

18-1994-cr(L)
United States v. Rosario

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term, 2020

5
6 (Argued: December 2, 2020 Decided: February 23, 2021)

7
8 Docket Nos. 18-1994-cr(L), 19-2399(CON)

9
10 _____
11 UNITED STATES OF AMERICA,

12
13
14 *Appellee,*

15
16 v.

17
18 IVAN ROSARIO, AKA "GHOST,"

19
20 *Defendant-Appellant.*
21 _____

22
23 Before:

24
25 SACK, CHIN, and LOHIER, *Circuit Judges.*
26

27 We consider whether the United States District Court for the District of
28 Connecticut (Vanessa L. Bryant, *Judge*) made the factual findings required
29 under United States v. Dunnigan, 507 U.S. 87 (1993), before applying an
30 obstruction of justice enhancement under U.S.S.G. § 3C1.1. Because the
31 District Court did not make the necessary findings at sentencing, the case is
32 REMANDED IN PART for further proceedings consistent with this opinion.
33 In a separate summary order filed simultaneously with this opinion, we
34 dispose of Rosario's remaining claims.
35
36
37
38

1 MICHAEL P. JOSEPH, Kliegerman & Joseph, LLP, New
2 York, NY, *for* Defendant-Appellant Ivan Rosario.

3
4 JOSEPH VIZCARRONDO, Assistant United States
5 Attorney (Marc H. Silverman, Assistant United
6 States Attorney, *on the brief*), *for* John H. Durham,
7 United States Attorney for the District of
8 Connecticut, New Haven, CT, *for* Appellee United
9 States of America.

10
11 PER CURIAM:

12 Defendant-Appellant Ivan Rosario appeals from a judgment of the
13 United States District Court for the District of Connecticut (Bryant, L.), after a
14 jury trial, sentencing him principally to a term of 210 months' imprisonment.
15 As relevant here, Rosario objects to the District Court's imposition of a two-
16 level sentence enhancement for obstruction of justice under U.S.S.G. § 3C1.1
17 relating to his trial testimony. He argues that the District Court did not make
18 the findings of fact required before imposing the enhancement. We agree and
19 **REMAND IN PART** to the District Court for further proceedings consistent
20 with this opinion. In a separate summary order filed simultaneously with
21 this opinion, we dispose of Rosario's remaining claims.

22 BACKGROUND

23 Rosario was charged with various firearms offenses and conspiring to
24 distribute heroin, as well as witness tampering with intent to influence or

1 prevent testimony, in violation of 18 U.S.C. §§ 1512(b)(1), (b)(2)(A), and (j),
2 and causing or inducing any person to destroy evidence, in violation of 18
3 U.S.C. §§ 1512(b)(2)(B) and (j). At trial, the Government introduced evidence
4 that Rosario had coerced his child's mother (who was not his wife, as Rosario
5 was married to another woman) and his own mother to destroy a mobile
6 phone so that it could not be used as evidence against him on the drug
7 conspiracy charge. In response, Rosario testified that he asked his child's
8 mother to destroy the phone because it contained recordings of "intimate
9 moments" between them and he did not want his wife to discover those
10 videos. See App'x at 258–59, 263. Rosario denied that he ordered the phone
11 destroyed because it held incriminating evidence of his participation in the
12 heroin conspiracy. The jury acquitted Rosario of unlawful possession of a
13 firearm and obstruction of justice based on witness tampering; it was unable
14 to reach a verdict as to the narcotics conspiracy count; and it convicted
15 Rosario of obstruction of justice based on destruction of evidence.

16 At sentencing, the District Court observed that "the Government is
17 proposing that the Court add two additional points for the defendant's
18 untruthfulness, his perjurious testimony, indicating that he requested the

1 phone be destroyed not because it contained incriminating evidence but
2 because he did not want [his wife] to know that he had consorted with [his
3 child's mother]." App'x at 441. The District Court later added the following:

4 There is no doubt here, no doubt whatsoever, that [Rosario] elicited the
5 aid of his mother, . . . and the mother of his child, . . . his paramour at
6 the time, to destroy evidence to evade prosecution and conviction for
7 the charge of conspiracy to distribute and the possession with intent to
8 distribute more than a kilo of heroin.

9
10 App'x at 475. Over Rosario's objection, the District Court then applied the
11 two-level enhancement under § 3C1.1 for committing perjury. Rosario was
12 sentenced principally to a term of 210 months' imprisonment.

13 DISCUSSION

14 We consider de novo whether the District Court's factual findings in
15 support of its perjury enhancement pursuant to U.S.S.G. § 3C1.1 complied
16 with the requirements of United States v. Dunnigan, 507 U.S. 87 (1993). See
17 United States v. Ben-Shimon, 249 F.3d 98, 102 (2d Cir. 2001). Section 3C1.1
18 provides for a two-level enhancement of the offense level if "the defendant
19 willfully obstructed or impeded, or attempted to obstruct or impede, the
20 administration of justice with respect to the investigation, prosecution, or
21 sentencing of the instant offense of conviction" and the obstructive conduct

1 related to the defendant's offense of conviction or a closely related offense.
2 U.S.S.G. § 3C1.1. The Guidelines caution that if, as here, a defendant is
3 convicted for obstruction of justice, the § 3C1.1 enhancement "is not to be
4 applied to the offense level for that offense except if a significant further
5 obstruction occurred during the investigation, prosecution, or sentencing of
6 the obstruction offense itself (e.g., if the defendant threatened a witness
7 during the course of the prosecution for the obstruction offense)." U.S.S.G.
8 § 3C1.1 cmt. 7.

