

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 21 CR 345
v.	)	Hon. John F. Kness
	)	
TIMOTHY MAPES	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S POST-TRIAL MOTIONS

MORRIS PASQUAL
Acting United States Attorney

By: /s/ Julia K. Schwartz
DIANE MacARTHUR
JULIA K. SCHWARTZ
Assistant United States Attorneys
219 South Dearborn Street
Fifth Floor
Chicago, Illinois 60604
(312) 353-5300

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	1
ARGUMENT.....	5
I. The Court Should Deny Defendant’s Motion for Judgment of Acquittal.	5
a. Legal Standard	5
b. The Government Presented Sufficient Evidence to Sustain Defendant’s Conviction.....	5
c. Sufficient Evidence Supported the Jury’s Determination that Defendant’s Lies Were Material.....	10
d. Sufficient Evidence Supported the Jury’s Determination that Defendant’s Lies Were In Response to Clear Questions.	12
i. Applicable Law	12
ii. Analysis	13
II. The Court Should Deny Defendant’s Motion for a New Trial.....	17
a. Legal Standard	17
b. The Court Properly Admitted Evidence of the Immunity Order.....	18
c. The Court Properly Allowed Gary Shapiro to Testify.....	20
d. The Court Properly Admitted Limited Evidence Concerning Defendant’s Prior Interview.	26
e. The Court Properly Admitted Evidence Concerning the Chinatown Parcel. 28	
i. The Government Did Not Constructively Amend the Indictment.	28
ii. The Chinatown Transfer Evidence Was Plainly Relevant.....	29
iii. McClain’s Mention of the Chinatown Transfer in Government Exhibit 17 Was Not Hearsay.	31
f. The Court Properly Admitted Evidence Before 2017 to 2019.....	32
g. The Court Properly Admitted Recorded Calls.....	34
i. The Court Properly Admitted Government Exhibit 12.	34
ii. The Court Properly Admitted Government Exhibit 63.....	36
iii. The Court Properly Admitted Government Exhibit 74.....	37
iv. The Government Did Not Make An Improper Argument During Closing Argument.....	37

v. Mapes Has Waived Any Claim of Prejudice.	40
h. The Court Properly Admitted Evidence of Defendant’s Meeting with Springfield FBI in January 2019.....	40
i. The Court Properly Excluded Evidence and Argument Concerning Other Witnesses Refreshing Recollection.	43
CONCLUSION	47

INTRODUCTION

The UNITED STATES OF AMERICA, by and through its attorney, MORRIS PASQUAL, Acting United States Attorney for the Northern District of Illinois, respectfully submits the following response to defendant Timothy Mapes' post-trial motions for judgment of acquittal and for a new trial. Dkt. 133.

At trial, the government presented ample evidence of Mapes' repeated lies in the grand jury on March 31, 2021. His motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 ignores this evidence, and the deferential standard that must be applied in the context of a Rule 29 motion. Considering the evidence in the light most favorable to the government, there was sufficient evidence from which the jury could find the defendant guilty.

Defendant's motion for a new trial under Federal Rule of Criminal Procedure 33 is similarly ill-founded. There was no evidentiary or legal error that would provide a basis for a new trial.

BACKGROUND

Background

On February 12, 2021, defendant Timothy Mapes was served a subpoena to testify before a federal grand jury, which was investigating Speaker of the Illinois House of Representatives Michael Madigan's efforts to accept and solicit bribes. Among other topics, the grand jury was investigating the relationship between Madigan and Michael McClain, Madigan's friend and a former state legislator, and their participation together in bribe-related activity. Because Mapes had served as

Madigan's Chief of Staff for approximately 25 years, he was uniquely positioned to provide information about Madigan's relationship with his close friend and confidant, Michael McClain.

On March 24, 2021, about a week before defendant Timothy Mapes testified in the grand jury, Chief Judge Rebecca Pallmeyer entered an order granting Mapes derivative use immunity pursuant to 18 U.S.C. § 6002. GX 422.¹ The order directed Mapes to testify before the grand jury and provided that no testimony or evidence presented by Mapes to the grand jury through his testimony could be used against him other than in an instance where he lied under oath. *Id.*

On the morning of his testimony, March 31, 2021, Mapes appeared before Chief Judge Pallmeyer in person, who admonished Mapes that the order required him to testify truthfully before the grand jury and that, if he failed to do so, he could face prosecution. GX 423. Mapes appeared before the grand jury later the same day and gave materially false testimony in response to questions posed to him. GX1, GX424.

Indictment

On May 26, 2021, the grand jury returned a two-count indictment against Mapes based on his grand jury testimony. Count One charged Mapes with perjury in violation of Title 18, United States Code, Section 1623(a). Dkt. 1, Count 1. Count Two

¹ The government can tender a copy of its exhibits to the Court upon request.

charged Mapes with attempted obstruction of justice in violation of Title 18, United States Code, Section 1512(c)(2). Dkt. 1, Count 2.

Count One, the perjury charge, related to seven episodes during which Mapes testified falsely in the grand jury that he either did not know or did not recall information concerning Michael McClain's work for, and interactions with, Michael Madigan from 2017 to 2019. *Id.*

Count Two, the attempted obstruction of justice charge, alleged that Mapes testified falsely, in an attempt to obstruct, influence and, impede an official proceeding about a number of topics. Those topics included: (i) whether McClain told Mapes about McClain's communications with Madigan between 2017 and 2019; (ii) whether Mapes knew McClain did work for Madigan between 2017 and 2019 and whether McClain told Mapes about that work; (iii) whether Mapes knew McClain took action on Madigan's behalf during that period, including by communicating messages to and from Madigan; (iv) whether Mapes knew about McClain's communications with two elected representatives on Madigan's behalf in 2018; (v) whether Madigan asked Mapes to pass messages to McClain in 2017 and 2018; (vi) whether McClain told Mapes about McClain's communications with Madigan's staff from 2017 to 2019, and (vii) whether Mapes knew about Madigan's impressions of Individual C, ComEd's CEO. Dkt. 1, Count 2, ¶ 2.

Trial

As discussed in greater detail below, the evidence at trial established that Mapes lied repeatedly in the grand jury when he was asked broad questions about

what he knew about Madigan's relationship with McClain and the work McClain did for Madigan from 2017 to 2019. Mapes claimed not to recall *any* work McClain performed for Madigan from 2017 to 2019; *any* times McClain passed messages for Madigan during that period; or *any* conversations McClain had with Madigan. GX 424 at 69, 73, 79, 115-16, 120, 122.

On August 21, 2023, after the government rested its case-in-chief, defendant moved for judgment of acquittal pursuant to Rule 29, arguing that the government failed to present evidence that Madigan gave assignments to McClain related to ComEd or that Mapes engaged in any unlawful conduct, in addition to alleging the evidence was deficient with regard to particular allegations in Count Two, the obstruction count. Tr. 1445-48.² The Court initially reserved decision on the motion pursuant to Federal Rule of Criminal Procedure 29(b). Tr. 1448, 1636. With regard to Mapes' arguments concerning sub-paragraphs 2(m) and 2(n) of Count Two, the Court ruled that "there's sufficient evidence that a reasonable jury certainly could find beyond a reasonable doubt that Mapes did commit perjury and did engage in obstruction. . . . The evidence cited by the government is enough for a reasonable jury to make those findings in favor of guilt." Tr. 1660-61.

On August 24, 2023, after nearly three weeks of trial, a jury returned guilty verdicts on both counts, and further decided that the government had proved each false statement and each matter defendant lied about in each count. Dkt. 124, 125.

² The trial transcript is referred to herein as "Tr."

Post-Trial Motions

Defendant filed a post-trial motion, seeking judgment of acquittal and a new trial. Dkt. 133. For the reasons discussed below, the motion should be denied.

ARGUMENT

I. The Court Should Deny Defendant's Motion for Judgment of Acquittal.

a. Legal Standard

A motion for a judgment of acquittal challenges the sufficiency of the evidence to sustain a guilty verdict against a defendant. Fed. R. Crim. P. 29. A defendant faces “a nearly insurmountable hurdle” in contending that the jury had insufficient evidence to find him guilty. *United States v. Armbruster*, 48 F.4th 527, 531 (7th Cir. 2022). In reviewing a motion for a judgment of acquittal, this Court reviews the evidence presented to the jury in the light most favorable to the government and makes all reasonable inferences in the government's favor. *See United States v. Cejas*, 761 F.3d 717, 726 (7th Cir. 2014). This Court may overturn the jury's verdict “only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt.” *United States v. Jones*, 713 F.3d 336, 340 (7th Cir. 2013) (internal marks omitted). It is the jury's role to weigh the evidence and assess the witnesses' credibility; courts do not “second-guess the jury's assessment of the evidence.” *United States v. Rollins*, 544 F.3d 820, 835 (7th Cir. 2008).

b. The Government Presented Sufficient Evidence to Sustain Defendant's Conviction.

Mapes contends that there was insufficient evidence to support the jury's verdict. As this Court ruled, “there [was] sufficient evidence that a reasonable jury

certainly could find beyond a reasonable doubt that Mapes did commit perjury and did engage in obstruction,” and the evidence presented at trial was “enough for a reasonable jury to make those findings in favor of guilt.” Tr. 1660-61.

Mapes lied repeatedly about Madigan’s relationship to McClain, including the following lies charged in Count One:

- Perjury Lie 1: Mapes was asked: “Did Mr. McClain, after he retired . . . give you any insight into what his interactions with Mr. Madigan were that you weren’t privy to personally.” Mapes responded: “No, that wouldn’t—that wouldn’t happen.” GX1-e; GX424 at 73.³
- Perjury Lie 2: Mapes was asked, “Mr. McClain didn’t—wouldn’t tell you what he was discussing with Mr. Madigan or anything that he was doing on behalf of Mr. Madigan in that ’17, ’18 and ’19 timeframe?” Mapes responded, “No.” GX1-s; GX 424 at 122.
- Perjury Lie 3: Mapes was asked, if he had “any knowledge about whether or not Mr. McClain performed any sort of tasks or assignments for Mr. Madigan in 2017 to 2018 timeframe at all?” He answered, “I don’t recall any.” GX1-c; GX 424 at 69.
- Perjury Lie 4: Mapes was asked if he had “any reason to think Mr. McClain was acting as an agent for Mr. Madigan after he retired in 2016, that is, doing work for him or carrying out assignments for him.”

³ The audio of Mapes’ grand jury testimony was admitted as Government Exhibit 1, and the transcript was admitted as Government Exhibit 424.

Mapes answered, “I’m not aware of any. I’m not aware of that activity. Let’s put it that way.” GX1-g; GX 424 at 78.

- Perjury Lie 5: Mapes was asked, “Do you recall anyone ever describing any work—anyone at all describing any work or assignments [] Mr. McClain was performing on Mr. Madigan’s behalf?” Mapes answered, “I don’t recall that—that I would have been part of any of that dialogue. I don’t know why I would be,” and then “No, I don’t recall any of that.” GX 1-p; GX 424 at 115-16.
- Perjury Lie 6: Mapes was asked, “Are you aware of any facts that would help us understand whether or not, in fact, Mr. McClain acted as an agent or performed work for Mr. Madigan or took direction from Mr. Madigan in that time frame?” Mapes answered, “I don’t know who you would go to other than Mr. Madigan or Mr. McClain. Mr. Madigan, if he had people do things for him like I did things for him, was—didn’t distribute information freely.” GX 1-s; GX 424 at 120.
- Perjury Lie 7: Mapes was asked, with regard to 2017 to the present, “do you know Mr. McClain to have acted in any capacity as a messenger for Mr. Madigan to convey messages to and from him.” Mapes answered, “I’m not aware of any.” GX 1-d; GX 424 at 73.

The government’s evidence at trial demonstrated that this testimony—and other testimony—was false. Substantial evidence showed that Mapes was intimately aware of the sensitive work McClain performed for Madigan, in terms of political

fundraising (*e.g.*, GX 282, GX 309, GX 36), committee and leadership assignments (*e.g.*, GX 66, GX 374, GX 375, GX 72, GX 73, GX 75, GX 379, GX 380), strategizing in the wake of sexual harassment allegations (*e.g.*, GX 16, GX 57), asking Representative Lou Lang to step down from office (*e.g.*, GX 368, GX 369, GX 58, GX 59, GX 60, GX 66), advising Representative Bob Rita as to gaming legislation (*e.g.*, GX 209, GX 258, GX 8, GX 57), and more. Mapes referred to McClain as “the right-hand guy to Mike Madigan” (GX 44), and even sometimes gave McClain assignments on behalf of the Speaker. GX 7, GX 294, GX 252.

McClain even told Mapes in multiple recorded phone calls about the various “assignments” he was performing for Madigan. For example:

- On May 30, 2018, McClain reported about his work to help transfer a piece of property in Chinatown from State to City ownership for Madigan; “in my case uh it’s an assignment as you probably know. I’m trying to get some uh legal, um, um, property transferred from the I, CDOT. . . . it’s in Theresa Mah’s district. . . .” GX 17.
- On July 26, 2018, McClain reported that he had “an assignment regarding Sam Yingling,” and “What is he gonna do regarding Speaker Mike Madigan and voting for him.” GX 51.
- On August 21, 2018, McClain reported to Mapes that he would be traveling to Skokie “on my ever-going, uh, assignment of helping out the nursing home industry.” GX 57.

- On October 26, 2018, McClain told Mapes that “one of my assignments is to tell [then Representative] Lou Lang that he has no, uh, life in the House anymore.” GX 58.

McClain repeatedly advertised and reported on the work he did for Madigan. At no point did Mapes indicate any surprise over these assignments. Mapes knew McClain did work for Madigan—but he lied about it in the grand jury.

One category of evidence that established that Mapes lied when he claimed to know nothing about McClain’s work for Madigan were communications regarding committee assignments in the House of Representatives. A series of calls in November 2018, five months after Mapes resigned, established that Mapes knew McClain was discussing sensitive topics with Madigan. For example, on November 15, 2018, McClain shared with Mapes who Madigan was considering appointing to the ethics committee and asked Mapes’ advice for a female appointment. GX 66. In an email on November 28, 2018, McClain continued to solicit Mapes’ advice on committees. GX375. And two days later, the two men again discussed committees. GX 72. Just one day later, Mapes told McClain that he had gone “through all the committees” in order to give advice to Madigan. GX 73. Less than two weeks later, on December 12, 2018, McClain relayed to Mapes how Madigan had gone through all the committee requests “line by line” and his feelings about who should be chair. GX 75. These are just a few examples of communications between Mapes and McClain that prove Mapes knew McClain played a critical role in Madigan’s political operation.

c. Sufficient Evidence Supported the Jury's Determination that Defendant's Lies Were Material.

Mapes argues that there was insufficient evidence that his false statements were material. As a threshold matter, materiality is only an element of the perjury count (Count One), not the attempted obstruction of justice count (Count Two). As to Count One, there was ample evidence from which the jury could find Mapes' lies were material to the government's investigation.

Mapes argues, in contradiction to the indictment and the evidence presented at trial, that "no rational jury could conclude that the government proved beyond a reasonable doubt that Mr. Mapes lied or obstructed in the grand jury concerning the two topics material to the grand jury's investigation: bribes paid, and legislation passed in exchange for bribes." Dkt. 133 at 9. Mapes ignores the fact that evidence need not concern *criminal* conduct to be material. "[F]alse testimony is material if it relates to any subsidiary issue properly under consideration by the grand jury even though it may not be directly connected to the primary subject of investigation." *United States v. Wesson*, 478 F.2d 1180, 1181 (7th Cir. 1973) (grand jury was investigating illegal gambling businesses pursuant to statute which became effective in 1970; questions as to activities of grand jury witness in 1968 were material and could form basis for perjury prosecution).

The jury was properly instructed that "[t]estimony concerns a material matter if it is capable of impeding, interfering with or influencing the grand jury. The government is not required to prove that the testimony actually impeded, interfered with or influenced the grand jury." Tr. 1707; *see also* William J. Bauer Pattern

Criminal Jury Instructions of the Seventh Circuit (2020 ed.) at 661; *United States v. McComb*, 744 F.2d 555, 563 (7th Cir. 1984).

The jury heard abundant evidence that one aspect of the grand jury investigation concerned establishing the nature of the relationship between Madigan and McClain. Former FBI Special Agent Brendan O’Leary confirmed that Mapes was an important government witness, as a member of Madigan’s “tight inner circle,” who worked as Madigan’s Chief of Staff for 25 years. Tr. 427. Law enforcement was “interested in finding out whether Mr. McClain was being used by Speaker Madigan to carry out or to convey or communicate certain messages” (Tr. 421), the very topic that Mapes lied about in the grand jury. GX424 at 73. O’Leary testified that Madigan and McClain’s relationship and communications were important to the grand jury because Madigan had not been indicted when Mapes testified: “[Madigan] had a very tight circle of people around him. He utilized Mr. McClain as sort of a go-between to take his orders and dole them out to the people, the end users. So, the communication between Mr. McClain—Mr. Madigan and his inner circle was extremely important to us. And the case was ongoing. We still had more to do.” Tr. 425-26. Information from members of the inner circle, like Mapes, was particularly important because Madigan did not use his own email or cellphone to communicate; he instead relied on trusted agents, like McClain, to carry out his orders. Tr. 427-28.

Special Agent Ryan McDonald similarly testified that McClain’s work for Madigan was important to the investigation, because “Mr. McClain was acting on behalf or as an agent of Speaker Madigan.” Tr. 702. Based on this and other evidence,

the jury had ample evidence to find that McClain's work for Madigan on sensitive matters—whether legal or not—was material to the grand jury, since McClain's status as an agent would help demonstrate that his actions were taken at Madigan's direction.

d. Sufficient Evidence Supported the Jury's Determination that Defendant's Lies Were In Response to Clear Questions.

