NO. 13-3198

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee, vs. WILLIAM BEAVERS Defendant-Appellant.	) Appeal from the United States) District Court for the Northern) District of Illinois, Eastern Division)) No. 12 CR 124)) Honorable James B. Zagel,) Judge Presiding.

BRIEF AND SHORT APPENDIX FOR DEFENDANT-APPELLANT WILLIAM BEAVERS

Victor Henderson
Samuel Adam
Henderson Adam, LLC
330 S. Wells Street, Suite 1410
Chicago, IL 60606
(312) 262-2900

Sheldon Sorosky
158 W. Erie
Chicago, IL 60654
(312) 640-1776

Attorneys for Defendant-Appellant, William Beavers

DISCLOSURE STATEMENT

The undersigned, counsel of record for Defendant-Appellant, William Beavers, furnish the following in compliance with Circuit Rule 26.1:

1. Full name of every party represented: William Beavers.

2. Names of all law firms whose partners or associates have appeared or are expected to appear for the party:

Victor Henderson
Samuel F. Adam
Samuel E. Adam
Henderson Adam, LLC
330 S. Wells Street, Suite 1410
Chicago, IL 60606
(312) 262-2900

Aaron Goldstein
Sheldon Sorosky
Lauren Kaeseberg
158 W. Erie
Chicago, IL 60654

3. The party is an individual not a corporation.

/s/ Victor Henderson
Victor Henderson
Henderson Adam, LLC
330 S. Wells Street, Suite 1410
Chicago, IL 60606
(312) 262-2900

Date: January 21, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JURISDICTIONAL STATEMENT

This is a direct appeal from a criminal conviction in federal district court. The criminal prosecution was brought pursuant to 26 U.S.C. §§ 7206(1) and 7212(a). The jurisdiction of the District Court was authorized pursuant to Title 18 U.S.C. §3231. The Court of Appeals for the Seventh Circuit has jurisdiction pursuant to Title 28 U.S.C. §1291. The Defendant was sentenced on September 25, 2013 in the United States District Court for the Northern District of Illinois Eastern Division. Notice of Appeal was timely filed by Defendant on October 4, 2013.

.

ISSUES PRESENTED FOR REVIEW

(I) Whether the court ruled erroneously to prohibit circumstantial evidence of Defendant's good faith, including through evidentiary rulings and limitations on the Defendant's expert witness' testimony.

(II) Whether the jury instruction on "loan" was an inaccurate statement of law that prejudiced Defendant.

(III) Whether the exclusion of African American men on the jury was a denial of Defendant's right to a fair cross-section of the community

STATEMENT OF THE CASE

The government alleged that Beavers willfully and knowingly lied on his 2006, 2007 and 2008 tax returns by failing to report income. Beavers maintained that he never intended to keep the money as income but that it was loans, or the returns were the product of mistake. For all counts, Beavers' defense was one of good faith. Beavers was convicted on all counts and sentenced to six months imprisonment. This timely appeal follows.

STATEMENT OF FACTS

At the time of his trial, William Beavers was Cook County Commissioner. Mr. Beavers had previously been an elected Alderman in the city of Chicago and he is a former Chicago Police Officer. Tr. 46-47. As part of being a public official, Beavers oversaw campaign funds including Citizens for Beavers and Friends of Beavers.

Mr. Beavers was primarily accused of taking money out of his campaign funds for personal use and then not reporting it on his tax returns as income. Tr. 32. The defense was that these were loans and that mistakes were made. Overall, Beavers has always maintained that he did not intend to defraud the IRS.

The case began when Beavers was approached by federal agents at his home and asked about his taxes. Dkt. 50. At this meeting, the agents asked Beavers to cooperate with them against "Stroger" and "Daley" and to wear a wire. Beavers refused. Dkt. 50. He subsequently became the subject of the federal indictment at issue here. After some additional reports were tendered to the defense prior to trial, Defendant filed a Motion to Dismiss based on vindictive prosecution. Dkt. 50. This motion was denied by the court.

After the visit to Beavers' home by the agents, Beavers contacted his accountant and filed amended tax returns. Evidence of these amended tax returns was barred at trial based on the court's *in limine* rulings. See Dkt. 47 (Government's Motion to Preclude Evidence Concerning Events Subsequent to Defendant's Filing of Charged Tax Returns), Dkt. 57 (Defendant's Response) and

Dkt. 63 (Defendant's Motion to Reconsider). The court maintained its ruling that evidence of events post-2008 from the defense was not permitted, even despite Defendant's arguments of good faith and that due process require he be permitted to defend against the indictment which alleged conduct through 2011.

The Trial

The trial came down essentially to three issues: (1) A $68,000 payment made by Beavers with a campaign fund check to his pension fund; (2) 100 checks written by Beavers out of campaign funds to himself; and (3) $1200/month payments from the county to Beavers as expenses which were not on the W2 (due to error by the county) and not reported as income.

(1) $68,000 payment

In 2006, Beavers was informed that because of his decades-prior status as an alderman (which resulted in no contributions to the pension fund at the beginning of his tenure as alderman), he could enroll for the maximum annuity plan under the Municipal Employees Annuity and Benefit Fund of Chicago if he made a lump payment of $68,763. Tr. 501-02. Beavers wrote this check out of his campaign fund and made the contribution to his pension in order to enroll in the maximum plan. Although the fund and the county issued Beavers a W2 that year, the $68,000 amount was not included in the W2. Tr. 907, 996. The defense to this count was that the $68,000 was a loan that Beavers intended to pay back, and on which he had already repaid some of the money. Defendant argued that as of 2008 (which was the 'cut-off date' determined by the government), Beavers had repaid $19,500 of

this amount (a figure obtained from Agent Ponzo). Tr. 819, 1212. The defense theory was that evidence of loans went to good faith.

(2) 100 Checks

Between 2006 and 2008, Beavers wrote himself approximately one hundred checks from the campaign fund which amounted to $226,000. The government's theory was that this was income and not declared on his tax returns. The government argued that this was to support a gambling habit. Tr. 1157-58. Despite a ruling from the court limititng the amount and use of gambling evidence, a considerable amount of testimony and argument was presented on gambling. See, e.g., Tr. 314-356. (In fact, by Defendant's count, the government referenced gambling almost 50 times in its closing arguments. Tr. 1149-87, 1214-28).

