Nos. 22-6121/23-5029

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	O R D E R
	)	
DOYCE G. BARNES [22-6121],	)	
FARADAY HOSSEINIPOUR, aka Faraday N. Hosseinipour [23-5029],	)	
	)	
Defendants-Appellants.	)	

Before: MOORE, STRANCH, and MATHIS, Circuit Judges.

In these consolidated matters, co-Defendants Doyce G. Barnes and Faraday Hosseinipour, aka Faraday N. Hosseinipour, appeal the judgment in their criminal case after a jury convicted each of them of one count of conspiracy to commit mail fraud and one count of securities fraud. They separately move for release pending appeal. The government responds in opposition, and Defendants reply.

"[A] person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, [must] be detained, unless" there is "clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community" and the appeal "raises a substantial question of law or fact" that is likely to result in "reversal, . . . an order for a new trial, . . . a sentence that does not include a term of imprisonment, or . . . a reduced sentence." 18 U.S.C. § 3143(b)(1). There is a presumption against release pending appeal. *United States v. Chilingirian*, 280 F.3d

704, 709 (6th Cir. 2002). And the burden rests on the person seeking release. *United States v. Vance*, 851 F.2d 166, 168 (6th Cir. 1988).

The district court concluded that neither Barnes nor Hosseinipour was a flight risk, and the government does not substantively challenge that finding here. Nor is there any argument that either Defendant poses a danger to the community if released. Accordingly, the only question before us is whether Defendants' appeals raise a substantial question of law or fact. "[A]n appeal raises a substantial question when the appeal presents a 'close question or one that could go either way,'" and that question "is so integral to the merits of the conviction that it is more probable than not that reversal or a new trial will occur if the question is decided in the defendant's favor." *United States v. Pollard*, 778 F.2d 1177, 1182 (6th Cir. 1985) (quoting *United States v. Powell*, 761 F.2d 1227, 1233–34 (8th Cir. 1985) (en banc)).

Defendants' convictions rest on their involvement in a multi-level marketing organization called Infinity 2 Global ("I2G"), which the government alleged was an illegal pyramid scheme. For $5,000, an investor could become an "Emperor" who shared in profits generated by an online casino and the sale of computer apps. This income, however, was negligible; in reality, an Emperor's only revenue stream was collecting a portion of the $5,000 fee paid by new members the Emperor recruited to join I2G, typically based on overstatements regarding the success of the enterprise. After a lengthy trial, a jury convicted both Barnes and Hosseinipour. The district court denied Hosseinipour's subsequent motion for a new trial, based on ineffective assistance of counsel, without holding an evidentiary hearing. Defendants now separately move for release pending appeal.

Defendants first challenge the sufficiency of the evidence. They argue that the government failed to prove that I2G was a pyramid scheme, failed to prove that Emperor packages were a security, and failed to prove that Barnes and Hosseinipour had the requisite knowledge to participate in a fraud. We review the sufficiency of the evidence de novo, but we must view the

evidence in the light most favorable to the government and will affirm if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Hendricks*, 950 F.3d 348, 352 (6th Cir. 2020). Given this deferential standard of review and the extensive trial testimony and evidence cited in the district court's decision denying a judgment of acquittal, at this stage we are not convinced that this is a substantial issue. *See United States v. Hochevar*, 214 F.3d 342, 344 (2d Cir. 2000) (per curiam) ("When release is sought before the appeal has been briefed and argued, the district court, having greater familiarity with the record, is normally in a far better position than the court of appeals to make such determinations in the first instance.").

Defendants next argue that the district court erred in excluding testimony from their expert witness while permitting testimony from the government's. We do not believe that this argument presents a substantial issue either. We review a district court's evidentiary rulings for an abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). "An abuse of discretion occurs where the reviewing court has 'a definite and firm conviction that the court below committed a clear error of judgment.'" *In re Wingerter*, 594 F.3d 931, 936 (6th Cir. 2010) (quoting *In re M.J. Waterman & Assocs., Inc.*, 227 F.3d 604, 607–08 (6th Cir. 2000)). And "[e]ven if the district court abused its discretion, . . . [e]videntiary errors remain subject to harmless error review," under which "any 'error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.'" *United States v. Kilpatrick*, 798 F.3d 365, 378 (6th Cir. 2015) (quoting Fed. R. Crim. P. 52(a)).

"[D]istrict courts have a 'gatekeeping role' in ensuring that 'any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" *United States v. Anderson*, 67 F.4th 755, 760 n.2 (6th Cir. 2023) (per curiam) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 597 (1993)). The district court clearly explained both why it found Defendants' expert unqualified and its reasons for admitting the government expert's testimony. At this juncture, we

do not believe that a reviewing court would be left with the definite and firm conviction that the district court's evidentiary rulings were a clear abuse of judgment.