Mapes renews his pretrial motion to dismiss portions of Count One, and argues that the prosecutor's questions were fundamentally ambiguous. Dkt. 133 at 10-16. The Court properly denied Mapes' motion to dismiss on this basis. Dkt. 91 at 8-15. Construing the evidence in the light most favorable to the government, there is no basis to overturn the jury's verdict.

i. Applicable Law

"[A] perjury conviction which might have been based on questions that were ambiguous or on responses that were literally truthful may not be sustained." *United States v. Lighte*, 782 F.2d 367, 369 (2d Cir. 1986); *see also Bronston v. United States*, 409 U.S. 352, 362 (1973). A perjury conviction should be reversed where the relevant questions were "fundamentally ambiguous," meaning they were "not a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony." *Lighte*, 782 F.2d at 375.

Significantly, as this Court recognized, "the mere presence of some ambiguity, however, is insufficient to defeat a perjury charge." Dkt. 91 at 1. Even where a question is ambiguous, a perjury conviction should be upheld "if a jury has been called

upon to determine that the question *as the defendant understood it* was falsely answered.” *United States v. Gorman*, 613 F.3d 711, 716 (7th Cir. 2010) (cleaned up). Moreover, “[a] defendant may not succeed on a claim of fundamental ambiguity by isolating a question from its context in an attempt to give it a meaning entirely different from that which it has when considered in light of the testimony as a whole.” *United States v. Farmer*, 137 F.3d 1265, 1269 (10th Cir. 1998).

Similarly, the literal truth defense is a “narrow one . . . [that] applies only where a defendant’s allegedly false statements were undisputedly literally true.” *United States v. Sarwari*, 669 F.3d 401, 406 (4th Cir. 2012) (internal citations and quotations omitted). A literal truthfulness defense is ordinarily left to the jury, absent a finding that the prosecutor’s questions were fundamentally ambiguous as a matter of law. *Lighte*, 782 F.2d at 374-75.

ii. Analysis

Mapes’ argument is nearly identical to the argument presented in his pretrial motion, which was rejected by this Court. Dkt. 33 at 4-11; Dkt. 91 at 8-15. Mapes argues that certain episodes in Count One should be dismissed “as a matter of law.” Dkt. 133. The Court should re-affirm its pretrial ruling. As the Court ruled before trial, the prosecutor’s questions that were the focus of Count One were not so ambiguous that they were incapable of comprehension. Dkt. 91 at 11. Indeed, when viewed in context, “[n]othing in the language at issue was especially vague.” Dkt. 91 at 13.

Moreover, the jury had ample evidence to conclude that Mapes understood what was being asked and was not confused by the questions. *See Gorman*, 613 F.3d

at 716. For example, during Mapes' testimony, the prosecutor asked more than a dozen questions about what Mapes knew about Madigan's and McClain's relationship from 2017 to 2019. GX424 at 65, 67, 69, 70, 71, 73, 74, 77, 78, 102-03, 115-16, 120-121. Mapes was given the opportunity to take breaks to consult with his counsel, and on one occasion asked for a break. GX 424 at 7, 58. Mapes also agreed at the outset of his appearance that he would let the prosecutor know if he did not understand a question, or if a question was unclear. *Id.* at 7. Mapes agreed that if he did not let the prosecutor know that he did not understand a question, everyone would assume that Mapes understood the question that was asked. *Id.* at 8. Mapes did not express any lack of understanding when answering the questions that led to the false specifications charged in Count One.

Contrary to Mapes' claim that "the terms 'agent' and 'assignments' are ambiguous" (Dkt. 133 at 12), the prosecutor defined those terms. For example, the government asked Mapes if he had "any reason to think [McClain] was acting as an agent for [Madigan] after he retired in 2016, that is, doing work for him or carrying out assignments for him." Dkt. 1 ¶ 8; GX424 at 78. The prosecutor expressly defined the term "agent" ("doing work . . . or carrying out assignments for him"). Mapes' response that "I'm not aware of that activity," demonstrates that he knew the question concerned "activity" by McClain on behalf of Madigan. Mapes was also asked, "Are you aware of any facts that would help us understand whether or not, in fact, Mr. McClain acted as an agent or performed work for Mr. Madigan or took direction from Mr. Madigan in that time frame?" Mapes answered, "I don't know who

you would go to other than Mr. Madigan or Mr. McClain. Mr. Madigan, if he had people do things for him like I did things for him, was—didn't distribute information freely." GX 1-s; GX 424 at 120. Again the prosecutor defined the term "agent."

As if that wasn't enough (and it was), the prosecutor explained *why* the question was important, so Mapes understood precisely why the information was being sought: "a key issue for us is whether or not Mr. McClain acted as an agent for Mr. Madigan in any respect . . . Are you aware of any facts that would help us understand whether or not, in fact, Mr. McClain acted as an agent or performed work for Mr. Madigan or took direction from Mr. Madigan in that time frame?" GX 424 at 120. Mapes did not express confusion over the question, but answered: "I don't know who you would go to other than Mr. Madigan or Mr. McClain. Mr. Madigan, if he had people do things for him like I did things for him, was—didn't distribute information freely." *Id.*

Similarly, the prosecutor specified that "assignments" was interchangeable with "doing work." GX 424 at 78 (asking if McClain was "doing work for [Madigan] or carrying out assignments for him?"). Indeed, the word "assignments" was not a phrase plucked from thin air. McClain used the phrase "assignments" over and over in recorded conversations with Mapes to describe the work that McClain was doing for Madigan. *E.g.*, GX 17, GX 51, GX 57, GX 58. Mapes never expressed any confusion over the meaning of the word "assignments" during his calls with McClain.

In short, the prosecutor's "obvious, consistent focus" in his questions was strong evidence that Mapes understood what was being asked. *United States v. Hird*,

913 F.3d 332, 348 (3d Cir. 2019) (affirming perjury conviction where prosecutor's questions had an "an obvious, consistent focus," and the "broader context" would permit the jury to conclude the defendant understood the questions). Mapes' repeated false statements were not the product of any ambiguity but were knowingly false.

Mapes' argument is similar to the defense rejected by the Fifth Circuit in *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006). In *Brown*, the Fifth Circuit affirmed the defendant's perjury conviction and rejected his claim that the questions posed to him were ambiguous. The court noted that there was no indication that the defendant struggled to understand or that the defendant misunderstood the questions. Instead, the defendant's answers were "carefully responsive," to the questions posed, which demonstrated that the defendant was "keenly aware of the thrust of the prosecutor's questions." *Id.* at 529.

Here too, a reasonable jury could find that Mapes carefully attempted to dodge straightforward questions about Madigan and McClain, two men with whom he had a close personal relationship for decades. Over and over, Mapes testified that he did not know or recall anything about Madigan's and McClain's relationship, even though McClain had described to Mapes at length the work he did for Madigan. Considering the evidence in the light most favorable to the government, the jury could reasonably conclude that Mapes' testimony was knowingly false.

For this reason, Mapes' literal truth defense also fails. As this Court previously ruled, "[w]hether Defendant did, in fact, recall answers to either of those questions at the time of his grand jury testimony is a quintessential jury question." Dkt. 91 at 10

n.3.⁴ The jury had sufficient evidence to reasonably conclude that Mapes did not have a mere “testimonial mishap,” (Dkt. 133 at 15), but knowingly lied in the grand jury.⁵

II. The Court Should Deny Defendant’s Motion for a New Trial.

a. Legal Standard

A court may vacate a judgment and grant a new trial upon a defendant’s motion “if the interest of justice so requires.” Fed. R. Crim. P. 33; *see also United States v. Berg*, 714 F.3d 490, 500 (7th Cir. 2013); *United States v. Smith*, 674 F.3d 722, 728 (7th Cir. 2012). A new trial is in the interest of justice where “the substantial rights of the defendant have been jeopardized by errors or admissions during trial.” *United States v. Kuzniar*, 881 F.2d 466, 470 (7th Cir. 1989).

“A jury verdict in a criminal case is not to be overturned lightly, and therefore a Rule 33 motion is not to be granted lightly.” *United States v. Santos*, 20 F.3d 280, 285 (7th Cir. 1994) (quotation marks and citation omitted). For this reason, Rule 33 motions are generally disfavored, and courts should only grant them in “the most extreme cases.” *United States v. Coscia*, 4 F.4th 454, 465 (7th Cir. 2021) (quotation marks and citation omitted).

⁴ A prosecutor is not required to ask follow-up questions, refresh someone’s recollection, or disclose sensitive aspects of the government’s investigation to secure truthful testimony. *See United States v. D’Auria*, 672 F.2d 1085, 1093 (2d Cir.1982) (“There is no requirement that the government reveal to a perjurer that it has evidence of the untruthfulness of his statements, much less that it reveal evidence to a witness whom it believes to have committed perjury.”).

⁵ Mapes argues that certain witnesses did not recall information at trial. Dkt. 133 at 16. The memories of those witnesses has no bearing on *Mapes*’ state of mind when he testified on March 31, 2021, as discussed in Section II(i), below.