The defense to the "100 checks" allegation was that these were loans or advances taken out by Beavers and that he was repaying the money and never intended to keep the money as income. While the government argued that poor bookkeeping by Beavers' staff was purposeful and enabled the fraud (Tr. 1150), the defense tried to establish that this 'poor bookkeeping' was just that – poor bookkeeping. In fact, with regard to these 100 checks, Beavers' campaign treasurers (then-current and former) both testified. Vetrice Coleman (then-current treasurer) testified that she would write "void" on check stubs once she learned the amount was paid back by Beavers. Tr. 304-05. When the government pointed out that Coleman did not testify to this at the grand jury, she maintained this was her practice. Tr. 290. Floyd Young, who preceded Coleman as treasurer, testified that

when he would approach Beavers prior to the D2 reporting periods with outstanding checks, "invariably, [Beavers would] pay them back." Tr. 366. The defense noted that every check was written to William Beavers, signed by William Beavers and that this was all done out in the open. Tr. 821.

Government witness IRS Agent Ponzo testified that there was some reimbursement and there was money paid back by Beavers to the campaign account. Tr. 743-44. Specifically, he testified on cross-examination that in 2006, $94,517.33, of $96,000 was reimbursed (98%) (Tr. 755), in 2007, $55,150.22 of $69,300.84 was reimbursed (80%) (Tr. 756-57), and in 2008, $46,447.89 of $61,000 (76%) was reimbursed. Tr. 758-59.

(3) $1200/month contingency fund payments

As Cook County Commissioner, Beavers received an additional $1200 per month from the County for expenses from a contingency fund. Tr. 516. When receiving this money, the recipient was obligated to complete a form to declare what he expenses were used for. Tr. 524. On the forms for each year, Beavers (or his agent) openly declared he would take the money as income. Specifically, in 2007, it was written: "Commissioner Beavers will claim his FY 2007 contingency as income." Tr. 525. In 2008, he wrote: "Contingency funds were taken as income for fiscal year 2008." Tr. 528. However, in contradiction of the IRS rules and regulations, the County did not include this additional income on Beavers' W2s. Tr. 536

Beavers' defense to this charge was that there was a mistake made and that the error of not reporting the income on the W2 was circumstantial evidence of good

faith. Yet, this defense was kept from the jury based on objections to relevance. Tr. 953-60.

Rulings at Trial

Jury Selection

When jury selection began, the Defendant objected immediately because there was not a single black male included in the 50-person panel. Tr. 7A. For this reason, based on *Batson* and constitutional protections, the defense objected to the jury pool. Tr. 7A. The court denied the Defendant's requests to either broaden the pool (increasing the number would possibly make the pool more random and mitigate the problem), send the panel back and request a new panel or begin selection anew. Tr. 7A-15A.

Expert Witness

Prior to trial, the government objected to the testimony of defense expert witness Barry Gershinzon based on an alleged violation of Rule 16 disclosures. 3/13/13 Tr. 5-6. The government averred that the disclosures by the defense did not sufficiently state the "bases of his opinions and his conclusions." 3/13/13 Tr. 5[1]. The defense maintained that it did not violate any disclosure rules and instead, "provided a letter to the government the same way they provided to us." 3/13/13 Tr. 6. Nevertheless, an extensive voir dire was conducted of the defense witness to allow the government to (as the government put it,) "know what sorts of materials

[1] The majority of citations to the Report of Proceedings are cited as Tr. #. However, where the transcripts were prepared out of paginated order, the citation is noted as Date Tr. Page #. For example, the testimony of Gershinzon at his pre-trial voir dire is cited as 3/13/13 Tr. 5.

he relied on in preparing his opinions. We'd like the opportunity to find out what he's going to talk about." 3/13/13 Tr. 4.

During the voir dire by the government, Gershinzon testified that his opinion was that the $68,763 payment was a loan. 3/13/13 Tr. 6. Gershinzon testified that he formed this opinion based on a number of factors, including the review of documents (records of campaign fund accounts, the 100 checks, the IRS summary schedule charts, the W2, the D2s), his own experience as an accountant for the prior 30 years including his experience working with small businesses and elected officials, and what Beavers told him. 3/13/13 Tr. 9, 11-18.

The government conducted an extensive examination of Gershinzon including questioning him on his reliance on Beavers' representation about the loan. 3/13/13 Tr. 6-18.

Over Defendant's objection to the scope of the voir dire, (3/13/13 at 32-33), questioning by the government continued and in addition to similar testimony as previously elicited, Gershinzon testified that *if* Beavers did not intend to pay the money back, it would be taxable income to Beavers. 3/13/13 Tr. 36.

The court later ruled that Gershinzon could testify but in a more limited manner. Prior to Gershinzon's testimony during trial, the government raised some additional issues and the testimony by Gershinzon was further limited. The court ruled that Gershinzon would not be permitted to testify to what Beavers told him. Tr. 895-96. The defense clarified for the court that Gershinzon would not testify as to what Beavers said and that Gershinzon had an opinion about whether they were

loans, based on a variety of other objective reasons beyond what Beavers told him including review of records, what was omitted from records, his experience of thirty years, his knowledge of the difference between loan and income. Tr. 896-97.

Questioning resumed again and the defense again clarified that Gershinzon would testify to his opinion about loans and "what would make it a loan," based on objective criteria including "the return of money" or "an oral agreement between parties. . . just not the form, it's also the substance." Tr. 899.

After additional government objections to Gershinzon's testimony (Tr. 902), the court ultimately ruled "we'll hear what the expert has to say, the jury can hear what the expert has to say. . . . he can be cross-examined as to whether he's got an opinion as to any specific transaction." Tr. 902. Based on additional government objections, the court barred the expert from testifying about his experience preparing D2s and taxes for politicians. Tr. 904-05. Also, the court barred the defense from eliciting testimony regarding the omission of the income reporting on the W2s despite the defense's strenuous argument that Beavers' tax preparer had already testified that Beavers gave him the W2s upon which he completed the returns, and that this was evidence the jury should be able to evaluate as part of Beavers' defense of good faith. Tr. 916-18.