Next, Defendants argue that the district court erred in not giving a jury instruction on their anti-saturation defense. Like challenges to evidentiary rulings, we review challenges to jury instructions under the abuse-of-discretion standard. *United States v. Williams*, 612 F.3d 500, 506 (6th Cir. 2010). The presence of an effective anti-saturation program is an affirmative defense in a case such as this. *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 481–82 (6th Cir. 1999). But "[a]lthough a district court is required to instruct the jury on the theory of defense," *United States v. Chowdhury*, 169 F.3d 402, 407 (6th Cir. 1999), "where there is insufficient evidence, as a matter of law, to support an element of the affirmative defense," the district court may decline to instruct the jury on the elements of the defense, *Gold Unlimited*, 177 F.3d at 482 (quoting *United States v. Sarno*, 24 F.3d 618, 621 (4th Cir. 1994)). Based on our preliminary review of the record, and although this issue presents a close question, we do not believe that Defendants have met their burden at this stage. *See Bryant v. McDonough*, 72 F.4th 149, 152 (6th Cir. 2023) (order). We therefore conclude that this issue does not justify release.

Defendants also challenge the district court's answer to a juror question related to the statute of limitations. We have held that, in general, decisions about whether and how to answer juror questions are "best left to the discretion of the trial judge." *United States v. Collins*, 226 F.3d 457, 461 (6th Cir. 2000). Given the deference paid to the district court, *id.*, and given that "juries are presumed to follow the court's instructions," *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (per curiam), Defendants have not carried their burden at this preliminary stage to show that the district court's answer raises a substantial issue likely to result in a reversal, new trial, or reduced sentence.

To be clear, the above analyses are based on the arguments and evidence that the parties brought to the court's attention in their motion briefing and rely in many respects on the district

court's familiarity with the substantial trial record. *See Hochevar*, 214 F.3d at 344 ("When release is sought before the appeal has been briefed and argued, the district court, having greater familiarity with the record, is normally in a far better position than the court of appeals to make such determinations in the first instance."). Moreover, as Barnes's counsel notes, the parties have not "brief[ed] every issue [they] intend to raise on appeal," Appellant Reply Br. at 1, and therefore, this court's determination that certain issues do not raise substantial questions should not be construed as a final determination on the merits. Finally, Hosseinipour raises additional claims that Barnes does not. First, she argues that her counsel was ineffective both in pretrial plea negotiations and during trial. Second, she argues that the district court improperly denied her request for an evidentiary hearing. "[A] motion under 28 U.S.C. § 2255 is generally the preferred mode for raising a claim of ineffective assistance of counsel." *United States v. Ferguson*, 669 F.3d 756, 762 (6th Cir. 2012). But "we may choose to hear the issue on direct appeal if we find that the parties have adequately developed the record." *Id.* We review the district court's decision not to grant an evidentiary hearing for an abuse of discretion, *United States v. Allen*, 254 F. App'x 475, 477 (6th Cir. 2007), and we have affirmed the denial of such requests where the defendant "failed to proffer any evidence that his trial counsel rendered ineffective assistance," *United States v. Bass*, 460 F.3d 830, 838 (6th Cir. 2006).

Hosseinipour sought an evidentiary hearing in the district court for the precise reason of developing the record as to her counsel's ineffective assistance. In support of her motion for new trial based on that ineffective assistance, Hosseinipour submitted an affidavit detailing her counsel's pattern of concerning behavior, such as advising Hosseinipour to reject a plea offer because it would be perjury to plead guilty when she believed she was innocent; failing to inform Hosseinipour or the government about the other's expressed interest in additional plea negotiations; refusing to file a motion to sever when Hosseinipour asked him to, which left her as the only low-level participant tried alongside I2G's ringleaders; not reviewing Hosseinipour's

statement to a federal agent until after the agent testified; and even refusing to inform the court that Hosseinipour had fired him, telling co-defendants' counsel but continuing to participate in the trial. Hosseinipour's husband submitted an affidavit that corroborated his wife's description of counsel's representation, which is notable because counsel is his brother. Counsel himself submitted an affidavit confirming that, at the time of trial, he had very little experience with criminal representations or jury trials; no experience with federal prosecutions, criminal proffer agreements, complex e-discovery, or government investigations; and that he was not even subscribed to a legal research service.

Despite the corroboration of her husband and counsel, and despite its own uncomplimentary statements about counsel's performance, the district court summarily rejected Hosseinipour's affidavit as self-serving and denied the motion for a new trial without holding an evidentiary hearing. Based on our review of the record, however, we believe that Hosseinipour has raised a substantial issue regarding the district court's failure to hold an evidentiary hearing and its denial of her claim of ineffective assistance of counsel on its merits, given the number and severity of counsel's alleged deficiencies and corroboration by multiple affidavits.

Accordingly, Barnes's motion for release pending appeal is **DENIED**. Hosseinipour's motion for release pending appeal is **GRANTED**, subject to such reasonable terms and conditions as the district court may order in its discretion. The matter is **REMANDED** to the district court for the limited purpose of releasing Hosseinipour on appropriate conditions, with this court to otherwise retain jurisdiction for completion of the appeal. The district court is requested to set the terms and conditions of release forthwith.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk