

NONPRECEDENTIAL DISPOSITION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**

Argued March 5, 2024

Decided May 2, 2024

Before

DIANE S. SYKES, *Chief Judge*

JOHN Z. LEE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 22-1855

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEITH BROWN,
Defendant-Appellant.

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

No. 17-cr-467-1

Robert M. Dow, Jr.,
Judge.

ORDER

Keith Brown was charged with unlawful possession of a firearm by a felon. At trial, the jury deadlocked, and the district judge declared a mistrial. Brown was then tried again, with added charges including attempted obstruction of justice and perjury, both based on the allegation that he testified falsely at the first trial. The jury deadlocked again on the firearm-possession charge but found him guilty on the other charges, and the judge denied his motion for a judgment of acquittal. On appeal, Brown challenges the sufficiency of the evidence supporting his convictions, contending that the government did not prove that he had the requisite state of mind or that his false

statements were material. We conclude that the evidence was sufficient to support the convictions and therefore affirm the judgment.

I.

On February 6, 2016, a police dispatcher broadcasted a report of three males “with guns on their waistband” arguing with three other males inside a barbershop in Chicago. Officers Lukasz Gorski and Alexander Kulisek responded to the call. As the officers entered the barbershop, two men immediately walked toward the back of the shop, and one of them threw a handgun into a bathroom. The officers followed the two suspects through the back door and into the lot behind the shop. During the pursuit, Officer Gorski saw one of the men, later identified as Keith Brown, throw a handgun over a fence. The officers eventually apprehended Brown and the other fleeing man and found a .40 caliber semiautomatic pistol with an extended magazine in the alley adjacent to the fence.

The government charged Brown with one count of being a felon in possession of a firearm, and he proceeded to trial. Brown testified in his own defense that he did not have a gun at the barbershop and was not inside the shop when the officers arrived. According to Brown, shortly before the officers arrived, he received a call from his fiancée, who was incarcerated in the Cook County Jail. Brown said he went out to the back lot to talk on the phone. About five or ten minutes later, Brown—still speaking to his fiancée—observed two men run out of the shop while being chased by police officers. At this point, Brown testified, one of the officers ordered him to the ground and arrested him.

The jury could not reach a unanimous verdict, and so the judge declared a mistrial. Afterward, the government investigated Brown’s assertion that he was on the phone with his fiancée when officers arrived at the barbershop. The government reviewed phone records from Cook County Jail and found that Brown’s fiancée had indeed called him on February 6, 2016. The call, however, ended approximately 15 minutes before the police dispatcher broadcasted the report about the barbershop and 20 minutes before the officers began chasing the two men from the shop.

Based on this evidence, the government obtained a superseding indictment. Brown was charged with attempted obstruction of justice in violation of 18 U.S.C. § 1512(c)(2) and perjury in violation of 18 U.S.C. § 1623, along with the unlawful possession of a firearm by a felon count from the original indictment and a fourth count

for unlawful possession of ammunition by a felon, in connection with a separate incident. Brown pleaded not guilty again and proceeded to trial.

At the second trial, the jury heard testimony that contradicted Brown's assertions from his first trial. Officer Gorski testified that he observed Brown throw a firearm over the fence. And Officer Kulisek testified that Brown was not on the phone and did not have a phone in his hand at the time of his arrest. Additionally, an investigator from the Cook County Department of Corrections testified that the call between Brown and his fiancée ended about 15 minutes before the police dispatcher broadcast the report concerning the barbershop.

Brown testified in his defense again. This time, he said that he had been on the phone with someone other than his fiancée when the police officers arrived. But he testified that he could not remember who he was talking to, lost the phone when he was arrested, and could not recall the number associated with that phone. In explaining his testimony from the first trial, Brown said that he misidentified his fiancée as the person who was on the phone.

The second jury could not reach a unanimous decision on the firearm-possession count either, but it found Brown guilty on the obstruction and perjury counts. (The jury also found Brown guilty of unlawfully possessing ammunition, but because he does not challenge this conviction on appeal, we do not discuss it further.)

After the verdict, Brown moved for a judgment of acquittal under Rule 29(c) of the Federal Rules of Criminal Procedure. He argued that the government failed to present sufficient evidence that he intentionally made false statements at his first trial or that any falsehoods were material, and thus he could not be found guilty of attempted obstruction of justice and perjury. According to Brown, the government did not establish that the statements he made at the first trial were anything but honest mistakes.

The judge denied the motion. He explained that the jury heard Brown's version of events along with his testimony from the first trial, and these accounts differed substantially. Further, other evidence contradicted Brown's assertions at the second trial: the officers testified that Brown fled the barbershop, that he was not on the phone immediately before the officers arrived or when they arrested him, and that he threw a gun over the fence. Noting that the jury was not obligated to accept Brown's explanation that the discrepancies between his testimony at the first and second trials

were mere mistakes, the judge concluded that the government presented sufficient evidence that Brown intended to deceive the first jury by giving what amounted to a false alibi.

The judge later sentenced Brown to 104 months' imprisonment and 36 months' supervised release. He timely appealed.

II.

