Nos. 16-12978-FF & 16-13294-FF

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD NEIL FELDMAN and KIM XUAN FELDMAN,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:14-cr-521, Hon. James D. Whittemore

REPLY BRIEF OF KIM XUAN FELDMAN

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Michael Stanton
Sean Patrick Cronin
STANTON CRONIN LAW GROUP
6944 West Linebaugh Ave, Ste 102
Tampa, FL 33625
(813) 444-0155 T
(813) 422-7955 F
mstanton@sclawyergroup.com
scronin@sclawyergroup.com

Counsel for Kim Xuan Feldman

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Adams, Natalie Hirt – Assistant United States Attorney;
2. Belden, Doug, Hillsborough County Tax Collector – Claimant;
3. Bentley, A. Lee, III – United States Attorney;
4. Bui, Victoria – Claimant;
5. Burns, P.A. – Appellate counsel for Kim Xuan Feldman;
6. Burns, Thomas A. – Appellate counsel for Kim Xuan Feldman;
7. Camareno, Bryant R. – Counsel for Claimant Victoria Bui;
8. Cronin, Sean Patrick – Appellate counsel for Kim Xuan Feldman;
9. Ester, Jason Charles – Counsel for Diane Nelson, Pinellas County Tax Collector;
10. Feldman, Edward Neil – Defendant-Appellant;
11. Feldman, Kim Xuan – Defendant-Appellant;
12. Fitzgerald, Brian Thomas – Counsel for Doug Belden, Hillsborough County Tax Collector;
13. Gershow, Holly L. – Assistant United States Attorney;
14. Gonzalez, Ricky – Victim;
15. Hale, Shauna S. – Assistant United States Attorney;

16. Jung & Sisco, P.A. – Trial counsel for Edward Neil Feldman;

17. Law Office of Bryant R. Camareno – Counsel for Claimant Victoria Bui;

18. Law Office of David T. Weisbrod – Appellate counsel for Edward Neil Feldman;

19. Leeman, Michael V. – Assistant United States Attorney;

20. Mayes, Joey – Victim;

21. Nelson, Diane, Pinellas County Tax Collector – Claimant;

22. O'Donnell, Kaitlin R. – Assistant United States Attorney;

23. Porcelli, Hon. Anthony E. – United States Magistrate Judge;

24. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

25. Saltzman, Adam M. – Assistant United States Attorney;

26. Sisco-Law – Trial counsel for Edward Neil Feldman;

27. Sisco, Dale R. – Trial counsel for Edward Neil Feldman;

28. Sisco, Paul M. – Trial counsel for Edward Neil Feldman;

29. Skinner, Kenneth Michael – Trial counsel for Edward Neil Feldman;

30. Stanton Cronin Law Group, PL – Appellate counsel for Kim Xuan Feldman;

31. Stanton, Michael – Appellate counsel for Kim Xuan Feldman;

32. Suess, Michelle R. – Trial counsel for Edward Neil Feldman;

33. Taylor, Timothy R. – Trial counsel for Kim Xuan Feldman;

34. Weisbrod, David T. – Appellate Counsel for Edward Neil Feldman;

35. Whittemore, Hon. James D. – United States District Judge;

36. Wren, Shannon – Victim.

No publicly traded company or corporation has an interest in the outcome of this appeal.

March 27, 2017

/s/ Michael Stanton
Michael Stanton

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Mrs. Feldman adopts Dr. Feldman's reply brief in its entirety.

ARGUMENT AND CITATIONS OF AUTHORITY

Throughout its brief,[1] the Government repeatedly asks this Court to review Mrs. Feldman's arguments for plain error and apply the invited-error doctrine. Its requests are misguided. In other respects, the Government misinterprets the record and misconceives the controlling legal frameworks. Properly understood, the record and the law make clear that this Court must reverse or vacate Mrs. Feldman's judgment.

I. IN RESPONDING TO MRS. FELDMAN'S DOUBLE JEOPARDY ARGUMENT, THE GOVERNMENT MISUNDERSTANDS THE EXPRESS REQUIREMENTS OF RULE 26.3, MISINTERPRETS THE RECORD, AND MISAPPLIES THE INVITED-ERROR DOCTRINE

In several important respects, the Government's defense of the District Court's double jeopardy ruling is incorrect.

