

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of June, two thousand fifteen.

PRESENT: RALPH K. WINTER,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

GARY HEINZ, MICHAEL WELTY, PETER
GHAVAMI,

Defendants-Appellants.

Nos. 13-3119-cr(L),
13-3121-cr(CON),
13-3296-cr(CON),
14-1845-cr(CON),
14-1857-cr(CON),
14-1859-cr(CON)

FOR APPELLANTS: MARC L. MUKASEY (Philip J. Bezanson, *on the*
brief), Bracewell & Giuliani LLP, New York, NY,
for Gary Heinz.

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2 GREGORY L. POE (Preston Burton, Rachel S. Li Wai
3 Suen, *on the brief*), Poe & Burton PLLC,
4 Washington, DC, *for* Michael Welty.
5

6 NATHANIEL Z. MARMUR, Law Offices of Nathaniel
7 Z. Marmur, PLLC, New York, NY (Charles A.
8 Stillman, James A. Mitchell, Mary Margulis-
9 Ohnuma, Ballard Spahr Stillman & Friedman,
10 LLP, New York, NY, *on the brief*), *for* Peter
11 Ghavami.
12

13 FOR APPELLEE: DANIEL E. HAAR, Attorney (Brent Snyder, Deputy
14 Assistant Attorney General, James J. Fredricks,
15 Finnuala K. Tessier, Kalina Tulley, Jennifer
16 Dixon, Attorneys, *on the brief*), U.S. Department
17 of Justice, Antitrust Division, Washington, DC.
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19 Appeal from judgments of the United States District Court for the
20 Southern District of New York (Kimba M. Wood, *Judge*).

21 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,
22 AND DECREED that the judgments of the District Court are AFFIRMED.

23 Defendants-appellants Gary Heinz, Michael Welty, and Peter Ghavami
24 appeal from judgments of conviction, following a jury trial, for conspiracy to
25 commit wire fraud in violation of 18 U.S.C. §§ 371 and 1349 and, as to Heinz and
26 Ghavami, wire fraud in violation of 18 U.S.C. § 1343. On appeal, the Defendants
27 claim that (1) the Government should be judicially estopped from arguing that
28 their conduct affected financial institutions, (2) the Government failed to disclose
29 evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963), and (3) the District
30 Court erred by improperly instructing the jury, admitting prior bad acts

1 evidence, and admitting lay witness testimony.¹ We assume the parties'
2 familiarity with the facts and record of the prior proceedings, to which we refer
3 only as necessary to explain our decision to affirm.

4 We are not persuaded by the Defendants' argument regarding judicial
5 estoppel. The original indictment and co-conspirators' plea agreements, which
6 do not state whether the fraud "affected a financial institution," are not "clearly
7 inconsistent" with the charges in the superseding indictment that the
8 Defendants' fraud "affected a financial institution." See New Hampshire v.
9 Maine, 532 U.S. 742, 750 (2001); United States v. Christian, 342 F.3d 744, 748 (7th
10 Cir. 2003).

11 As for the alleged Brady violation, we agree with the District Court that
12 the email the Government failed to disclose is neither favorable nor material to
13 the defense. See United States v. Certified Env'tl. Servs., Inc., 753 F.3d 72, 91, 93
14 (2d Cir. 2014). Rather, the email supports the Government's theory at trial
15 regarding the meaning of code words used within the conspiracy.

16 Nor do we identify error in the District Court's jury instruction and
17 evidentiary decisions. Viewed as a whole, the jury instruction did not convey to
18 the jury that a certification was false if it was submitted for a business purpose
19 that the jury deemed illegitimate, see United States v. George, 779 F.3d 113, 117
20 (2d Cir. 2015), and it was not error to instruct the jury to determine whether the
21 Defendants agreed to defraud municipalities of their property right to control
22 their assets, see United States v. Carlo, 507 F.3d 799, 802 (2d Cir. 2007). In
23 addition, for substantially the reasons provided by the District Court, it was not
24 error to admit evidence that Ghavami and Heinz manipulated bids on municipal

¹ We address the Defendants' argument that the prosecution was time barred in a separate opinion filed simultaneously with this order.

1 investment contracts during their previous employment at JPMorgan Chase,
2 particularly since the District Court gave an appropriate limiting instruction to
3 the jury. See United States v. Mercado, 573 F.3d 138, 141-42 (2d Cir. 2009).
4 Finally, the District Court did not err by admitting lay witness Mark Zaino's
5 opinion testimony pursuant to Federal Rule of Evidence 701. The Government
6 laid a sufficient foundation to explain that Zaino derived his opinions as a
7 member of the Defendants' conspiracy, Zaino's testimony helped explain
8 "ambiguous references . . . that [were] clear only to the conversants," and the
9 testimony was not based on specialized knowledge within the scope of Federal
10 Rule of Evidence 702. United States v. Yannotti, 541 F.3d 112, 125-26 (2d Cir.
11 2008); see United States v. Garcia, 291 F.3d 127, 141 (2d Cir. 2002).

12 We have considered the Defendants' remaining arguments that are not the
13 subject of the opinion we issue simultaneously with this summary order and
14 conclude that they are without merit. For the reasons stated herein and in the
15 separate opinion accompanying this order, the judgments of the District Court
16 are AFFIRMED.

17 FOR THE COURT:

18 Catherine O'Hagan Wolfe, Clerk of Court