When he testified before the jury, Gershinzon testified that he reviewed the documents and concluded the 100 checks were advances and that he saw evidence of loans. Tr. 934-35. This opinion was based on the way it was not reported or treated as an expense or income and that it aligned with the documentation

showing a history of taking money out and putting money in. Tr. 935-36. Following this testimony, a large number of government objections to questions were sustained. Tr. 937-41, 947-51. At that point, the court ordered additional voir dire. Tr. 951-52. Outside the presence of the jury, Gershinzon testified that the W2s were wrong with regard to the $1200/month contingency funds from the county as well as the $68,000 and further, that his tax treatment of the $68,000 would differ from Ponzo and would have resulted in a refund in 2006. Tr. 953-60.

On cross-examination, the government (outside the presence of the jury on voir dire), questioned Gershinzon at length, and asked a line of questions about whether Beavers "voluntarily" made the $68,000 payment. Tr. 864-68. Gershinzon would not answer questions about Beavers' "voluntariness," cautiously avoiding Beavers' state of mind (based on the court's earlier order). Tr. 968, 970-71. Despite defense counsel's representations to the court that Gershinzon was only following their orders to stay away from Beavers' mindset, the court expressed frustration with Gershinzon, and found Gershinzon "not credible" because of this. Tr. 970-72, 978-91. The court ruled: ". . . it is my judgment he cannot let go of his conviction that what the defendant said to him is a determining factor, an important factor, he cannot let go of that. And I don't think that he's a reliable witness." Tr. 990.

The court further ruled, "an expert in this context is not permitted -- this is 704(b) -- is not permitted to state an opinion or inference as to whether the defendant did or did not have a mental state or condition constituting an element of the crime charged. . . [he] can testify to [ ] what indicators he would look for in

determining whether someone intended to treat such a withdrawal as income or as a loan, and whether and to what extent any of these indicators were present" in this case. The court further ordered that Gershinzon could testify that the W2 contained errors regarding the $68,000. Tr. 996-97. Yet, the court would not allow testimony about errors in the W2 regarding the 1200/month contingency funds. Tr. 1004.

The court ultimately ruled it would instruct the jury that it was striking the opinion of Gershinzon as to loans. Tr. 1005. However, in front of the jury, the government was still able to cross-examine Gershinzon as to the fact that there was nothing in the records he reviewed that noted that any of these payments were "loans", no promissory notes existed and there was not evidence of interest payments or an explicit commitment to repay. Tr. 1014-15.

* * *

The defendant elected not to testify, based in part on the restrictions on Gershinzon's testimony. Tr. 1029.

The government called a rebuttal witness, David Weiner. Weiner testified to what evidence he would look for when examining something as a "loan." Tr. 1064-68. Weiner also testified that he would look at documents and transactions with more scrutiny when there is only one person on both sides of the transaction. Tr. 1068.

After the government's rebuttal witness Weiner testified and immediately prior to closing arguments, the court instructed the jury that:

> Yesterday, toward the very end of the case, you heard

> the testimony from a defense witness named Barry Gershinzon. On direct examination Mr. Gershinzon testified about his opinion as to whether certain checks were loans, advances, or income. That testimony was not properly admitted. I, therefore, strike that testimony and instruct you to disregard Mr. Gershinzon' opinion regarding those checks. You may not consider any aspect of that opinion in deciding this case. You may, however, consider Mr. Gershinzon's testimony, as well as the testimony of the government's witness, David Weiner, regarding facts and circumstances relevant in deciding whether a particular check is a loan, advance, or income.
> You are now going to hear closing argument.

Tr. 1148. This was over strenuous objection by the defense, which objected to the premise of the instruction as well as the instruction directing the jury to disregard the defense expert but to consider the government's expert. Tr. 1129-33.

Jury Instructions

Over Defendant's objection, the court instructed the jury regarding the definition of a loan as follows:

> When a taxpayer receives a loan, he incurs an obligation to repay that loan. Because of that obligation to repay, loan proceeds do not constitute income. The transfer of money from one party to another constitutes a loan only if, at the time of transfers, the parties to the transaction intend that the person who receives the money actually will be obligated to repay it.
>
> In determining whether the defendant has received particular funds as a loan or as income, you should consider all of the facts and circumstances surrounding the defendant's receipt of the funds.

Tr. 1240. This instruction was a modified government instruction.

In giving this instruction, the court overruled Defendant's objections and request that the court provide the jury with the precise definition of loans as recited by the United States Supreme Court in *Comm'r v. Tufts*, 461 U.S. 300, 307 (1983). Tr. 1083-88, 1122-25, 1248. The exact language, pulled from the *Tufts* case, which Defendant requested was: "When a taxpayer receives a loan, he incurs an obligation to repay that loan at some future date. Because of this obligation, the loan proceeds do not qualify as income to the taxpayer. When he fulfills the obligation, the repayment of the loan likewise has no effect on his tax liability." Id. See also, Dkt. 74, (Defendant's Instructions and Objections to the Government's Instructions), Dkt. 76 (Government's Proposed Instructions.)

* * *

Ultimately, Beavers was convicted of all counts against him. Tr. 1253; Dkt. 94. Defendant's motions for directed verdict and judgment of acquittal were denied by the court. Tr. 862, 1256-57; Dkt. 79, Dkt. 83, Dkt. 84. Beavers was sentenced to six months in the Bureau of Prisons. Dkt. 94. Notice of appeal was timely filed on October 4, 2013. Dkt. 96.

SUMMARY OF ARGUMENT

Defendant contends that his ability to present a meaningful and complete defense was eviscerated by the trial court's rulings on evidentiary issues and in limiting the testimony from expert witness Barry Gershinzon. In addition, improper instructions to the jury did not permit the jury to properly consider the issue of loan (which was the key defense issue). Finally, the jury panel was devoid of African

American men, and the systematic exclusion violated Beavers' right to a jury of a fair cross-section of the community.

