

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES OF AMERICA

v.

PAUL J. MANAFORT, JR.,

Defendant.

Crim. No. 1:18-cr-83 (TSE)

GOVERNMENT’S MOTION FOR CURATIVE INSTRUCTION

The United States of America, by and through Special Counsel Robert S. Mueller, III, hereby moves for a curative instruction, at the beginning of proceedings on August 9, 2018, correcting the Court’s erroneous admonishment of government counsel in front of the jury on August 8, 2018. The record demonstrates that the Court mistakenly faulted the government for permitting IRS revenue agent Michael Welch, the government’s expert witness, to remain in the courtroom during the proceedings, when in fact on the first day of trial the Court had expressly granted the government’s motion to do so. The Court’s reprimand of government counsel suggested to the jury—incorrectly—that the government had acted improperly and in contravention of Court rules. This prejudice should be cured.

A. Background

On the first day of trial, after jury selection and before opening statements, the government moved to exclude witnesses from the courtroom during the proceedings “with the exception of our expert and our case agent.” Tr. 7/31/18 at 14-15, See Attachment B. The Court asked the defense if it had any objection to the government’s case agent and expert remaining in the courtroom, and the defense answered no. *Id.* at 15. The Court then asked for the name of the expert; government

counsel stated “Special Agent Michael Welch,” and, in response to the Court’s further question, explained that Mr. Welch is an IRS revenue agent and an expert in tax computation. *Id.* The Court stated: “All right. I will grant the motion to exclude witnesses.” *Id.*

On August 8, 2018, at the start of Mr. Welch’s testimony, the government asked if he had been present in the courtroom during the trial. Tr. 8/8/18 at 1661, *see* Attachment A. When Mr. Welch responded that he had, the Court expressed surprise and stated that it was the Court’s “clear recollection” that it had not permitted expert witnesses to remain in the courtroom and that it did not “typically” do so. *Id.* The court instructed government counsel that he must “ask specifically.” *Id.* The Court admonished the government to not “do that again,” and stated that the government needs to “be clear about that.” *Id.* at 1662.

B. Argument

The record establishes that the government acted appropriately with respect to Mr. Welch’s presence in the courtroom. It moved the Court to allow Mr. Welch to remain, and the Court expressly granted the motion. Tr. 7/31/18 at 14-15.

The Court’s sharp reprimand of government counsel in front of the jury on August 8 was therefore erroneous. And, while mistakes are a natural part of the trial process, the mistake here prejudiced the government by conveying to the jury that the government had acted improperly and had violated court rules or procedures. The exchange could very well lead the jury to reach two erroneous inferences: (a) that Mr. Welch’s testimony is not credible because he was improperly privy to the testimony of other witnesses, and (b) that the government sought to secure an unfair advantage by secreting its expert in the courtroom without permission.

Even if the Court did not intend to suggest that the government had been insubordinate, actions that project a “negative impression” of one side, *United States v. Lefsih*, 867 F.3d 459, 467

(4th Cir. 2017) (internal quotation marks omitted), or that reveal “continual agitation and hostility toward counsel,” *United States v. Cassagnol*, 420 F.2d 868, 879 (4th Cir. 1970), can lead the jury to decide the case on improper grounds. The government is therefore entitled to a curative instruction. *See United States v. Martinovich*, 810 F.3d 232, 240-41 (4th Cir. 2016) (prejudice from district court’s errors, including incorrectly “chastis[ing]” defense counsel and “accusing him of going outside the trial court procedure,” was limited by curative instruction).

Accordingly, the government moves for a curative instruction, at the beginning of proceedings on August 9, 2018, stating that: on the prior day the Court had admonished the government for failing to “ask specifically” that its expert witness be permitted to remain in the courtroom; that in fact the government had obtained permission from the Court for Mr. Welch to remain in the courtroom; that the Court was mistaken in its suggestion that the government had not followed court procedures; and that the jury should not be under the impression that the government or the witness had acted improperly or violated a court order or rule.

CONCLUSION

For these reasons, the government requests that the Court give the referenced curative jury instruction at the start of the proceedings on August 9, 2018.

Respectfully submitted,

ROBERT S. MUELLER, III
Special Counsel

Dated: August 9, 2018

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/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of August, 2018, I will cause to be filed electronically the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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1 an expert in an area and the extent to which you accept that
2 witness' testimony as expert testimony are matters left
3 entirely to you, the jury. And I'll give you further
4 instructions on this as well as other matters at the end of
5 the case.