A failure to make a prompt objection during trial results in forfeiture. *See United States v. Olano*, 507 U.S. 725, 731 (1993). Courts apply plain error review to claims that have been forfeited. *E.g.*, *United States v. Diggs*, No. 18 CR 185-1, 2022 WL 615033, at *21 (N.D. Ill. Mar. 2, 2022), *aff'd*, No. 22-1502, 2023 WL 5688801 (7th Cir. Sept. 5, 2023). Plain error review requires a new trial only if “(1) an error occurred, (2) the error was plain, (3) it affected the defendant’s substantial rights, and (4) it seriously affected the fairness, integrity, or public reputation of the proceedings.” *United States v. Gan*, 54 F.4th 467, 475 (7th Cir. 2022). In addition, errors that are harmless do not merit a new trial under any circumstance. *Id.* at 475; *see also Neder v. United States*, 527 U.S. 1, 7 (1999).

b. The Court Properly Admitted Evidence of the Immunity Order.

The Court did not err in denying Mapes’ motion to exclude evidence that he was immunized before his grand jury testimony. Dkt. 102 at 7. As the Court correctly ruled, defendant’s immunity was relevant to show Mapes’ knowledge that he testified falsely; his immunity made it more likely that his “do not recall” answers were efforts to answer (as required under the immunity order) “while not offering damaging evidence against either Madigan or McClain.” *Id.* at 8.⁶

The out-of-circuit decision in *United States v. Seltzer*, 794 F.2d 1114 (6th Cir. 1986), does not support the defendant’s position. *Seltzer* involved perjury by the

⁶ In addition, Mapes’ immunization was relevant because it showed that Mapes was not caught by surprise in the grand jury and was treated fairly. The immunity order and admonishment by the Chief Judge were two steps in a deliberative process that culminated in Mapes’ testimony. And the fact that Mapes was immunized and admonished is relevant to materiality, because it underscored the importance of Mapes’ truthful testimony.

defendant before a grand jury that was investigating his employer's tax crimes. 794 F.2d at 1115. The defendant was called before the grand jury in 1981 but refused to answer questions on the ground that his answers might incriminate him. *Id.* at 1115-16. The prosecutor then asked the grand jury foreman to read to the defendant an order of immunity that had been obtained before the defendant's testimony. *Id.* at 1116. After conferring with his attorney, the defendant answered questions posed to him. *Id.* The defendant was called again to testify before a grand jury in 1983. *Id.* The defendant was subsequently indicted for perjury based on the 1981 and 1983 grand jury testimony. *Id.* at 1117. The district court judge subsequently dismissed the perjury counts as to the 1981 testimony but allowed the government to use a transcript of the 1981 grand jury appearance to prove the counts related to the 1983 grand jury appearance. *Id.*

During a sidebar at trial, the district court judge stated that he believed it would be inappropriate for the jury to know that the defendant testified only with a grant of immunity. 794 F.2d at 1121. The government asked the court to prohibit the defense from implying that the defendant was a willing, cooperative witness. *Id.* The judge said he would allow testimony concerning the immunization order if defense counsel opened that door. *Id.* Based on the defendant's testimony during his case-in-chief, the district judge ruled that the defendant had opened the door to testimony about his immunization. *Id.* at 1121-22. On appeal, the Sixth Circuit held that the district court did not abuse its discretion in allowing cross-examination and prosecutorial comment during rebuttal argument about the defendant's invocation

before the grand jury of his fifth amendment privilege, which was appropriate “to dispel any vision of him as a cooperative witness.” *Id.* at 1123.

The *Seltzer* court did not consider the situation presented here, where the government redacted from the exhibits shown to the jury *any* reference to the defendant’s invocation of the fifth amendment. In addition, and as this Court recognized, “because the Sixth Circuit affirmed on the ground that the defendant opened the door to evidence of immunity, it was not required to consider whether the district judge’s initial concerns were well founded.” Dkt. 102 at 8 n.2.

Mapes is also wrong that the immunity order was unfairly prejudicial under Rule 403. As the Court ruled, the risk of prejudice was minimal, particularly given that the government redacted all mention of Mapes’ invocation of his Fifth Amendment rights. Dkt. 102 at 7-8. Contrary to Mapes’ contention that the government “subtly but permissibly” commented on his invocation, the government at no point suggested that Mapes invoked his Fifth Amendment rights. Dkt. 133 at 18. Indeed, Mapes points to no portion of the transcript in which the government made such a comment; it never happened.

c. The Court Properly Allowed Gary Shapiro to Testify.

The Court properly permitted former First Assistant United States Attorney Gary Shapiro to testify about the grand jury process in the Northern District of Illinois. As the Court ruled, his testimony was relevant under Rule 401, because “trial jurors may be confused about the grand jury process in view of their service as trial jurors” and “Shapiro’s testimony will seek to abate any such confusion.” Dkt. 102 at 5.

Shapiro did not testify as an expert, as Mapes claims. Dkt. 133 at 20. Shapiro did not refer to the facts of this case or to anything that Mapes said in the grand jury. Instead, Shapiro provided general information about the grand jury process based on his own personal observations and experience. Moreover, Shapiro did not render any opinions or draw any conclusions during his testimony. Rules 701 and 702, concerning testifying in the form of an opinion, are thus inapplicable. As the Court ruled, “Shapiro’s testimony is not for the purpose of providing an opinion, but instead to provide useful facts and context concerning the function of the grand jury.” Dkt. 102 at 6; *see also id.* at 5-6 (“the principal harm Rules 701 and 702 seek to avoid is having a witness provide an opinion based on specialized knowledge without also having to meet the requirement of reliability”).

Even if Rule 701 did apply, Shapiro’s knowledge was not “specialized” as that term is used in Rule 701. Shapiro’s knowledge of the grand jury process came from his day-to-day participation in it. Mapes is therefore wrong that “Shapiro offered no first-hand observations or facts.” Dkt. 133 at 22. As the Advisory Committee Notes to Rule 701 state, particularized knowledge acquired through participation in day-to-day affairs of business is not experience, training, or specialized knowledge within the realm of an expert. Fed. R. Evid. 701, Advisory Committee Notes, 2000 Amend.

Shapiro’s testimony was wholly consistent with the information the jury heard in *United States v. Garcia*, 562 F.2d 411 (7th Cir. 1977). There, the Seventh Circuit approved of a jury instruction that explained the indictment and the grand jury process that led to its issuance. The district judge instructed the jury:

You are going to take with you into the jury room the indictment in this case, and I want you to understand what its significance is, and what it is not.

A grand jury consisting generally of 23 members of your fellow veniremen when you came in on the first day were selected to serve on the November grand jury. Twenty-three of them. They listen to information presented by the government, not necessarily evidence because under the rules the grand jury may hear information which would not be admissible at a trial, but they hear information, and on the basis of the information they hear they make a determination whether or not there is probable cause to proceed further, to hold a trial, to find out whether or not in fact the defendant committed a crime.

They make no determination of the guilt of the defendant. They are not supposed to. They are supposed to be simply the first screening process by which a preliminary determination is made whether or not to go further with the case, to hold a trial.

The first people who are going to make any determination as to the guilt or innocence of these, are going to be you people. Nobody else has made that determination before. . . .

562 F.2d at 416-17.

The Seventh Circuit held that the instruction “was a fair, careful, and accurate attempt” to avoid an inference that a charge leveled by a grand jury would weigh on the side of guilt for the petit jury. 562 F.2d at 417. Shapiro’s testimony essentially provided this same information to the jurors.⁷

Mapes also claims that his testimony was not a proper because he had not been at the U.S. Attorney’s Office for 10 years. Dkt. 133 at 22. But the defense points to no

⁷ In light of *Garcia*, Shapiro’s brief testimony about the burden of proof in grand jury proceedings was not error. Moreover, any error was cured by the Court’s instruction to strike Shapiro’s testimony and only consider legal instructions given by the Court rather than any witness. Tr. 343; see *Samia v. United States*, 599 U.S. 635, 647 (2023) (noting that limiting instructions suffice even in situations with potential “life-and-death stakes for defendants”).

meaningful difference between the grand jury process during Shapiro's tenure and when Mapes testified in 2021, and that is because there is none to be found. And such an argument goes to weight, not admissibility.

Mapes curiously claims that Shapiro's testimony was unfairly prejudicial because it "bolstered the regularity of the grand jury process" and "allowed the jury to presume the regularity of the grand jury process as it related to Mr. Mapes, but did not allow Mr. Mapes to point out the significant differences in Mr. Mapes' grand jury experience from the experiences of other grand jury witnesses." Dkt. 133 at 21-22. But the so-called "regularity" of the grand jury process was not in dispute. Mapes at no point argued, either before or during trial, that Mapes' grand jury proceeding was irregular or improper. Such an argument would have been improper in any event. And as the Court held, the experience of *other* witnesses in the grand jury had no relevance to whether *Mapes* lied when he testified. Tr. 1645. And even so, Mapes took the opportunity to cross examine Shapiro on the ways different types of witnesses are treated. He asked about some witnesses meeting with the government before their testimony. Tr. 368-69 (Q: "And often in this process, prosecutors will meet with the lay witness beforehand to reduce the speculation and the potential for guessing, correct?" A: "If the witness agrees to it, yes, we would always prefer that."). And he asked about the preparation of grand jury statement for some witnesses. Tr. 369. Thus, Mapes' contention that he was unable to elicit information about how witnesses are questioned in the grand jury is wrong.