ARGUMENT

I. Improper and Erroneous Evidentiary Rulings by the District Court Prejudiced the Defendant.

Standard of Review: The district court's evidentiary rulings are reviewed for abuse of discretion. *Romanelli v. Suliene*, 615 F.3d 847, 854 (7th Cir. 2010).

A criminal defendant is "unquestionably entitled to 'a meaningful opportunity to present a complete defense.'" *United States v. Alayeto,* 628 F.3d 917, 922 (7th Cir. 2010) (citing *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)). See also *California v. Trombetta*, 467 U.S. 479, 485 (1984); *California v. Green*, 399 U.S. 149, 176 (1970). A defendant is also entitled to have the jury consider any theory of defense supported by law and evidence. *United States v. Kelley*, 864 F.2d 569, 572 (7th Cir.1989).

Beavers' defense of good faith and lack of intent was supported by law and evidence. Good faith is a proper defense in cases in which the government must prove some form of 'specific intent,' such as intent to defraud or willfulness. Seventh Circuit Pattern Criminal Jury Instruction 6.10, Committee Comment. The jury was provided with a good faith instruction in this case.

There was ample evidence proposed by Defendant which supported the defense that Beavers acted in good faith and did not intend to violate the law. This evidence included the erroneous reporting on the W2s, his amended tax returns,

and repayment of checks. In addition, the proposed testimony from expert witness Barry Gershinzon provided relevant evidence that supported the defense theory. Yet, the court did not allow the jury to consider this evidence. The issue was one for the jury to decide. The government could have cross-examined and argued that Beavers' defense was not credible, but it was a decision the jury should have made. Even the court acknowledged the key issue: "It's really significant, and the thing that's really significant about it is, one of the big issues that this jury is going to have to decide is was there a loan." Tr. 400-01. However, the court did not permit Defendant to present evidence in support of his defense.

A. Improper Evidentiary Rulings Barring Circumstantial Proof of Good Faith and Improper Limitations on Cross-Examination Were In Error

The defense repeatedly asked the court to allow the Defendant a meaningful opportunity to present a complete defense. In arguing to admit evidence of a possible tax refund to Beavers in 2006 (based on a different tax treatment of the $68,000), Defense counsel stated, "The issue in the case is whether Mr. Beavers intentionally falsified he tax returns to gain a benefit. . . What he case is about [is] did Mr. Beavers intentionally either include or omit information on his tax returns to gain an advantage, [in] other words to make money, or to get money that he wasn't entitled to." Tr. 982. Also in arguing that the underlying errors in the W2s as well as the amended tax returns and check repayment should be admitted, counsel argued the question as "Are [the tax returns] based on a corrupt intent by someone to defraud the IRS or are those representations based on document[s] that

corroborate his good faith. So how can you circumstantially prove good faith in this case without these underlying facts? That can't be done. And the good faith instruction that the jury is going to get needs to be corroborated by those facts and we're entitled to be able to put this in our defense." Tr. 983.

Despite the repeated requests by the defense, the court restricted the defense and limited the introduction of evidence and cross-examination. For example, during Agent Ponzo's testimony, the defense was prevented from questioning him about the errors in the W2s, Beavers' amended tax returns, and repayment of checks. This cross-examination would have supported the defense of no intent. In fact, the defense sought no more than what the government was permitted to do – present evidence of intent (or lack thereof) circumstantially in support of its theory. See, e.g., *United States v. Persfull*, 660 F.3d 286, 294 (7th Cir. 2011), citing *United States v. Howard*, 619 F.3d 723, 727 (7th Cir. 2010) ("because direct evidence of a defendant's fraudulent intent is typically not available, specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself. . .") The government proved up its case by using circumstantial evidence of alleged criminal intent. However, circumstantial evidence sought by the defense of non-corrupt intent, which was just as probative as the government's evidence, was prohibited.

The jury should have heard the excluded evidence in Beavers' defense. The government's arguments that the acts by Beavers subsequent to being questioned by law enforcement were corrective, and thus not relevant, were not grounds for

exclusion of the evidence. To the contrary, they were arguments that should have been made to a jury.

The court's rulings excluding that evidence based on relevance objections were in error. Federal Rule of Evidence 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence to support defendant's theory was relevant. In fact, even evidence that has at least minimal probative value should have been admitted. See, e.g., *United States v. Radtke*, 415 F.3d 826, 840 (8th Cir. Minn. 2005) (subsequent acts may be probative to state of mind at the time of alleged criminal acts).

This Court analyzed the admission of amended tax returns filed subsequent to allegations of wrongdoing in *United States v. Tishberg*, 854 F.2d 1070, 1073 (7th Cir. 1988). In the *Tishberg* case, the defendant had a rather extensive background in accounting and he had prepared and filed his own tax returns; thus, this Court ruled that amended returns were properly excluded and rejected the claim that there was an oversight due to incompetent and careless accounting. *Tishberg*, at 1071. In the case at bar, however, Beavers is not an accountant and did not prepare his own tax returns. He relied on an accountant to do so for him, and that accountant (witness Philip Achusim) testified at trial that he prepared the returns based upon the W2s and documents given to him by Beavers. Tr. 412.

Where the government had no direct evidence of criminal intent (and proved its case primarily on the omissions of "income" in the returns), the Defendant had a right to counter that theory with his own circumstantial evidence supporting mistake and lack of intent. The errors on the W2 and the "corrective" measures taken after learning of the errors go to the heart of that defense.

The government was welcome to argue to the jury that none of that was to be believed – but the jury deserved to hear the argument. The court's rulings invaded the province of the jury and denied Beavers his rights to present a defense and his right to a trial by jury.