6 Mr. Asonye, you may proceed.

7 BY MR. ASONYE:

8 Q. Agent Welch, have you been present each day in this
9 courtroom so far in this trial?

10 A. Yes, I have.

11 Q. Have you heard all of the testimony --

12 THE COURT: I thought we excluded witnesses.

13 MR. ASONYE: Except for -- Your Honor, except for
14 expert witnesses, Your Honor --

15 THE COURT: Is that right?

16 MR. ASONYE: -- and case agents.

17 THE COURT: The case agents I did admit. But the
18 next time we do this, it's my clear recollection, Mr. Asonye,
19 that I wasn't admitting experts. You need to ask
20 specifically. You're going to go ahead now, I'm going to
21 permit that, but I want you to remember that. I typically
22 allow the case agents to remain. I don't typically allow
23 experts for either side to remain.

24 MR. ASONYE: Appreciate it, Your Honor. We'll check
25 the transcript, but we believe that we said case agent

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1 and expert witness.

2 THE COURT: Well, let me be clear: I don't care

3 what the transcript says. Maybe I made a mistake. But I want

4 you to remember don't do that again. When I exclude

5 witnesses, I mean everybody. Now, it may be that I didn't

6 make that clear. It may be that I did allow this, but don't

7 do it in the future.

8 MR. ASONYE: Fair enough, Your Honor.

9 THE COURT: I beg your pardon?

10 MR. ASONYE: I said fair enough, Your Honor.

11 THE COURT: Well, it's right. Fair enough.

12 All right. I just want you to have that in mind,

13 Mr. Asonye, because you appear here again. And when I exclude

14 witnesses, I mean everybody unless I make a specific

15 exception, and I do for case agents.

16 Proceed. It's not a big deal, but I want you to be

17 clear about that.

18 MR. ASONYE: May I proceed, Your Honor?

19 THE COURT: You may.

20 BY MR. ASONYE:

21 Q. Have you heard all of the testimony of the witnesses who

22 have testified thus far in this case?

23 A. Yes, I have.

24 Q. And have you reviewed all the exhibits that have been

25 admitted thus far in this trial?

1 you need for that?

2 MR. ZEHNLE: Thirty minutes.

3 THE COURT: All right. And you're Mr. Westling?

4 MR. ZEHNLE: No, I'm Mr. Zehnle.

5 MR. WESTLING: We've been shuffling around. We
6 apologize for that.

7 THE COURT: So she's innocent.

8 All right. How long did you say you needed?

9 MR. ZEHNLE: Thirty minutes.

10 THE COURT: All right. I think that's appropriate
11 and sensible and be prepared to go on. I'm not going to
12 address the 40 pages that are still in dispute. Do you
13 anticipate those coming up in the first witness or so?

14 MR. ANDRES: Several of them, but not any of the
15 ones that really are the longer ones that are really of
16 concern, but we can let defense know who we are going to call
17 and what exhibit --

18 THE COURT: Which ones -- yes, advise chambers and
19 the defendants which ones you intend to use in these first few
20 witnesses so that I can pay attention to those.

21 MR. ANDRES: Okay.

22 THE COURT: Thank you.

23 MR. ASONYE: Judge, I'm sorry, we also -- the
24 Government would move to exclude any witnesses once the
25 opening statements start with the exception of our expert and

1 our case agent.

2 THE COURT: All right. Any objection to the case
3 agent and the expert?

4 MR. WESTLING: No, Your Honor.

5 THE COURT: Who is the expert?

6 MR. ASONYE: Special Agent Michael Welch, Your
7 Honor.

8 THE COURT: And in what discipline is he an expert?

9 MR. ASONYE: In tax, Your Honor, tax computation,
10 Your Honor. He's the IRS revenue agent.

11 THE COURT: All right. I will grant the motion to
12 exclude witnesses. And other than the defendant, does the
13 defendant wish to have anyone else present.

14 MR. WESTLING: No, Your Honor.

15 THE COURT: Anything else before I recess?

16 MR. ANDRES: No, Judge. Thank you.

17 MR. WESTLING: Nothing from the defense, Your Honor.

18 THE COURT: All right. I thank counsel for your
19 cooperation. Court stands in recess until 2:45.

20 (Lunch Recess 2:00 p.m.)

21 P R O C E E D I N G S

22 A F T E R N O O N S E S S I O N

23
24 THE COURT: All right. Mr. Flood, you may bring the
25 jury in, please.