NONPRECEDENTIAL DISPOSITION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

Submitted February 26, 2024*
Decided February 28, 2024

Before

DIANE S. SYKES, *Chief Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 21-3372

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN BIANCOFIORI,
Defendant-Appellant.

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

No. 1:16-CR-00306(1)

Harry D. Leinenweber,
Judge.

O R D E R

A jury found Benjamin Biancofiori guilty of conspiracy to commit sex trafficking, *see* 18 U.S.C. § 1594; sex trafficking by force, *see id.* § 1591(a), (b)(1); and attempting to obstruct enforcement of the sex-trafficking law, *see id.* § 1591(d). He received a below-guidelines prison term of 30 years. In this order we address his appellate

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

arguments that the district judge wrongly denied him a new trial and committed sentencing errors. Biancofiori's arguments have no merit; thus, we affirm.

Background

Because Biancofiori lost at trial, we recite the facts of this case in the light most favorable to the jury's verdict. From 2007 until his arrest in 2016, Biancofiori forced nine women into prostitution, taking the money that they received. He also falsely promised them wealth, supplied them with drugs, and brutally beat them if they did not receive the money he expected or tried to escape. In addition, when Biancofiori learned that he was under investigation, he forced one victim to write falsely that he never beat her, tried unsuccessfully to keep her from testifying to a grand jury, and, after he was arrested, tried to prevent two other victims from testifying.

At trial, the government offered extensive evidence of Biancofiori's conduct. Among the 22 government witnesses, including five of the nine victims and a coconspirator, some testified that Biancofiori beat victims with his fists or with metal-knuckled gloves. The government also submitted text messages where Biancofiori admitted to beating his nine victims and stealing the money they made through prostitution. Next, the government provided records and testimony from medical professionals who treated one deceased victim for severe injuries from two assaults, while other witnesses testified that they observed Biancofiori assault that victim repeatedly around the same time that she reported an attack. The government also introduced a manuscript that Biancofiori wrote describing a "pimp" who viciously beat the women who worked for him. The women's names and injuries in the manuscript matched those of his victims.

Biancofiori objected to much of this evidence. As relevant here, he argued the judge should exclude evidence of his treatment of victims who did not testify; such evidence, he contended, was unduly prejudicial, and its admission violated his right under the Sixth Amendment to confront the witnesses against him. He also asked the judge to exclude the manuscript as unduly prejudicial because, he asserted, it was fictional. The judge rejected these arguments.

After the jury convicted Biancofiori, the district judge handled post-verdict matters. These included two unsuccessful motions for a new trial. The first repeated Biancofiori's evidentiary arguments, and the second, filed one year later and denied as untimely, argued that the prosecutors engaged in misconduct. Separately, during his

allocution at sentencing, Biancofiori maintained that the women willingly worked for him. He played video and audio recordings that he contended showed that the women were happy to be with him or in love with him. After listening to several of these recordings, the judge asked him to move on because he was relitigating his guilt and delaying the sentencing hearing. Before imposing the sentence, the judge confirmed that Biancofiori had made all his arguments. The judge then sentenced Biancofiori to a below-guidelines prison term of 30 years and a lifetime term of supervised release.

Analysis

On appeal, Biancofiori challenges the denials of his two motions for a new trial and asserts he had an inadequate opportunity to allocute or to present mitigating evidence at the sentencing hearing.

A. First Motion for New Trial

Biancofiori argues that the district judge erred by denying his first motion for a new trial, which maintained that the judge should have excluded evidence under the Federal Rules of Evidence and the Constitution. We must resolve his contentions under the Federal Rules of Evidence before resorting to the Constitution, *United States v. Vargas*, 915 F.3d 417, 420 (7th Cir. 2019), and we review the denial of his motion for a new trial and the evidentiary rulings for abuse of discretion, *United States v. Rivera*, 901 F.3d 896, 903 (7th Cir. 2018); *United States v. Eads*, 729 F.3d 769, 776 (7th Cir. 2013).

1. Manuscript

Before trial, the district judge provisionally ruled that the manuscript might be unduly prejudicial, but after victims testified to abuse that matched the abuse recounted in the manuscript, the government again moved to introduce excerpts from it. Once Biancofiori chose to testify and could assert his view that the manuscript was fictional, the judge admitted portions of it.

On appeal, Biancofiori contends that admission of the manuscript violated two rules of evidence. First, he insists, the manuscript did not qualify as a statement by a party opponent. But to qualify for admission under Rule 801(d)(2)(A), the party-opponent rule, the government needed to show only that Biancofiori wrote the manuscript and that it was offered against him. *See Jordan v. Binns*, 712 F.3d 1123, 1128–29 (7th Cir. 2013). The district judge properly ruled that both conditions were met:

Biancofiori admitted he wrote it and did not dispute that the government used it against him. Second, Biancofiori maintains, the manuscript's admission was unduly prejudicial relative to its probative value under Rule 403. But Biancofiori wrote about a "pimp" who abused women with the same names as his victims, and his narrative matched events in the victims' testimony. Admission of the manuscript under Rule 403 was thus reasonable and not an abuse of discretion. *See United States v. Jackson*, 898 F.3d 760, 764–65 (7th Cir. 2018). Finally, Biancofiori suggests that the judge should have given the jury a limiting instruction, but that argument is unavailable on appeal because he did not request one at trial. *See United States v. Suggs*, 374 F.3d 508, 517–18 (7th Cir. 2004).