"Knowledge and belief are characteristically questions for the factfinder, in this case the jury." *Cheek v. United States*, 498 U.S. 192, 203-04 (1991) (defendant's "good-faith belief that he was not violating any of the provisions of the tax laws" was a complete defense to a charge of "willfully attempting to evade" payment of income tax "even if the defendant's belief was mistaken or objectively unreasonable"). The Court further stated in *Cheek* that forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Id.* at 203. It was reversible error for the court to prevent the jury from hearing this evidence. In denying Beavers' the right to present a defense, the error of the lower court was reversible, constitutional error. See *California v. Trombetta*, 467 U.S. 479, 485 (1984); *California v. Green*, 399 U.S. 149, 176 (1970) (compulsory process and confrontation clauses "constitutionalize the right to a defense as we know it"). This error cannot

be deemed harmless. *Neder v. United States*, 527 U.S. 1, 8 (1999). This was a closely balanced case, the evidence against Beavers was not overwhelming.

The error was exacerbated by the government's closing arguments in which the government exploited the court's limitation on the defense theory of good faith and mistake. The government specifically argued to the jury that there was evidence that his was "not a mistake." See, Tr. 1155, where the government argued, "So when he uses campaign money in 2006, 2007, and 2008, and doesn't include that money, you know *it was not a mistake,* it was not inadvertent, it was intentional. He knew he needed to claim that money and he did not." (Emphasis added).

The fact that Beavers was not allowed to argue evidence of mistake and good faith – relevant theories of defense – was reversible error by the court.

B. The Court's Rulings Limiting the Testimony of Defendant's Expert Witness Were Erroneous

Pre-trial, the court ruled in favor of the government in determining that the defense did not provide proper disclosures under Rule 16. 3/13/13 Tr. 3-6. This was in error, however, because the Rule requires a summary of the expected testimony, not a list of topics. See, *United States v. Rettenberger*, 344 F.3d 702, 706 (7th Cir. 2003), citing *United States v. Duvall*, 272 F.3d 825, 828 (7th Cir. 2001).

Nevertheless, the court ruled that further disclosure from the witness was warranted prior to his testimony in front of the jury and an extensive voir dire was conducted.

The court's sustaining of the government's further objections based on that voir dire were erroneous (as detailed in the Statement of Facts, *supra*). All of the concerns cited by the government and the court could have been addressed through cross-examination and argument by the government. In fact, the government did engage the witness in a thorough cross-examination both during voir dire and before the jury. See, e.g., 3/13/13 Tr. 14-18. For example, the government attacked the witness' reliance at "face value" of what Beavers told him. Id. at 17. The government also had the witness concede that *if* the transactions were not loans, that they would be taxable income. Id.

Instead of permitting the jury to make its findings, the court restricted the expert and essentially removed his function which prejudiced Defendant. The instruction, which came just prior to closing arguments, told the jurors that Gershinzon's testimony regarding his opinions on loans was improper and "to disregard Mr. Gershinzon' opinion regarding those checks. You may not consider any aspect of that opinion in deciding this case. You may, however, consider Mr. Gershinzon's testimony, as well as the testimony of the government's witness, David Weiner, regarding facts and circumstances relevant in deciding whether a particular check is a loan, advance, or income. You are now going to hear closing argument." Tr. 1148. The prejudice with this instruction was exacerbated by the

court instructing the jury to consider the government's witness' interpretations, essentially over Gershinzon's.

The court's abuse of discretion is further evident in its contradictory rulings with regard to the expert's testimony. The court first ruled that Gershinzon could testify to his opinion about loans as long as he did not factor in Beavers' statements. Gershinzon complied with this directive and listed all of the objective factors he relied on in coming to his opinion of loan. Yet, the court misconstrued what Gershinzon said on the witness stand during voir dire and turned his cautiousness into a negative, stating then that he was not reliable because he could not answer the questions about voluntariness. This was an abuse of discretion – the record plainly reveals what Gershinzon was doing and that was that he asserted he could not answer the questions insofar as they required him to delve into Beavers' state of mind in accordance with the court's previous ruling. To use that against the witness then to later bar this testimony was error.

Further, the court first ruled that evidence regarding the W2s from the county could come in, but then ruled that the W2s regarding the 1200/month funds were not admissible because they were not relevant. The court's contradictory rulings were fundamentally unfair and demonstrate an abuse of discretion. See, e.g., *United States v. Santos,* 201 F.3d 953, 962 (7th Cir. 2000), where this Court ruled that where the trial court failed to exercise a properly informed discretion (even if the court misunderstood the purpose), its ruling excluding the evidence "cannot be upheld unless it would have been an abuse of discretion for him to have

admitted the evidence . . ." The court did not exercise fair discretion or judgment regarding the defense expert.

This error by the court is particularly prejudicial because the question of whether these were loans was so central to the case. See, Tr. 400-01 where the court itself noted "It's really significant, and the thing that's really significant about it is, one of the big issues that this jury is going to have to decide is was there a loan."

The limitations on the expert's testimony were an abuse of discretion and prevented the Defendant from presenting a defense in any meaningful way. The violation of this "unquestionabl[e]" right requires reversal of Defendant's convictions. *United States v. Alayeto, supra*.

II. The District Court's Jury Instruction on the Definition of "Loan" Was an Improper Statement of the Law and This Error Mandates a New Trial.

Standard of Review: This Court typically reviews jury instructions *de novo*, but gives the district court substantial discretion to formulate the instructions "so long as [they] represent[ ] a complete and correct statement of the law." *United States v. Matthews*, 505 F.3d 698, 704 (7th Cir. 2007).

In the instant case, the instruction on the definition of "loan" was not a "complete and correct statement of the law" as required. This instruction affected every count of conviction and a new trial is warranted.

At trial, a centerpiece of the defense was that the money the government portrayed as income was actually a loan. There was a significant amount of testimony regarding loans from multiple witnesses, and the court even noted that the decision as to whether there was a loan was "one of the big issues" for the jury. Tr. 400-01. There is no question that the issue of loans was litigated exhaustively throughout the trial.

The jury instruction on the definition of loan itself was litigated extensively. Tr. 1083-88, 1122-25, 1248; Dkt. 74, Dkt. 76. It is incontrovertible that this was a key instruction for the jury.