Mapes' Rule 403 argument boils down to an argument that Shapiro was a capable witness who was able to explain the operation of the grand jury succinctly. But that is not a basis to exclude a witness under Rule 403. Gary Shapiro's testimony was relevant and helped the jury to understand the secret grand jury process. Mere prejudice to the defendant is not reason enough to exclude evidence; it must be unfairly prejudicial. *United States v. Curry*, 79 F.3d 1489, 1496 (7th Cir.1996). As the Seventh Circuit explained in *United States v. Suggs*, 374 F.3d 508, 516 (7th Cir. 2004), "[e]vidence is unfairly prejudicial only if it will induce the jury to decide the case on an improper basis, commonly an emotional one, rather than on the evidence presented." Here, Shapiro's testimony was plainly relevant and helpful to the jury. There was no possible prejudice that outweighed the high probative value of this testimony.

The two cases Mapes cites demonstrate that Shapiro was not an expert, and even if he was an expert, any error was clearly harmless. In *United States v. Christian*, 673 F.3d 702, 709 (7th Cir. 2012), a case agent opined that, based on his training and experience, the defendant's actions that he observed made him believe the defendant was armed; that it was common to find firearms on the street in high crime areas; and that people who carry weapons illegally typically conceal them in their waistbands. *Id.* at 706-07. The Seventh Circuit held portions of the agent's testimony concerning his own personal observations, even if influenced by his training and experience, were not expert opinions. *Id.* at 709-10. In contrast, the agent's testimony that he believed the defendant's arm movements were consistent

with concealing a gun was improper expert testimony, because “the government wasn’t merely seeking lay opinion testimony; the government was asking Agent Manns to bring his experience to bear on his personal observations and ma[k]e connections for the jury based on that specialized knowledge.” *Id.* at 709 (cleaned up).

Unlike in *Christian*, Shapiro was not testifying as an expert because he did not “bring[] the wealth of his experience as an officer to bear on those observations [or] ma[ke] connections for the jury based on that specialized knowledge.” *Id.* at 707 (cleaned up). In fact, Shapiro did not apply his knowledge of the grand jury process to Mapes’ testimony in any way; he had left the U.S. Attorney’s Office well before Mapes appeared in the grand jury.

Moreover, even in *Christian*, where the agent improperly testified as a dual expert/lay witness, the district court’s error was harmless, because the defense had the opportunity to cross examine the agent on his testimony and the jury was instructed to give the agent’s testimony the weight the jury thought it deserved. *Id.* at 712.

Similarly, in *United States v. Conn*, 297 F.3d 548 (7th Cir. 2002), a case agent opined on the issue in dispute in a firearms trafficking case: whether a gun was a “firearm” or a collectors’ item. Even in *Conn*, where the agent should have been tendered as an expert, the Seventh Circuit found no error because the agent’s experience and methods satisfied the requirements of Rule 702. *Id.* at 556-57.

The same is true of Shapiro. Even assuming he was an expert, any error was harmless because he was quite obviously qualified to explain the workings of federal

grand juries in this district given his decades of experience at the U.S. Attorney Office, and his testimony was based on reliable methodology and knowledge. In short, any error in allowing Shapiro to testify was plainly harmless.

d. The Court Properly Admitted Limited Evidence Concerning Defendant's Prior Interview.

The Court properly permitted the government to elicit limited evidence concerning Mapes' prior interview with law enforcement, namely, the questions that were asked during Mapes' proffer-protected interview on February 11, 2021, approximately 6 weeks before his grand jury testimony. Dkt. 102 at 1-4. As the Court ruled, this evidence was relevant to demonstrate that defendant was not blind-sided by the questions asked in the grand jury: "Evidence suggesting that Defendant was interviewed mere weeks before his grand jury appearance, that he was asked questions on similar topics to those presented in the grand jury, and that he was represented by counsel in connection with that proffer all tend to show that Defendant had ample opportunity to consider the subject of his grand jury testimony." Dkt. 102 at 3.

Mapes again incorrectly argues that the questions Mapes was asked during the proffer were hearsay. The Seventh Circuit has held that "questions are not statements under Rule 801 and therefore are not hearsay." *United States v. Pulliam*, 973 F.3d 775, 783 (7th Cir. 2020), *as amended* (Sept. 8, 2020) (citations and quotations omitted). A remark is "a question if it is designed to elicit information and a response." *Id.* This holds true regardless of whether someone testifies in court about what questions were posed. *See United States v. Thomas*, 453 F.3d 838, 845 (7th Cir.

2006) (district court abused its discretion by excluding testimony about a question posed at scene of shooting, because it was not a statement and therefore not hearsay). Agents' and prosecutors' questions of Mapes were unquestionably designed to elicit responses from Mapes, and therefore were not hearsay. This Court properly held that "[u]nder this framework, the questions Defendant was asked at his proffer interview were not 'statements'; they were remarks designed to elicit information and a response." Dkt. 102 at 4.

Mapes is also wrong that the government breached the proffer agreement. Dkt. 133 at 23. The plain terms of the proffer letter state that "*anything related to the government by you or your client* during the proffer cannot and will not be used against your client . . . in the government's case-in-chief." Dkt. 64-1; Gov. Exh. A (proffer letter) (emphasis added). It does not bar the use of information related *by the government to the defendant*. There was clearly no breach of the proffer.

Finally, evidence concerning the proffer interview and the questions asked was not unfairly prejudicial, given its high probative value. The government agreed not to introduce the proffer letter or defendant's responses during the proffer, in order to mitigate any potential prejudice. The Court properly ruled that Mapes' speculation that "the trial jury will ascribe criminality to him based on the existence of the proffer agreement . . . is unwarranted," particularly given the "absence of evidence concerning Defendant's answers." Dkt. 102 at 4.

e. The Court Properly Admitted Evidence Concerning the Chinatown Parcel.

The Court properly admitted evidence concerning the transfer of a piece of land in Chinatown from State ownership to City ownership by way of state legislation. Dkt. 102 at 10-11. At the time of Mapes' testimony, the government was investigating Madigan's and McClain's efforts to transfer the Chinatown parcel in order to facilitate a sale to a private developer that would, in exchange, hire Madigan's law firm for real estate tax work.⁸ Mapes testified in the grand jury that he had read about the government's investigation into the Chinatown parcel transfer, but otherwise did not remember details. GX424 at 143-46.

i. The Government Did Not Constructively Amend the Indictment.

The government did not constructively amend the indictment by presenting evidence of the Chinatown transfer.

A constructive amendment of an indictment occurs "when the evidence at trial goes beyond the parameters of the indictment in that it establishes offenses different from or in addition to those charged by the grand jury." *United States v. Phillips*, 745 F.3d 829, 832 (7th Cir. 2014) (quotation marks and citations omitted). Significantly, "not all variations in proof that contradict or supplement verbiage in the indictment rise to the level of constructive amendments." *Id.* (quotation marks and citations omitted). To constitute an improper constructive amendment, the crime

⁸ This portion of the investigation resulted in charges against Madigan and McClain in Case No. 21 CR 115, currently pending before Judge Blakey. See *United States v. Madigan and McClain*, 22 CR 115, Dkt. 37, Counts 19 and 20 (N.D. Ill.).

charged in the indictment “must be materially different or substantially altered at trial, so that it is impossible to know whether the grand jury would have indicted for the crime actually proved.” *Id.* (quotations and citations omitted).

As the Court ruled before trial, the Chinatown transfer allegations were relevant to both counts. As to the perjury count, “the Chinatown property episode, although not specifically listed in Count One as one of Defendant’s alleged false statements to the grand jury, could be viewed by the trial jury as an example of a Madigan-to-McClain ‘assignment’ of which Defendant was aware.” Dkt. 102 at 11-12. As to the attempted obstruction count, the Court ruled that “[i]f Defendant in fact believed that McClain was doing work (‘assignments’) for Madigan, then the trial jury could find that Defendant’s testimony to the contrary was obstructive even though the Chinatown episode is not mentioned specifically in Count Two.” Dkt. 102 at 12. This ruling was plainly correct. There was no constructive amendment of the indictment.

ii. The Chinatown Transfer Evidence Was Plainly Relevant.

The evidence regarding the Chinatown land transfer was also relevant. McClain told Mapes that the Chinatown bill was one of his “assignments” from Madigan during a phone call recorded on May 30, 2018, while Mapes was still Chief of Staff responsible for legislation in the House of Representatives. GX 17. Particularly notable was the fact that McClain told Mapes that “it’s an assignment *as you probably know*.” GX 17 (emphasis added). That call showed that Mapes knew McClain did “assignments” for Madigan in 2018. The call was therefore compelling

evidence that he lied when he said he was unaware of any such assignments, which was one of the lies alleged in Count One.

Government Exhibit 17 was also relevant to materiality. As former Agent O’Leary testified, the grand jury was investigating whether McClain performed sensitive tasks or work for Madigan. Tr. 421. Government Exhibit 17 was an example of a call that was important to the investigation on these, and other topics, because the Chinatown land transfer bill was one primary focus of the grand jury’s investigation. Given that the government had a recording indicating that Mapes knew about the Chinatown transfer bill, law enforcement reasonably could have expected Mapes to provide information about that legislation. Of course, he did not do so. Thus, this call was relevant to materiality.