Specifically, the Government argues Mrs. Feldman had "ample opportunity" to "comment, object, or suggest alternatives to a mistrial." U.S. Br. 38. But that is not what Federal Rule of Criminal Procedure 26.3 requires. Instead, Rule 26.3 provides, "Before ordering a mistrial, the court *must* give *each defendant* and the government an opportunity to comment on the propriety of the order, to state whether that party

[1] Mrs. Feldman and the Government have already set forth their positions with respect to severance. *Compare* Kim Feldman Br. 38-41, *with* U.S. Br. 31-35. That issue is now for the Court to resolve.

consents or objects, and to suggest alternatives." Fed. R. Crim. P. 26.3 (emphases added). Indeed, the drafters of Rule 26.3 explained it was expressly "designed to remedy" any situation in which a district court "fail[s] to solicit the parties' views on the necessity of a mistrial and the feasibility of any alternative action." *Id.* cmt. Moreover, "a violation of Rule 26.3 … strongly suggests that the trial judge did not exercise sound discretion." *United States* v. *Berroa*, 374 F.3d 1053, 1058-59 (11th Cir. 2004). For those reasons, the Government misunderstands the operative legal framework.

Relatedly, the Government misinterprets the record. The parties agree the following colloquy took place:

> THE COURT: All right. Mr. Sisco, Mr. Taylor, did you find any additional authority for me to consider?
>
> ….
>
> MR. SISCO: Judge, and it's my position that a curative instruction is not going to cure the prejudice to my client.
>
> MR. TAYLOR: Judge, Ms. Feldman has the same position as this is a conspiracy case with regard to that I agree that, *I agree that I don't believe a curative instruction is going to—*
>
> THE COURT: Well, I don't know how it prejudices your client, but it would only be admissible as to Dr. Feldman.

Doc. 168 at 16 (emphasis added). The disagreement between the parties, which this Court must resolve, is how to interpret that colloquy.

The Government mischaracterizes Mr. Taylor's statement as an argument "that the district court had no choice but to grant a mistrial" as to both defendants. U.S. Br. 39. That interpretation, however, is incorrect. Instead, Mr. Taylor merely "agreed with [Mr. Sisco] that the prejudice to Dr. Feldman could not be cured with an instruction." Kim Feldman Br. 47. As such, Mr. Taylor agreed the District Court had to grant a mistrial as to Dr. Feldman, but he did not agree the District Court had to grant a mistrial as to Mrs. Feldman.

For that reason, the Government mistakenly contends Mrs. Feldman cannot obtain relief because she invited the error. That is not how the invited-error doctrine works. The "doctrine of invited error is implicated when a party induces or invites the district court into making an error." *United States* v. *Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009) (citation and punctuation omitted). As should be clear from its title, the doctrine applies only when a defendant takes some action that *invites* the error committed. For instance, the doctrine bars an evidentiary argument when a defendant agrees to allow a tape-recorded statement in-

to evidence, a sentencing argument when a defendant expressly acknowledges a district court could impose a sentence of supervised release, or a hearsay argument when the defendant asks a government witness to relay hearsay. *Id.* (collecting authorities).

Here, however, Mrs. Feldman did not argue that a curative instruction would not have sufficed *as to her*; instead, she argued that a curative instruction would not have sufficed *as to Dr. Feldman*. Doc. 168 at 16. That much is clear because even the District Court acknowledged the prosecutor's question could not have prejudiced her, because "it would only be admissible as to Dr. Feldman." Doc. 168 at 16. For that reason, Mrs. Feldman did not invite the District Court to enter a mistrial as to her. Instead, she took no action at all. And it was the District Court's burden to "solicit [her] views on the necessity of a mistrial and the feasibility of any alternative action." Fed. R. Crim. P. 26.3 cmt. Accordingly, the invited-error doctrine does not apply.[2]

[2] Relatedly, the Government does not respond to Mrs. Feldman's argument that the Government was judicially estopped from arguing on appeal that there was a manifest necessity for a mistrial (because it had taken a contrary position below). *See* Kim Feldman Br. 48 n.11.