The government offered a number of variations on the loan jury instruction with qualifiers like "bona fide" and "genuine." Tr. 1083-88. The defense objected and proposed an instruction which explicitly tracked the language in the United States Supreme Court in *Comm'r v. Tufts*, 461 U.S. 300, 307 (1983). The Defednant's proposed instruction was an exact quote from *Tufts*: "When a taxpayer receives a loan, he incurs an obligation to repay that loan at some future date. Because of this obligation, the loan proceeds do not qualify as income to the taxpayer. When he fulfills the obligation, the repayment of the loan likewise has no effect on his tax liability." Tr. 1083-88, 1122-25, 1248.

Ultimately, the court overruled Defendant's objections and instructed the jury in accord with the government's proposed instruction:

> When a taxpayer receives a loan, he incurs an obligation to repay that loan. Because of that obligation to repay, loan proceeds do not constitute income. The transfer of

> money from one party to another constitutes a loan only if, at the time of transfers, the parties to the transaction intend that the person who receives the money actually will be obligated to repay it.
>
> In determining whether the defendant has received particular funds as a loan or as income, you should consider all of the facts and circumstances surrounding the defendant's receipt of the funds.

Tr. 1240.

This instruction is not "a complete and correct statement of the law." *Matthews*, *supra*. The Supreme Court clearly defined 'loan' in the *Tufts* case and that language should have been used. Instead, the court's instruction tracked the government's theory of the case and added an undue burden on what the jury was to determine.

In assessing a claim of an erroneous instruction to the jury, this Court reviews the instruction "in the context of the overall trial and the arguments by counsel." *United States v. Bailey*, 859 F.2d 1265, 1277 (7th Cir. 1988). See also *United States v. Toushin*, 899 F.2d 617 (7th Cir. 1990) (erroneous jury instruction in tax fraud prosecution was not harmless where trial court essentially prevented defendant from presenting to the jury his theory of defense).

In the context of this case, the loan instruction was a critical instruction. Moreover, the government exploited this incorrect statement of the law and argued repeatedly to the jury that:

> Make no mistake, these were not loans. For money to be a loan, there has to be an *actual obligation* to pay the money back. Tr. 1215
>
> * * *
>
> The defendant did not get loans in this case. The defendant simply took the money with *no actual commitment* to pay it back. Sometimes he put money back in, sometimes he didn't. It was all up to him. It was his choice whether he was going to put money back in or not. There was no one else who was going to enforce that promise because there wasn't a promise to enforce and there was no one else to enforce it, it was all up to him. That's not a loan. That is taking money that is income. Tr. 1216.
>
> * * *
>
> There's no enforcement mechanism here, it was entirely up to him. That's *not an actual obligation* to pay the money back. Tr. 1221.

(Emphasis added).

This instruction to the jury foreclosed the possibility of the jury finding that the transactions in this case were indeed loans. As the witnesses testified, there are indicia to look at when determining if something was a loan. The government was free to argue that under the correct definition of loan (per *Tufts*: "When a taxpayer receives a loan, he incurs an obligation to repay that loan at some future date. . .") the indicia did not exist to support a finding of loans. However, this is not wahat happened.

The court added the following sentence to the *Tufts* language: "The transfer of money from one party to another constitutes a loan only if, at the time of

transfers, the parties to the transaction intend that the person who receives the money actually will be obligated to repay it." This is not accurate. In this context, the word "obligated" intrinsically includes a requirement of repayment in this context. To add superfluous language of "actually" only served to align the instruction with the government's argument and theory. It is not a correct and accurate statement of law.

In addition, the language that something is a loan "only if, at the time of the transfers, the parties. . . intend. . ." is also erroneous. The experts themselves testified that the concept of loan is open to interpretation and there are a variety of factors and indicia to consider in determining if something is a loan. There is no legal requirement that "at the time of the transfers" the party considers it to be a loan. Even under the circumstances of this case, there was evidence to support a finding that when Beavers wrote out the checks, he intended to use them as an advance but when he later used the money personally, he decided *then* that he would repay the money, thus reconstituting the original transaction as a loan. The relevant inquiry for the jury was not what the monies were intended to be used for at the time they were received by Beavers, but rather, what his intention was at the time he signed his tax returns. If at that point in time, these were considered loans and not income, then he did not falsely file his returns. There was enough evidence in the record to support that finding by the jury. The instruction did not permit the jury to make this finding.

Moreover, this phrasing puts undue emphasis on some external factor as an absolute requirement of a loan. To "actually be obligated to repay" connotes that an individual's intent to repay is not enough to satisfy a loan standard, but there must be some tangible, 'actual' additional obligation beyond the commitment to repay. Under the *Tufts* definition, though, the intent could be enough. The jury should have had the option to determine if these truly were loans. However, the court's erroneous instruction ordered the jury to find they were *not* loans and this deprived Beavers of his right to have a jury make the determination.

The error of the court's instruction deprived the jury of the ability to act as factfinders. This error mandates a new trial.

III. Mr. Beavers' Right to a Jury Made Up of a Fair Cross-Section of the Community Was Violated.

Standard of Review: This issue involves a mixed issue of law and fact, therefore the Court reviews the issue *de novo*. *United States v. Neighbors*, 590 F.3d 485, 491 (7th Cir. 2009), citing *United States v. Phillips*, 239 F. 3d 829, 842 (7th Cir. 2001).

When the jury panel was sent up to the courtroom in this case, there were zero African American men included in the group. This exclusion of black males from the jury was a violation of Mr. Beavers' right to a jury made up of a fair cross-section of the community. U.S. Const. Amend VI. *United States v. Neighbors*, 590 F.3d 485 (7th Cir. 2009).

This deficient panel violated Beavers' Sixth Amendment rights. In addition, the court's denial of Defendant's requests to order a new panel or increase the size (and thus the randomness of the panel) was in error and an abuse of discretion which compounded the Sixth Amendment error and also violated Defendant's equal protection rights.

After the panel was brought in and before questioning began, the defense objected and requested that a new panel be ordered. 3/12/13 Tr. 6A. Defendant (who is an African American man) asked the court to order a new panel. 3/12/13 Tr. 7A. Counsel noted for the court that statistically, there should have been at least three (3) black men in the jury panel of 50 individuals (black males are approximately 6.5% of the population). 3/12/13 Tr. 10A. The court denied Defendant's request and ruled, *inter alia*, that "it's not merely the defendant's right that is at issue here, it's the right of the individual citizens to sit as a juror. So there is a jury interest here." 3/12/13 Tr. 8A-9A. The court also noted that the "problem is we are not in the Circuit Court of Cook County." 3/12/13 Tr. 11A.