Mapes’ testimony about the Chinatown transfer was also relevant to Count Two, the attempted obstruction count. When Mapes was asked about the Chinatown bill in the grand jury, he denied having any conversations with McClain about the property transfer. GX 424 at 142-143. He claimed not to have heard of it until he saw it in the newspaper. *Id.* at 143. When pressed, Mapes said McClain “could have alerted me to something,” and recalled a visit from Theresa Mah, the state representative of the district covering Chinatown, but did not recall McClain’s role. *Id.* at 145-46.

The attempted obstruction count (Count Two) covered this deliberately misleading testimony. Specifically, Count Two alleges that Mapes testified falsely about whether McClain told Mapes about his communications with Madigan,

whether Mapes knew McClain was doing assignments for Madigan, whether Mapes knew McClain was taking action on Madigan's behalf, and whether McClain told Mapes about assignments. Dkt. 1, Count 2, ¶¶2(a), 2(b), 2(c), 2(d). Mapes' grand jury testimony about the Chinatown parcel was one example of this type of false statement, which was intended to impede the grand jury's investigation and prevent Mapes from being a useful government witness against Madigan and McClain.

iii. McClain's Mention of the Chinatown Transfer in Government Exhibit 17 Was Not Hearsay.

McClain's recorded statement to Mapes that the Chinatown land transfer legislation was "an assignment as you probably know," was not hearsay. The government did not offer McClain's statement for the truth of what McClain said—that Madigan did, in fact, give McClain this assignment. The statement was thus not hearsay, because it was not offered "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c)(2). The Court properly rejected Mapes' hearsay challenge, as "it is immaterial whether McClain had actually been given the assignment; Defendant's knowledge is at issue, not the accuracy of McClain's task list." Dkt. 102 at 12. This ruling was undeniably correct; McClain's communications to Mapes were admissible because they were not offered for their truth (that is, that McClain did work for Madigan), but to demonstrate what Mapes was told and what information he withheld in response to the questions he was asked during his grand jury appearance.⁹

⁹ Mapes' argument that the government did not respond to his hearsay argument overlooks six pages of the government's earlier response to his hearsay arguments. Dkt. 76 at 34-40. *See also, e.g., United States v. Harris*, 942 F.2d 1125, 1130 (7th Cir. 1991) (letters to the

f. The Court Properly Admitted Evidence Before 2017 to 2019.

Although Mapes' lies in the grand jury related to Madigan's and McClain's relationship from 2017 to 2019, the Court properly allowed the government to present evidence from before that period. This evidence was relevant to show the close relationship between McClain and Mapes. Their close relationship and consistent communications demonstrated that Mapes could not have forgotten the critical role McClain played in Madigan's political operation when he testified in March 2021.

Significantly, Mapes had multiple communications with McClain prior to 2017 about work McClain was doing for Madigan. *E.g.*, GX 207, GX 209, GX 214, GX 245. Those communications were relevant, as they showed that Mapes' repeated testimony that he did not know what McClain did for Madigan from 2017 to 2019 was false. Government Exhibit 245, excerpted below, is an example. On July 11, 2016, McClain emailed Mapes requesting Mapes' "authority to start calling people for fundraisers," and also asked about "our special program," a reference to Mapes' and McClain's special fundraising program for Madigan.¹⁰ This email thus demonstrates the longstanding work the men together performed for Speaker Madigan's political

defendant not offered for truth but were admissible for the non-hearsay "purpose of showing what [defendant] believed, because her belief does not depend on the actual truth of the matters asserted in the letters"); *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir. 1995), *as amended* (Feb. 2, 1996) (letters from defendant's dead father that said that defendant no longer had any financial assistance were not offered for truth but to show defendant knew he did not have access to those resources).

¹⁰ See Tr. 190-194 (Tom Cullen's testimony about Mapes' and McClain's fundraising efforts); Tr. 1570 (Emily Wurth's testimony about Mapes' and McClain's fundraising efforts).

operation, which was probative as to Mapes' knowledge of McClain's activities from 2017 to 2019.

From: Michael McClain [mccclain@adams.net]
Sent: 7/11/2016 4:17:58 PM
To: Mapes, Tim [Mapes@ildems.com]
CC: 'Michael McClain' [mccclain@adams.net]
Subject: Fundraisers and Money...

Timothy,

I hope you and your family had a great time out East.

I am sure you are swamped.

May I have the authority to start calling people for fundraisers this late summer, early Fall.

I will be glad to call the following. They are:

IRMA/IMA: Last year they raised \$130K. Ask? \$150K?
Tony Rossi: Last year they raised \$76.9K. Ask? \$100K?
ComEd: Last year they raised \$148.3K. Ask? \$250K?
Sam Toia: last year they raised \$103.8K. Ask? \$125K?
HACIA: Last year they raised \$108.8K. Ask? \$125K?
Kalish: Request in 2014 was \$125K and received \$30.2K.) Ask? \$200K

May I ask for two or three suggested dates from them?

Do you want the cut off to be October 10th?

How about our special program that we have been doing over the past few cycles? Do you want you and I to split up the names to start calling? I just think if we are going to ask for everyone to increase their client's donations we need to give them some notice so they can start working on their heads.

My best, Mike

Contrary to Mapes' argument (Dkt. 133 at 29), the fact that some of the relevant communications concerned subject matters like sexual harassment, political fundraising and other sensitive matters, does not render the communications irrelevant or unfairly prejudicial. Fed. R. Evid. 403. Evidence that Mapes and McClain were together involved in fundraising, and other politically sensitive topics

was highly probative. As discussed above, this evidence showed that Mapes was aware of sensitive work McClain did for Madigan—and that they did much of that work together.

g. The Court Properly Admitted Recorded Calls.

Mapes is wrong that the government introduced inadmissible hearsay at trial. Dkt. 133 at 30-33.

i. The Court Properly Admitted Government Exhibit 12.

The Court properly admitted Government Exhibit 12, a May 24, 2018 call between McClain and Representative Robert Rita about gaming legislation. Tr. at 23. Contrary to Mapes’ argument, a portion of the call *was* admissible under the hearsay exception for a statement of intention or plan. Fed. R. Evid. 803(3). Specifically, McClain informed Rita that he would “check with Mapes” about an issue concerning gaming (GX 12).¹¹

“A statement of the declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health)” is an exception to the rule against hearsay. Fed. R. Evid. 803(3). For this exception to apply, (1) McClain must have made the statement contemporaneously with what he described; (2) McClain must have had no chance (or reason) to fabricate, and (3) the statements had to be relevant to show McClain’s plans to meet with Mapes during the period charged in the indictment. *United States v. Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986); *see also United States v. Hartmann*,

¹¹ McClain told Mapes in another call (GX 57) that one of McClain’s “assignments” from Madigan was to work with Representative Rita on gaming legislation.

958 F.2d 774, 784 (7th Cir. 1992) (declarant’s “declared intent to carry out the ‘juice loan scam’ was admissible to show intent to execute the plan as well as to prove that he, in fact, carried out that plan”); *United States v. Hughes*, 970 F.2d 227, 234 (7th Cir. 1992) (district court erred in excluding defendant’s proffered evidence of his statement of his intent to procure drugs).

The declarant need not be the defendant for his or her state of mind to be relevant and admissible under Rule 803(3). To the contrary, the hearsay exceptions listed in Federal Rule of Evidence 803 (including the exception for statements of intention or plan) expressly allow admission of statements “regardless of whether the declarant is available as a witness.” In *United States v. Hartmann*, 958 F.2d 774, 783 (7th Cir. 1992), for example, the Seventh Circuit affirmed the admission of a dead man’s statements about his desire to change beneficiaries of his insurance policies and his fear that he would be murdered under Rule 803(3).

The balance of Government Exhibit 12 was not offered for its truth. Mapes challenges Representative Rita’s testimony about the call and particularly McClain’s advice to “give it to Mapes,” referring to gaming legislation. Dkt. 133 at 31. Mapes did not object to Rita’s testimony on this point (Tr. 291), so his argument is reviewed for plain error. *See Olano*, 507 U.S. at 730. There was no error here, let alone plain error, because the line at issue (“I’d give it to Mapes first”) was plainly not offered for its truth. It was a direction or piece of advice that McClain was offering Rita, not a factual assertion. *See United States v. Crim*, 451 F. App’x 196, 205 (3d Cir. 2011) (advice is “not [a] declaration[] of an act, but instead, more akin to instructions to do

something, which we have held not to be hearsay” (citation omitted)); *Cotter v. Vill. of Maple Park*, No. 04 C 1794, 2006 WL 218161, at *3 (N.D. Ill. Jan. 25, 2006) (Lefkow, J.) (lawyer’s advice not hearsay because not offered for truth but “for its effect on defendants and to explain the actions that defendants took in response to the advice that they received”). Rita’s understanding of what that advice meant was also plainly admissible. Further, it was relevant to help the jury understand why Rita believed McClain was speaking for, or on behalf of, Madigan when McClain gave advice as to gaming. *E.g.*, Tr. 276-279, 325-27.

ii. The Court Properly Admitted Government Exhibit 63.