II. THE GOVERNMENT INCORRECTLY INVITES THIS COURT TO REVIEW MRS. FELDMAN'S *DAUBERT* ARGUMENT FOR PLAIN ERROR

There is little need to rehash the entire disagreement between the parties about Dr. Chaitoff's testimony. According to the Feldmans' narrative, the Government and Dr. Chaitoff promised not to opine about all 3,200 patients, the Magistrate Judge reduced that promise to a written and enforceable order, and Dr. Chaitoff nevertheless proceeded to opine about all 3,200 patients. *See* Kim Feldman Br. 43-45. In contrast, according to the Government's narrative, it apparently agrees the prosecutor and Dr. Chaitoff promised not to opine about all 3,200 patients, but it does not agree the Magistrate Judge "definitively" ruled Dr. Chaitoff could not so testify, nor does it agree that Dr. Chaitoff proceeded at trial to opine about all 3,200 patients.[3] *See* U.S. Br. 50-56.

Notwithstanding those competing narratives, it is nevertheless important to discuss the Government's contention that this Court should review the *Daubert* argument for plain error. *See* U.S. Br. 54-56.

[3] The Government apparently does not dispute the major premise of Mrs. Feldman's argument that it would violate *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), for Dr. Chaitoff to opine about all 3,200 patient files after reviewing only 48 of them. *See* U.S. Br. 50-56 (not responding to "analytical gap" argument).

Mrs. Feldman agrees that the denial of a *Daubert* motion (or any motion in limine, for that matter) is preserved for appellate review so long as a district court ruled "definitively" on that question. Fed. R. Evid. 103(b) ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal."). But the parties disagree whether the Magistrate Judge's order denying the *Daubert* motion (Doc. 115) constituted such a "definitive[]" ruling.

A ruling is "sufficiently definitive" for Rule 103(b) purposes when it makes clear to the parties what evidence is or is not admissible and that the ruling is final rather than provisional. *Compare Tampa Bay Water* v. *HDR Eng'g, Inc.*, 731 F.3d 1171, 1179 & n.5 (11th Cir. 2013) (pretrial ruling was "sufficiently definitive" when it indicated finality and scope of admissible evidence), *with United States* v. *Wilson*, 788 F.3d 1298, 1313 (11th Cir. 2015) ("provisional ruling" was not definitive). Judged by that metric, the Magistrate Judge's order preserved the *Daubert* issue for appeal.

In his order, the Magistrate Judge noted Dr. Chaitoff had testified at the *Daubert* hearing "that a review of one patient's file would not be

sufficient to draw conclusions about another unreviewed patient's file." Doc. 115 at 2 n.3. Based on that testimony, the Magistrate Judge ruled "I thus find the objection to Dr. Chaitoff's testimony pursuant to Rule 702 to be without merit, *at least to the extent that the opinion does not extrapolate from the reviewed files to a broader conclusion involving files not reviewed*." Doc. 115 at 2 (emphasis added).

Put otherwise, the Magistrate Judge made a final and definitive pretrial ruling for Rule 103(b) purposes that Dr. Chaitoff's proposed testimony meets the Rule 702 standard so long as he "does not extrapolate [to] files not reviewed." Doc. 115 at 2. Contrary to the Government's contention, the Magistrate Judge's order easily meets the *Tampa Bay Water* standard. *See* Doc. 115 at 2. For that reason, the Feldmans did not need to renew their objection at trial, and this Court must review the *Daubert* issue for abuse of discretion. And under that standard, it was an abuse of discretion when the District Court failed to strike Dr. Chaitoff's extrapolation testimony. *See* Kim Feldman Br. 41-45.

III. THE GOVERNMENT MISCONCEIVES HOW THE *COSBY* V. *JONES* SUFFICIENCY-OF-THE-EVIDENCE STANDARD WORKS

Again, extensive discussion of the parties' disagreements about sufficiency of the evidence is unnecessary. *Compare* Kim Feldman Br.

57-62, *with* U.S. Br. 40-50. But it is necessary to explore the parties differing interpretations of *Cosby* v. *Jones*, 682 F.2d 1373 (11th Cir. 1982). *Compare* Kim Feldman Br. 57-61, *with* U.S. Br. 41 n.9.