When Defendant's request to re-draw the panel was denied, counsel made an alternate request to mollify the court's stated concerns. Defendant asked that the panel size be increased from 50 to 75 or 100, based on the fact that statistically, the randomness of the pool would increase with size. 3/12/13 Tr. 13A. This suggestion provided the court with the opportunity not to dismiss the current panel, but to simply increase its size. 3/12/13 Tr. 13A. The court denied this request, and Defendant made a final alternate suggestion, that the current panel be moved to a

different courtroom to preserve their right to sit and that an additional group of 50 jurors be impaneled. 3/12/13 Tr. 13A-14A. Again, the court denied Defendant's requests. The original panel, completely devoid of black men remained and the jury was chosen and sworn in from this panel.

In addition to the errors denying Defendant's motions at the time of jury selection, the court erred in denying Defendant's motion for new trial based on this constitutional violation, in which Beavers established that a systematic exclusion of black men in the district. Defendant meets the standard under the analysis in *United States v. Duren*, 439 U.S. 357, 364 (1979), ("in order to establish a prima facie violation of the fair cross-section requirement, a defendant must show (1) the group allegedly excluded is a distinctive part of the community, (2) the representation of this group in venires from which the jury is selected is not fair and reasonable in relation to the number of such persons in the community and (3) the underrepresentation is due to systematic exclusion of the group in the jury selection process.")

Under *Duren*, the first two prongs are unquestionably met: African-American men are a distinctive part of the community and zero African American men in the venire was not fair and reasonable in relation to the number of African American men in the community. See, *Neighbors* at 491; *Berghuis v. Smith*, 130 S.Ct. 1382 (2010) (African Americans are a distinct group for *Duren* analysis); 3/12/13 Tr. 10A (statistical expectation was at least 3 black men in the venire).

The third prong - systematic exclusion – is what is in question. In the case at bar, Defendant establishes such exclusion which caused the void of representation of African American men. *United States v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990).

Preliminarily, Defendant acknowledges that other cases in which defendants have asserted similar arguments have failed to establish systematic exclusion. However, Beavers presents a different set of circumstances. The Jury Plan was recently changed to better incorporate a fair cross-section of the community – this is an implicit acknowledgment of the problem in the Plan as exercised for Beavers' trial. Also, Beavers demonstrates a pattern of such exclusion in the Northern District of Illinois, including a case where in a similar situation (in that case, one black man was in the panel), the presiding judge sent back the panel.

First, the Jury Plan for the District was revised in September of 2013. The change made to the Plan was to include not only voter registration rolls, but also drivers license and state ID lists as well. See Jury Plan 2013, at pg 2, ¶ 5. The new Plan was approved by the full court on September 20, 2013 and by the Judicial Council of the Seventh Circuit on October 23, 2013. The Plan in use at the time of the Beavers trial only pulled venire from voter registration lists. (See Dkt. 79 attachments).

What is significant to note is that the new Plan specifically states that the court finds that the new combination of official voter registration rolls, along with drivers license and state ID lists "represents a fair cross-section of the community in

this District." Jury Plan 2013, at pg. 2, ¶ 5(a). The previous Plan pulling only from registered voters did not represent such a cross-section. The Federal Jury Selection and Service Act requires that:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from *a fair cross section of the community* in the district or division wherein the court convenes.

28 U.S.C. §1861 (emphasis added). The Jury Service and Selection Act also provides: "The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862...." 28 U.S.C. § 1861.

The JSSA was violated with the selection of the jury venire in the instant case. Choosing the venire only from voter registration rolls for the Beavers jury systematically excluded black males because black males are disproportionately underrepresented in voter registration. "[A] U.S. Census Bureau study of 2008 voting data that found that registered voters tend to be older, white and more affluent than the general population." Sweeney, Annie and Cynthia Dizikes, "The Balancing Act of Jury Selection," Chicago Tribune, March 27, 2013, quoting Paula Hannaford-Agor, an expert on jury system management with the National Center for State Courts.

Where other cases have failed to establish this fundamental error and exclusion (see, *Neighbors, supra*; *United States v. Guy,* 924 F.2d 702 (7th Cir.1991); *Davis v. Warden, Joliet Corr. Inst. at Stateville,* 867 F.2d 1003, 1015 (7th

Cir.1989)), the new acknowledgement in the Jury Plan that a fair cross-section is obtained from a wheel comprised of voters, drivers and state ID holders uniquely supports Beavers' argument. In addition, it must be noted that Beavers does not just make this argument on appeal, but he urged the lower court to rectify or mitigate the exclusionary venire prior to jury selection and again after his conviction. The court denied those requests.

However, it is known that the Plan utilized in the instant case did not comport with the JSSA. The Census Data and the Qualified Jury Wheel data demonstrate that the venires in this District were not fairly representative of the population. See, Census Data, *U.S. Census Bureau, State and County QuickFacts, available at http://quickfacts.census.gov/qfd/states/17000.html (accessed June13, 2011).* For example, in 2010 Census data, the percentage of jury eligible population of African Americans in the Eastern Division was 17.3%, while only 14% were included on the Qualified Wheel. (2009 Qualified Jury Wheel in Eastern Division). Only 12.8% of Latinos were part of the Qualified Wheel despite being 18.8% of the population. In contrast, there were 66% jury eligible population of whites, with 75.8% of those as part of the Qualified Wheel.

Even more troublesome is that the actual disparity between African Americans in the community (17.3%) and African Americans in the jury pool (14%) is 3.3%, but under the comparative test[2] the disparity is 23.6%. African Americans

[2] The comparative disparity test calculates how much less likely the group is to be chosen for jury service than the rest of the community, determined by dividing the

are systematically excluded when they are statistically 23.6% less likely to be pulled from the community for jury service.

