're welcome [inaudible 00:09:22]

Derrick: Thank you very much. Hi, Mr. Johnson?

Jeremy: Yes.

Derrick: Hi Mr Johnson, my name is Derrick, I'm a small business specialist with Wells Fargo in Charlotte, North Carolina. How are you today?

Jeremy: Good, how are you?

Derrick: Good. I'm living it up. It's halfway through the week already. I'm ...

Jeremy: No kidding.

Derrick: ... not too bad. Yes, sir. I'm basically here to assist today. All I'm doing is getting information, helping you with any request, and if necessary ...

Jeremy: It's a simple question. I don't think she understood. I have a merchant account application. It's from a company called Cardflex. They're an ISO for Wells Fargo Bank. I'm

just [00:10:00] I have questions on how to fill this out. Should I contact Wells Fargo Bank, or Cardflex?

Derrick: That would be Cardflex because unfortunately, unless you're dealing specifically, or directly, with Wells Fargo Merchant Services, we're not going to be able to really assist in terms of completing an application for you even though they may have some affiliation with Wells Fargo. Unfortunately, it would be a 3rd party you would be working with for that. Now, if you're interested in talking with the Wells Fargo merchant representative, that may be a different option. Unfortunately, that would be specifically with Cardflex that you would have to contact.

Jeremy: Got it, okay. Any questions, or any issues with this application, how to fill it out ... All of it goes through Cardflex then?

Derrick: That is correct, yes sir.

Jeremy: All right, cool. Thanks a lot. That's all I need to know.

Derrick: All right. My pleasure, sir. Best of luck, and give us a call if there's anything else we can do to help Mr. Johnson.

Jeremy: I will. Thank you, have a good day.

Derrick: You too. Thank you, sir. Bye-bye

Jeremy: Bye.