Cosby applies when all evidence is circumstantial. As even the District Court acknowledged, all testimony and evidence against Mrs. Feldman was "weak" and circumstantial. Doc. 368 at 153-57. Contrary to the Government's contention (U.S. Br. 41 n.9), Mrs. Feldman described all the testimony and evidence in the light most favorable to the Government (*see* Kim Feldman Br. 18-25, 59-61). But because that testimony and evidence, even when viewed in the light most favorable to the Government, and even drawing all reasonable inferences in the Government's favor, still "gives equal or nearly equal *circumstantial* support to a theory of guilt and a theory of innocence," *Cosby*, 682 F.3d at 1383 (emphasis added), the evidence was therefore insufficient.

IV. The Government Misstates The Standard Of Review For Analyzing The Prosecutor's Closing Arguments

With respect to closing argument, the Government mistakenly contends all but one argument raised on appeal should be reviewed for plain error because there were no contemporaneous objections. *See* U.S. Br. 60. That is factually incorrect.

As Mrs. Feldman previously explained (Kim Feldman Br. 52, 54), there were contemporaneous objections to the prosecutor's arguments regarding Jenelle Mays (Doc. 373 at 125), Dr. Vernard Adams (Doc. 373 at 133), and the supposed IRS reporting requirement (Doc. 373 at 137). Accordingly, those arguments must be reviewed for abuse of discretion, *United States* v. *Thompson*, 422 F.3d 1285, 1297 (11th Cir. 2005), not plain error.

As to the merits of the closing arguments themselves, the parties have already stated their positions. *Compare* Kim Feldman Br. 49-56, *with* U.S. Br. 59-73. Those issues are for the Court to resolve.[4]

---

[4] One argument merits further discussion: although the Government "certainly does not contest" the prosecutor's "butt-load" comment was not defensible as "a medical term of art or 'uniform measure of doses or dosages'" and acknowledges it was "perhaps not the most eloquent terminology to choose in this circumstance" (U.S. Br. 72-73), the Government still misconceives the harm it caused to Mrs. Feldman. There were two ways the jury could have interpreted the phrase: literally or hyperbolically. And each was equally harmful.

First, it is possible, albeit unlikely, the jury could have interpreted the phrase literally. Historically, the word "butt" meant either "a large cask especially for wine, beer, or water" or "any of various units of liquid capacity; *esp[ecially]*: a measure equal to 108 imperial gallons (491 liters)." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 155 (10th ed. 1994).

Second, it is also possible the jury could have understood the phrase hyperbolically, in which case it would have interpreted the prosecutor's comment as her considered (i.e., "expert") opinion that, in her experience prosecuting these types of cases, Dr. Feldman's victims had

CONCLUSION

For the foregoing reasons, the Court should either reverse the judgment and remand for entry of judgment in favor of Mrs. Feldman or vacate the judgment and remand for a new trial.

Respectfully submitted,

/s/ Michael Stanton

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Michael Stanton
Sean Patrick Cronin
STANTON CRONIN LAW GROUP
6944 West Linebaugh Ave, Ste 102
Tampa, FL 33625
(813) 444-0155 T
(813) 422-7955 F
mstanton@sclawyergroup.com
scronin@sclawyergroup.com

Counsel for Kim Xuan Feldman

---

such absurdly high quantities of the drugs in their systems that even a layperson like Mrs. Feldman should have known he was prescribing pain medication not for a legitimate medical purpose and not in the usual course of medical practice.

Either way, the "butt-load" comment caused substantial prejudice to Mrs. Feldman.

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 2,030 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

March 27, 2017

/s/ Michael Stanton
Michael Stanton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 27th day of March, 2017, to:

David J. Smith, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 27th day of March, 2017, to:

United States

AUSA Linda Julin McNamara

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via regular mail on this 27th day of March, 2017, to:

Kim Xuan Feldman (61784-018)
FCI Coleman Medium
P.O. Box 1032
Coleman, FL 33521

March 27, 2017

/s/ Michael Stanton
Michael Stanton