The Court properly admitted Government Exhibit 63, which was a November 8, 2018 phone call in which McClain told then Representative Lou Lang that he was Madigan’s agent and that Lang needed to resign from public office. Tr. 979-80. The government did not offer this recording for its truth (that McClain was, in fact, acting as an agent), but as one example that McClain openly shared with others that he acted on behalf of Madigan; he was not keeping it a secret. In that call, McClain was giving advice or direction to Lang, which is not an assertive statement. *See Crim*, 451 F. App’x at 205. The Court thus properly ruled that Government Exhibit 63 was admissible “to show the effect on Mr. Lang” and was not offered for its truth. Tr. 979-80. Similarly, Lang’s testimony about his impressions of the call and its effect on him was admissible. That testimony was relevant to show the way a senior member of Madigan’s leadership team reacted to serious news coming from McClain and that it was no surprise for McClain to be telling others he was acting on behalf of the

Speaker. Whether it was true or not was of no moment; what was important was that McClain openly spoke of his “centrality . . . to the political operation.” Tr. 980.

iii. The Court Properly Admitted Government Exhibit 74.

The Court properly admitted Government Exhibit 74, over defendant’s objection. Tr. 962. Government Exhibit 74 was a conference call involving Madigan, McClain, and others (but not Mapes) regarding committee appointments. It was relevant to add context to the discussion Mapes and McClain had about Mapes’ views on committee appointments—views that McClain then passed to Madigan. The call was admissible to show the participants who were present at the meeting, and what McClain said in front of Madigan and government witness Will Cousineau. Again, whether what they said during the call was true or not was immaterial; this evidence demonstrated that McClain was deeply enmeshed within Madigan’s orbit, and McClain’s active role as an agent was no secret to those—like Mapes—who were in the Speaker’s orbit.

iv. The Government Did Not Make An Improper Argument During Closing Argument.

Mapes incorrectly suggests that the government improperly argued for the truth of Government Exhibit 12, 63, and 74 during closing. Dkt. 133 at 32.

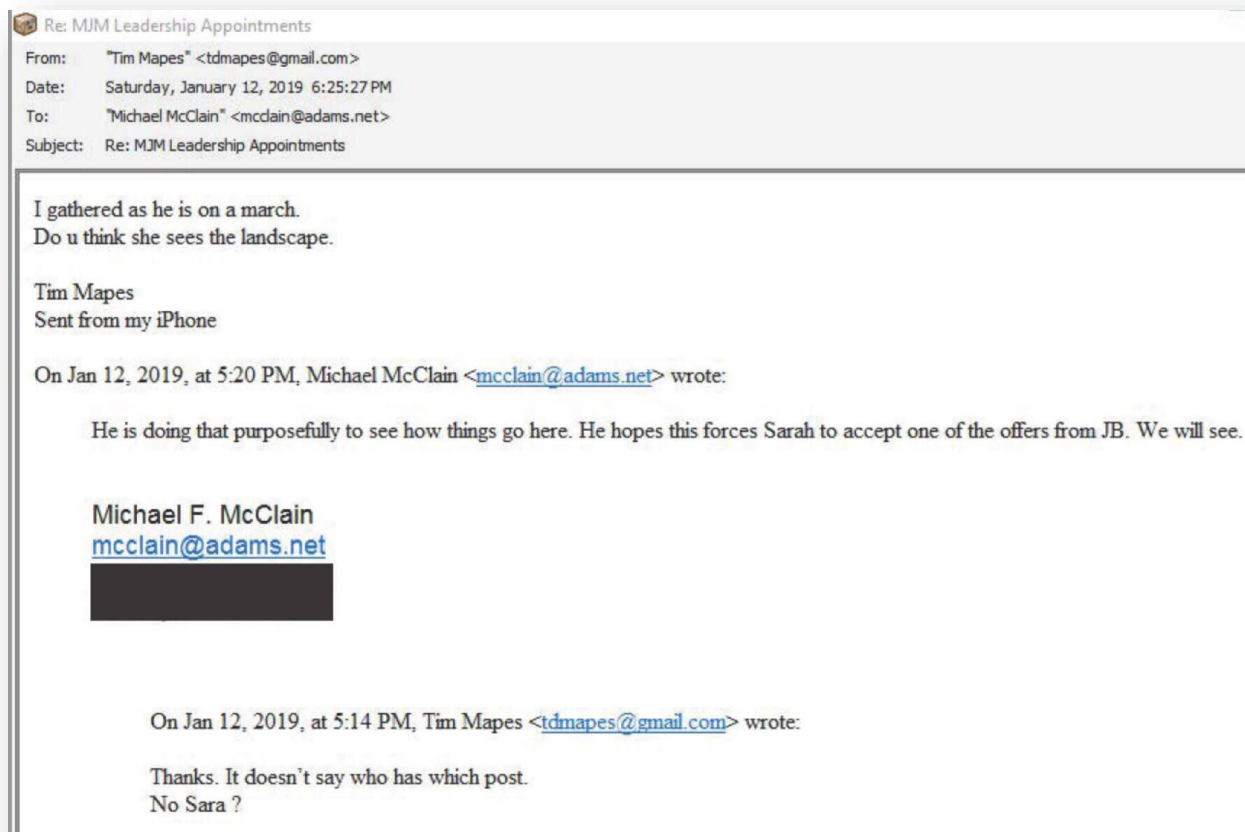
The government did argue that Lang and many other witnesses personally observed McClain acting as an agent for Madigan. Tr. 174. But that was not a reference to Government Exhibit 63, but to Lang’s testimony about McClain’s relationship with Madigan. Tr. 1018, 1050.

The government also argued that “the sheer number and detail of all those calls you heard, all those e-mails you saw, show that these were a tight-knit group of people and that Mapes simply could not have forgotten the pivotal role that McClain played in Madigan’s organization.” Tr. 1742. But that argument referred to communications between Mapes and McClain, as the next sentence makes clear: “On the wire alone—again, that’s just a nine-month period—there were 60 recorded phone calls *between Tim Mapes and Mike McClain.*” Tr. 1742 (emphasis added). Government Exhibits 12, 63, and 74 did not even include Mapes as a participant. This argument was entirely proper.

The government also did not argue for the truth of Government Exhibit 74. Contrary to defendant’s argument (Dkt. 133 at 33), the government properly relied on *different* exhibits to argue that Mapes knew about some of the topics discussed in Government Exhibit 74. For example, the government relied upon Government Exhibit 75 to argue that McClain “describ[ed] in detail the conversations that he, Mike McClain, had with Speaker Madigan” during his conversations with Mapes. Tr. 1742. Government Exhibit 75 was a call between McClain and Mapes, and thus plainly could be used to demonstrate Mapes’ knowledge.

Referring to a later email, Government Exhibit 380 (pasted below), the government argued: “Now, is this a man who thinks that Mike McClain is a big blowhard who's lying about his connection to Speaker Madigan? No. The defendant knows that Mike McClain is actively involved in the Speaker's world.” Tr. 1748.

Mapes is wrong that this was a reference to Government Exhibit 74. It was plainly proper argument based on the evidence the jury had seen and heard.



In any event, Mapes did not object to these portions of the government's closing. Thus, any objection was forfeited. Accordingly, the Court is limited to considering whether "the remarks were so egregious that the district judge was obliged, upon pain of reversal, to step in even without a defense objection." *United States v. Carswell*, 996 F.3d 785, 796 (7th Cir. 2021) (citation omitted). Mapes does not come close to satisfying this standard.

v. Mapes Has Waived Any Claim of Prejudice.

Mapes' contention that Government Exhibits 12, 63, and 74 were improperly used for their truth fails for another reason. Mapes expressly refused to agree to a jury instruction on exactly this point. Specifically, the government proposed instructing the jury that those three exhibits should not be considered for their truth. Tr. 1676-78. However, Mapes expressed a preference *not* to instruct the jury on those exhibits, consistent with a conversation the parties' lawyers had at sidebar during the trial testimony. Tr. 1678. Indeed, the Court specifically warned the defendant that, "if the defendant's lawyer doesn't think that this [instruction] is necessary, we can leave for another day and another forum if it even becomes relevant whether this might constitute a forfeiture or waiver of the argument as to 12, 63, and 74." Tr. 1679. After this warning, defense counsel again confirmed he did not want the instruction. *Id.* By rejecting the government's proposed instruction, Mapes has waived any claim of prejudice—particularly so here, where the Court warned the defendant that refusing the instruction on these exhibits could constitute a waiver. *See United States v. Garcia*, 580 F.3d 528, 542 (7th Cir. 2009) (waiver occurs where counsel made "knowing and intentional decision").

h. The Court Properly Admitted Evidence of Defendant's Meeting with Springfield FBI in January 2019.

Contrary to Mapes' argument (Dkt. 133 at 34), the Court properly admitted evidence of his January 2019 contact with FBI agents in the Central District of Illinois. Dkt. 133 at 34.

As Kim Edge from the FBI's Springfield office testified, Mapes was approached by Central District of Illinois FBI agents on January 24, 2019 as part of an unrelated investigation. Tr. 664-69. Mapes prepared a memo concerning the contact. GX425.