On appeal Brown challenges only the denial of his Rule 29 motion, contesting the sufficiency of the evidence that he intentionally testified falsely about a material issue at the first trial. In raising a sufficiency-of-the-evidence challenge, Brown faces a heavy burden. *See United States v. Farmer*, 38 F.4th 591, 602 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 841 (2023). We will set aside the jury's verdict only when, viewing the evidence in the light most favorable to the government, "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* (quoting *United States v. Amaya*, 828 F.3d 518, 523–24 (7th Cir. 2016)). When there are competing versions of events, the choice of what to believe is for the jury, not the court. *Id.* ("We can neither reweigh the evidence nor reassess witness credibility.").

Brown first argues that the government did not prove that he had the requisite state of mind to be found guilty of either attempted obstruction of justice or perjury. As to obstruction, the government had to prove that Brown attempted to obstruct, influence, or impede an official proceeding, and that he did so "corruptly." 18 U.S.C. § 1512(c)(2). The "corruptly" element requires proof of a "willful" mens rea, and thus it "serves to separate criminal and innocent acts of obstruction." *United States v. McKibbins*, 656 F.3d 707, 711 (7th Cir. 2011) (quoting *United States v. Matthews*, 505 F.3d 698, 705 (7th Cir. 2007)). With respect to perjury, the government had to prove Brown's willful intent to provide false testimony on a material matter. *United States v. Dumeisi*, 424 F.3d 566, 582 (7th Cir. 2005).

Here, Brown concedes that he provided false testimony at his first trial, but he argues it was an innocent mistake, not the product of a willful intent to mislead. Yet, he does not explain why this is the only rational interpretation of the evidence—a requirement to successfully mount a sufficiency-of-the-evidence challenge. *See Farmer*, 38 F.4th at 602. Intent can be established by circumstantial evidence and reasonable inferences. *See, e.g., United States v. Pust*, 798 F.3d 597, 600–01 (7th Cir. 2015). And here, when viewed in the light most favorable to the government, the record contains ample

evidence from which a rational jury could infer that Brown corruptly and willfully intended to deceive the first jury. *See United States v. Godinez*, 7 F.4th 628, 638–39 (7th Cir. 2021).

For example, once the government established that Brown could not have been on the phone with his fiancée when officers arrived at the barbershop, Brown changed his story to an account so vague that the jury could certainly disbelieve it. He testified at the second trial that he could not recall with whom he was talking to on the phone. Nor could he recall the whereabouts of the phone or even the phone’s number. Any of this information could have been used to prove or disprove his account—just as the information he provided at the first trial did—and so the jury could reasonably infer that the memory lapses were not genuine. On top of that, Brown’s misstatements from his first trial concern specific details of his alibi; namely, his whereabouts when the officers arrived at the barbershop and what he was doing when the officers chased the suspects leaving the shop. The second jury could have reasonably inferred that Brown provided a detailed account of the events at the first trial for the purpose of convincing the first jury that he was telling the truth.

Brown also suggests that the jury could not rationally find him guilty of attempted obstruction of justice without also finding him guilty on the firearm-possession charge. Because the jury did not believe that he had possessed a firearm, Brown’s argument goes, it could not logically believe that he lied about his explanation for why he did not possess the firearm. In this way, Brown posits that the jury’s verdict is inconsistent. But it is inaccurate to describe the verdicts here as inconsistent: the second jury found that Brown intentionally deceived the first jury to influence its verdict. This did not obligate the second jury to reach a guilty verdict on the firearm-possession charge, which was based on a different body of evidence (including inconsistent testimony from the police officers) not limited to Brown’s testimony. A rational jury could find, regardless of whether Brown possessed a firearm, that the story he presented at the first trial was a lie intended to mislead the first jury. Brown retorts that no one would tell such a lie because it is well known that all phone calls are recorded at the Cook County Jail, and he could have been easily exposed. Maybe so. But to the extent that Brown asks that we reassess his credibility, that is not our role on appeal. *See Farmer*, 48 F.4th at 602.

Last, Brown challenges the sufficiency of the evidence on another element of perjury: the materiality of his admittedly false statements at the first trial. *See* 18 U.S.C. § 1621; *United States v. Burge*, 711 F.3d 803, 812 (7th Cir. 2013). His false testimony was

material if it had “a natural tendency to influence or was capable of influencing, the decision” of the jury deciding, at the first trial, whether he possessed a firearm. *Burge*, 711 F.3d at 812 (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999)).

Brown’s argument rests on the premise that he made only one false statement at his first trial—that he was talking to his fiancée at the time the officers arrived. From there he contends that the identity of the person he was supposedly on the phone with is irrelevant to whether he possessed a gun. Contrary to Brown’s assertion, the superseding indictment cataloged a host of false statements beyond the identity of who he was supposedly talking to, including, being outside the barbershop at the time the officers arrived, never running from the officers, and not possessing or throwing a gun. These statements supported Brown’s defense that the officers arrested him for no reason and contradicted the primary evidence of his guilt: the officers’ testimony that he was in the shop, ran out when they arrived, and tossed a gun as he fled. Therefore, the false statements would naturally tend to exonerate Brown because if he had been outside on the phone with his fiancée, he could not have been inside, and then chased out of, the barbershop. *See Burge*, 711 F.3d at 813. That makes the statements material.

The misstatements were further material because they affected Brown’s credibility. After the inaccuracy of the testimony was confirmed, Brown was left at the second trial with a vague and less plausible account of the evening’s events. His inability to say who he was talking to, the whereabouts of the phone he was using, or the number associated with it could have reasonably influenced the second jury’s view of his credibility—something he avoided at the first trial by providing a false, but more detailed, account.

For these reasons, we AFFIRM.