Biancofiori's constitutional arguments—that admission of the manuscript violated his rights under the First and Fifth Amendments—are also meritless. He argues that admission of the manuscript violated his right to free speech, but he does not explain how or cite any cases supporting his argument; thus the argument is waived. *See United States v. Barr*, 960 F.3d 906, 916 (7th Cir. 2020). Biancofiori also contends that the decision to admit the manuscript was akin to compelled self-incrimination, but the proper inquiry under the Fifth Amendment is whether Biancofiori voluntarily created the manuscript, not whether he voluntarily provided it to the government. *See Andresen v. Maryland*, 427 U.S. 463, 473 (1976); *United States v. Doe*, 465 U.S. 605, 610–12 n.9 (1984). Biancofiori does not dispute that he wrote the book voluntarily; therefore its admission did not violate his rights under the Fifth Amendment.

2. Evidence About Non-Testifying Victims

Biancofiori next argues that the district judge's decision to admit evidence about non-testifying victims violated his rights under the Confrontation Clause. But the Clause does not require that victims testify; rather, it bars admission of "testimonial statements of a witness who did not appear at trial." *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). And the government generally did not offer testimonial statements from non-testifying victims. Rather, the testimonial evidence showing that Biancofiori forced these victims into prostitution came from those who saw—and testified at trial about—his abuse of the victims, and from his own text messages corroborating their accounts.

The only arguably testimonial statement that Biancofiori identifies from a non-testifying victim is one victim's statement to medical professionals. As reflected in her medical records and repeated by the medical professionals at trial, she said that she was twice "beat up." But because she made the statement to medical professionals for the

purpose of receiving medical treatment, the statement was not testimonial. *See United States v. Norwood*, 982 F.3d 1032, 1050–51 (7th Cir. 2020).

Biancofiori replies that, because this victim said that she was "beat up" but did not say who did it, the judge should have excluded the statement and accompanying medical records as unduly prejudicial under Rule 403. But the judge reasonably admitted this evidence: It was highly probative because it corroborated live witnesses' testimony that Biancofiori regularly abused this victim around the same time she said that she was "beat up." And any risk of unfair prejudice was limited because Biancofiori had the chance (though he did not pursue it) to cross-examine the medical professionals to point out that the records did not state who assaulted this victim.

Because the district judge's evidentiary rulings were proper, and the rulings were the only basis for the motion for a new trial, the judge did not abuse his discretion in denying that motion. *See Rivera*, 901 F.3d at 903.

B. Second Motion for New Trial

Biancofiori's last trial-based argument is that the district judge erred by denying his second motion for a new trial. In that motion, he accused the prosecutors of misconduct for eliciting false testimony, interfering with witnesses, and delivering an improper closing argument. But this motion was untimely: Biancofiori had to file it within 14 days of the verdict but waited more than one year. A district judge must deny an untimely motion for a new trial unless the government forfeits the timeliness argument (which it did not). *See Eberhart v. United States*, 546 U.S. 12, 19 (2005).

The only exception to the time limit is if "newly discovered evidence" supports Biancofiori's arguments. *See* FED. R. CRIM. P. 33(b)(1); *United States v. Ogle*, 425 F.3d 471, 476 (7th Cir. 2005). But most of the evidence that Biancofiori relied on to show prosecutorial misconduct stemmed from witness testimony or prosecutors' arguments at trial, which were not new. *Id.* at 477–78. Biancofiori insists that affidavits from three people (the mother of his daughter, a close friend, and one of the victims) were new. The district judge held an evidentiary hearing on this point and ruled that, even if the affidavits themselves were new, Biancofiori knew about the witnesses and their statements at the time of trial; therefore, the judge found, the underlying evidence was not new. On appeal, Biancofiori does not challenge this factual finding as clearly erroneous. Thus the judge properly denied the second motion for a new trial.

C. Sentencing Arguments

Finally, Biancofiori raises arguments about sentencing, but they are unavailing. To the extent that Biancofiori did not raise these arguments in the district court, where he said that he made all arguments he desired, they are forfeited, if not waived. *See United States v. Oliver*, 873 F.3d 601, 607 (7th Cir. 2017). But even on their merits he loses. He first contends that the judge did not allow him to present live testimony at sentencing. But a defendant has no unconditional right to present live testimony at sentencing. *United States v. Cunningham*, 883 F.3d 690, 699–700 (7th Cir. 2018). And the judge reasonably allowed Biancofiori to call two witnesses—but not four others he proffered to litigate consent, because that testimony would have improperly relitigated guilt. Second, Biancofiori complains that the judge unfairly limited his allocution by preventing the playback of recordings that he contends would have shown consent. But the judge allowed Biancofiori to allocate at length—for 45 pages of the transcript—and he reasonably limited the playback, again to avoid relitigating guilt. *See id.* at 700–01. Finally, Biancofiori argues that the judge sentenced him based on trial testimony that Biancofiori considers false. But trial testimony is sufficiently reliable to be a basis for sentencing decisions, and Biancofiori gives us no persuasive reason to depart from that rule here. *See United States v. Acosta*, 534 F.3d 574, 582 (7th Cir. 2008).

AFFIRMED