The Court correctly ruled that “[a] reasonable jury could find that Defendant’s actions following the meeting reflected his loyalty to Madigan and McClain, his intent to keep Madigan abreast of the government’s investigation, and his resulting desire to obfuscate before the grand jury in this District.” Dkt. 102 at 10. Specifically, the jury heard that Mapes and McClain had two phone calls the day of Mapes’ FBI contact, including a 23-minute phone call the afternoon of Mapes’ FBI meeting. GX 433. Based on this, the jury could easily infer that they were discussing the FBI contact. In addition, after the government’s investigation concerning Madigan became public on January 29, 2019 (Tr. 544), Mapes and McClain continued to discuss the FBI Springfield contact. GX 433. On February 13, 2019, McClain asked Mapes to meet and “bring that folder” with him (GX 79), an obvious reference to Mapes’ memo about his Springfield contact. GX 425.

Then, in a phone call recorded on February 15, 2019, just weeks after Mapes’ meeting with the FBI, Mapes told McClain about a conversation he had with Sheldon Zenner, Madigan’s attorney, about the meeting. Mapes had resigned as Madigan’s Chief of Staff in June 2018—approximately seven months before this conversation. Mapes prefaced his description by saying that he told Zenner “it was a request” that Mapes give Zenner his memo, and that he was calling McClain to “report[] back in.” The jury could readily infer that Mapes made these statements to McClain with the

intent that McClain relay them to Madigan, showing that Mapes was well aware that McClain not only was a close confidant of Madigan, but that he relayed messages for Madigan—a fact he lied about in the grand jury. And at the end of the call, Mapes repeated for emphasis, “I’m just reporting in,” again clearly showing that he was intending to keep McClain in the loop, so that Madigan, too, could be kept in the loop. GX 78.

This call also demonstrated that Mapes was aware of the government’s investigation into Madigan in the Northern District of Illinois. McClain and Mapes discussed whether Zenner was surprised by the FBI contact in the Central District of Illinois. Mapes said that Zenner “thought it a little unusual . . . But he does, he has a same view that it’s being precipitated by what’s going in, on in the Northern District.” GX 78. Although the relevant FBI contact was for a separate matter in the Central District, not the Northern District, Mapes’ reaction that it may have something to do with the Northern District of Illinois shows that he and McClain were circling the wagons and comparing notes as it related to the federal investigation in the Northern District of Illinois. This call was also relevant as to Mapes’ motive to lie before the grand jury; it shows Mapes’ continuing loyalty (even after his resignation) to Madigan and interest in keeping Madigan’s attorneys apprised of his contacts with law enforcement, both directly and by “reporting back in” to McClain as a messenger. This phone call was thus evidence of Mapes’ knowledge and intent when he *later* testified in the grand jury about the same FBI

interaction and the way in which Mapes chose to describe it; he was trying to protect Madigan.

In fact, when Mapes testified in the grand jury, he lied about his interactions with Madigan's counsel. Mapes testified that he may have shared his memo with Sheldon Zenner. GX 424 at 87. Mapes testified that no one other than his attorney in the grand jury proceeding had told him Zenner represented Madigan. *Id.* at 89-90. Mapes also testified that he showed Zenner the memo in 2019 simply for "informational purposes" and because he was a former Assistant U.S. Attorney. *Id.* at 90-92. Mapes also said he did not ask McClain to pass any messages to Madigan about Mapes' meeting with the FBI in 2019. *Id.* at 101-02. This testimony was false and misleading, and the jury was entitled to learn the background information as to why it was false.

In sum, the Court properly admitted evidence concerning the January 2019 FBI contact and Mapes' actions after that contact.

i. The Court Properly Excluded Evidence and Argument Concerning Other Witnesses Refreshing Recollection.

Without citing a single decision, Mapes argues that he should have been able to elicit evidence and to argue that witnesses other than Mapes listened to recordings or reviewed documents to refresh their recollections. Dkt. 133 at 35.

As a threshold matter, he misstates the Court's ruling. Mapes was permitted to elicit testimony that witnesses were unable to remember details about past events but were able to provide a more detailed and accurate account after reviewing a

document or recording in the government's possession. For example, during the testimony of Will Cousineau, the following questions were asked by defense counsel:

Q. Now, in preparation for testifying here today, you've reviewed documents?

A. I have.

Q. Fair to say that reviewing documents helped you to remember things that happened years ago?

A. At times it was of help, yes.

Q. Fair to say that at times, even after reviewing documents, you still couldn't recall a particular meeting or event?

A. Yes, sir.

Q. You have also at times in your preparation listened to recordings of conversations that you participated in with Mr. McClain, correct?

A. Correct.

Q. Fair to say that listening to those recordings has at times refreshed your memory about conversations and events that happened years ago?

A. Yes.

Tr. 938-39. Similar questions were asked of other government witnesses, such as former Representative Lou Lang. Tr. 1069-71.

The Court allowed defense counsel to ask questions about witnesses' memory "to explore the basis of this witness' recollection or lack thereof," but barred "any argument that because other witnesses were shown documents and the defendant wasn't that somehow there was unfairness or any kind of linkage along those lines." Tr. 142.

The Court limited defendant's arguments about the memories of other witnesses as follows:

Whatever somebody else as an individual may have remembered or not remembered because they may or may not have been shown documents is not relevant or not very relevant. Whatever relevance it might have is very, very low. And it seeks to draw an improper linkage from one individual to Mr. Mapes.

Individuals are individuals. Some people might remember things. They might have remembered things whether they had been shown documents or not shown documents. Other individuals might be different. But those are individuals who are not the defendant. What's relevant here is what the defendant remembered at the time that he testified in front of the grand jury.

Tr. 1645-46.

This ruling was entirely appropriate. Any comparison between Mapes' memory and other witnesses' memory was irrelevant. The conduct or state of mind of one individual generally is not probative of the conduct or state of mind of another. Evidence showing that another witness honestly failed to recall certain details makes it no more or less likely that Mapes had an honest failure of recollection. Simply put, "the knowledge or mental state of one person or entity has little or no probative value as to the knowledge or mental state of another person or entity." *Kelley as Trustee of BMO Litigation Trust v. BMO Harris Bank N.A.*, 634 F. Supp.3d 619, 633 (D. Minn. 2022) (excluding evidence of knowledge and state of mind of federal investigators as irrelevant to determine state of mind of other parties). *Cf. United States v. Van Eyl*, 468 F.3d 428, 437 (7th Cir. 2006) (holding that a district court acted within its discretion in excluding lay opinion testimony from coworkers regarding the legality of the defendant's conduct—to avoid the jury inappropriately using those witnesses' opinions to determine the defendant's state of mind—and then granting a new trial when the government violated this ruling in its closing argument).

The Court's ruling is consistent with a similar ruling by Judge Kendall in *United States v. Benalcazar*, No. 09 CR 144, 2011 WL 4553027, at *11 (N.D. Ill. Sept. 29, 2011) (Kendall, J.). There, the defendant in a tax conspiracy case sought to introduce "evidence of other witnesses' lack of knowledge as to the legality of the scheme to serve as circumstantial evidence that he also lacked the necessary knowledge." *Id.* Judge Kendall "disallowed such testimony because one person's state of mind is irrelevant to what another person actually believed." *Id.* As in *Benalcazar*, the mere fact that other witnesses were truthful when they said they could not recall certain details (and then had their memories refreshed by reviewing documents or recordings) had no bearing on Mapes' conduct or state of mind.

Said another way, suppose the government could point to another witness who deliberately lied before the grand jury and ultimately admitted he was doing so to protect a third party. This evidence would not make it any more or less likely that Mapes intended to lie when he appeared before the grand jury in this case, and obviously such evidence would not have been admissible at trial if the government sought to introduce it to argue that Mapes possessed the same intent to lie before the grand jury as someone else.

Mapes argues that he was unfairly prejudiced when he was not permitted to "make common sense observations about human memory as it played out in court through cross-examination." Dkt. 133 at 35. That is incorrect. The Court did in fact allow Mapes to present expert testimony on the way memory works, as the Court remarked in its ruling. Tr. 1646. And Mapes' counsel was permitted to make

numerous observations about human memory during closing. *E.g.*, Tr. 1822 (“And using your common sense and thinking about that process, would a recording help to foster a memory? Would a document help to serve as a cue to foster a memory?”); Tr. 1845-46 (“[The government is] asking you to find him guilty of crimes despite not doing any of those things and not giving him any chance to refresh his memory.”); Tr. 1803 (“You also heard from Professor McBride that stressful situations impact memory. And, again, that’s just common sense.”); Tr. 1813 (“Memory, as you heard from Professor McBride, is fallible.”). The jury thus heard argument about how memory works. There was no need to delve into the memories of *other* witnesses, so any error in this regard was harmless.

CONCLUSION

For the reasons stated above, the government respectfully asks the Court to deny defendant’s post-trial motions.

Respectfully submitted.

MORRIS PASQUAL
Acting United States Attorney

By: /s/ Julia K. Schwartz
DIANE MacARTHUR
JULIA K. SCHWARTZ
Assistant United States Attorneys
219 South Dearborn Street
Fifth Floor
Chicago, Illinois 60604
(312) 353-5300