Additionally, pursuant to the Jury Plan (both the former and the current Plans), the venire is proportionately drawn from the political subdivisions[3]. See, Jury Plan ¶6(a) (" . . . a properly programmed electronic data processing system may be used to select names from such lists for the master jury wheel, *provided that each county or political subdivision is proportionately represented in the master wheel.*") (Emphasis added).

This aspect of the Jury Plan is also systematically exclusionary as it is concerned with representation of individuals from different political subdivisions/geographical areas, but not representation of groups that have been historically and systematically excluded. To specify proportionate representation of geographical areas and not specify proportionate representation in racial or other demographics where underrepresentation is of constitutional magnitude is unjust.

In addition, evidence exists of systematic exclusion as a pattern in other cases in this District as well. This repeated occurrence, in spite of the statistics that establish how often black men should be included, support Defendant's argument.

---

absolute disparity by the percentage of the group in the jury pool. *Berghuis v. Smith*, 130 S.Ct 1382, 1390 (2010).

[3] Para. 2(c) of the Jury Plan defines "political subdivision" as: "In the Eastern Division of this District, "political subdivision" refers to the City of Chicago, the remainder of Cook County, the City of Aurora, the balance of Kane County, the balance of DuPage County, and the counties of Grundy, Kendall, Lake, La Salle, and Will."

See, e.g., *United States v. Anthony Simmons,* 10CR 820 (no black men in venire in front of Judge St. Eve in April 2013); *United States v. Felix Daniel,* 11 CR 743 (no black men in venire in front of Judge Gottschall in March 2013, the same week of Beavers' trial); *United States v. Vernon Chapman*, 10CR961, 11CR299 (case in which Judge Shadur sent a jury panel back because of lack of African Americans).

In addition to the violation of the fair cross-section requirement, Defendant's equal protection rights were also violated. U.S. Const. Amend. VI. Just prior to Beavers' trial, District Court Judge Milton Shadur, sent back and ordered a new jury panel because the first panel only included one black male. *United States v. Chapman,* 10CR961, 11CR299; referenced also in Sweeney, Annie and Cynthia Dizikes, "The Balancing Act of Jury Selection," Chicago Tribune, March 27, 2013. Like the defendant in Judge Shadur's courtroom, Beavers was also entitled to a new venire that was representative of the community. This Court's failure to preserve this right of the defendant resulted in the deprivation of equal protection under the law. In addition, the utilization of the new Plan will presumably serve to help obtain a more fair cross-section of the community; Beavers is entitled to benefit from this change in the District.

The adoption of the new Plan demonstrates Beavers' circumstances were not a fluke and were, rather, the product of systematic exclusion. Had Beavers' trial taken place six months or a year later, a different make-up would have constituted the panel, based on the intentional changes implemented by this District and Circuit with the very goal of correcting a problem regarding the fair cross-section

requirement. It is constitutionally unsound for the instant convictions to stand under these circumstances. This constitutional error mandates that Beavers be granted a new trial.

However, even if this Court were to find the constitutional argument insufficient in some manner, the lower court's abuse of discretion and erroneous rulings compel a new trial. Weighing the harm against the inconvenience of ordering a new jury panel, or even the right of the defendant versus the right of citizens to sit on the jury, it was unreasonable for the court to deny Defendant's repeated requests for a new panel or to expand the pool to mitigate the underrepresentation.

The case at bar is unique and this Court could grant a new trial to preserve Beavers' constitutional right to a fair cross-section in his jury without 'opening the flood gates,' so to speak. Beavers raised these very issues with the trial court and the error of the lower court, which abused its discretion, should be corrected by this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons contained in this Brief, Defendant-Appellant respectfully requests that this Court reverse his convictions and grant him a new trial.

Respectfully Submitted,

/s/ Victor Henderson

One of the Attorneys for Defendant-Appellant

Victor Henderson
Samuel Adam
Henderson Adam, LLC
330 S. Wells Street, Suite 1410
Chicago, IL 60606
(312) 262-2900

Sheldon Sorosky
158 W. Erie
Chicago, IL 60654
(312) 640-1776

Counsel for Defendant-Appellant, William Beavers

CERTIFICATE OF COMPLIANCE WITH RULE 32

The undersigned, counsel of record for Defendant-Appellant, William Beavers, hereby certifies that this brief complies with the type volume limitations of Fed. R. App.P. 32(a)(7)(b), in that the brief contains 8,663words. Counsel used Microsoft Word to prepare the brief. The font style is Century and the size of the type is 12 point.

/s/ Victor Henderson

Victor Henderson
Samuel Adam
Henderson Adam, LLC
330 S. Wells Street, Suite 1410
Chicago, IL 60606
(312) 262-2900

Sheldon Sorosky
158 W. Erie
Chicago, IL 60654
(312) 640-1776

Counsel for Defendant-Appellant, William Beavers

January 21, 2014

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2014, I electronically filed the foregoing Defendant-Appellant, William Beavers' Brief and Short Appendix with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Debra Bonamici
Assistant United States Attorney
219 S. Dearborn Street, 5th floor
Chicago, IL 60604

/s/ Victor Henderson

Victor Henderson
Samuel Adam
Henderson Adam, LLC
330 S. Wells Street, Suite 1410
Chicago, IL 60606
(312) 262-2900

Sheldon Sorosky
158 W. Erie
Chicago, IL 60654
(312) 640-1776

Counsel for Defendant-Appellant, William Beavers

January 21, 2014

SHORT APPENDIX

SHORT APPENDIX TABLE OF CONTENTS

RULE 30(d) CERTIFICATION

Victor Henderson, one of the attorneys for the Defendant-Appellant, William Beavers, certifies that all of the materials required by Circuit Rule 30(a) and (b) are included in this appendix.

/s/ Victor Henderson

Victor Henderson
Samuel Adam
Henderson Adam, LLC
330 S. Wells Street, Suite 1410
Chicago, IL 60606
(312) 262-2900

Sheldon Sorosky
158 W. Erie
Chicago, IL 60654
(312) 640-1776

Counsel for Defendant-Appellant, William Beavers

January 21, 2014