9 In Dunnigan, the Supreme Court held that "if a defendant objects to a
10 sentence enhancement resulting from her trial testimony, a district court must
11 review the evidence and make independent findings." 507 U.S. at 95. The
12 Court explained that the "concern that courts will enhance sentences as a
13 matter of course whenever the accused takes the stand and is found guilty" is
14 "dispelled" precisely because "the trial court must make findings to support
15 all the elements of a perjury violation in the specific case." Id. at 96–97.
16 Echoing Dunnigan, we have reasoned that a rigid "requirement of fact-
17 finding" ensures "that courts will not automatically enhance sentences

1 whenever the accused takes the stand and is thereafter found guilty.” United
2 States v. Catano-Alzate, 62 F.3d 41, 42 (2d Cir. 1995).

3 Any sentence enhancement for perjured trial testimony implicates a
4 defendant’s constitutional right to testify in his or her own defense. See Rock
5 v. Arkansas, 483 U.S. 44 (1987). The Supreme Court has therefore directed
6 district courts to “make findings to support all the elements of a perjury
7 violation in the specific case,” Dunnigan, 507 U.S. at 97 — namely, “that the
8 defendant (1) willfully and (2) materially (3) committed perjury, which is (a)
9 the intentional (b) giving of false testimony (c) as to a material matter,” United
10 States v. Thompson, 808 F.3d 190, 194–95 (2d Cir. 2015) (quotation marks
11 omitted). “[I]t is preferable for a district court to address each element of the
12 alleged perjury in a separate and clear finding,” although the court can also
13 satisfy these requirements by finding “an obstruction of, or impediment to,
14 justice that encompasses all of the factual predicates for a finding of perjury.”
15 Dunnigan, 507 U.S. at 95.

16 District courts must take these instructions seriously. In Catano-Alzate,
17 we concluded that the district court’s factual findings were inadequate
18 because it said only that “the Court thinks that the testimony given at trial

1 was not the truth and was material falsehood . . . [Defendant] chose to testify
2 and not be truthful, as far as I understand it. I am making those findings by a
3 preponderance of the evidence.” 62 F.3d at 42. In United States v. Williams,
4 we held that “the district court fell short of making the necessary findings”
5 when it stated only that “[b]ased upon the whole record that I have seen [and]
6 the testimony I have heard, [the defendant] obstructed justice.” 79 F.3d 334,
7 337 (2d Cir. 1996) (quotation marks omitted). As a result, we determined that
8 “[t]he record d[id] not contain the required finding that [the defendant]
9 knowingly made a false statement under oath.” Id. at 337. More recently, in
10 Thompson, we determined that relying merely on a pre-sentence report’s
11 statements that “[t]he Court expressly characterized [the defendant’s]
12 testimony as equivocal, inconsistent, and contradictory,” and that the
13 testimony “could not be credited,” failed to satisfy the requirements of
14 Dunnigan. 808 F.3d at 194–95.

15 In defense of the perjury enhancement at issue here, the Government
16 relies largely on the District Court’s statement at sentencing that “[t]here is no
17 doubt . . . that [Rosario] elicited the aid of his mother, . . . and the mother of
18 his child, . . . his paramour at the time, to destroy evidence to evade

1 prosecution and conviction for the charge of conspiracy to distribute and the
2 possession with intent to distribute more than a kilo of heroin.” App’x at 475.
3 For the first time, the Government suggested at oral argument that the
4 District Court’s order denying Rosario’s Rule 29 motion contained the
5 necessary findings. See Oral Arg. at 17:04–17:36. In that order, the District
6 Court explained that “the jury could have found Mr. Rosario’s proffered
7 explanation for why he wanted the telephone destroyed not credible.”
8 Special App’x at 7.

9 We disagree that either of these statements is enough to satisfy the
10 Dunnigan requirement.¹ In neither did the District Court make the findings
11 we have demanded. For example, the District Court did not identify the
12 “statements on which the perjury finding was grounded.” Ben-Shimon, 249
13 F.3d at 104. Nor did it make “explicit findings that [defendant’s]

¹ We hesitate to rely on the District Court’s order denying Rosario’s Rule 29 motion for two additional reasons. First, in the context of a Rule 29 motion, the District Court need only have asked whether any rational fact finder could have found Rosario’s testimony not credible, see United States v. Martoma, 894 F.3d 64, 72 (2d Cir. 2017), not whether Rosario intentionally, willfully, and materially committed perjury, see Dunnigan, 507 U.S. at 97. Second, the factual findings to support a perjury enhancement in response to a defendant’s objection to the enhancement must be provided at sentencing. See, e.g., Ben-Shimon, 249 F.3d at 102–03.

1 testimony . . . was intentionally false,” United States v. Norman, 776 F.3d 67,
2 84 (2d Cir. 2015), or that Rosario “knowingly made a false statement under
3 oath,” Williams, 79 F.3d at 337. We see no discussion, let alone a finding, of
4 whether Rosario “consciously acted with the purpose of obstructing justice.”
5 United States v. Zagari, 111 F.3d 307, 328 (2d Cir. 1997) (quotation marks
6 omitted).

7 The Government invites us to review the district court record ourselves
8 to determine that Rosario obviously perjured himself. We decline to do so. In
9 Ben-Shimon, we concluded that it “does not suffice for us to decide that [the
10 defendant] made obvious misrepresentations” because “the district court was
11 nonetheless required to reference the statements on which the perjury finding
12 was grounded.” 249 F.3d at 104; see also Williams, 79 F.3d at 337 (explaining
13 that while it “may be true” that defendant’s “testimony was so inherently
14 untruthful that the factual prerequisites to a perjury enhancement are
15 obvious,” this “cannot relieve the district court of the burden of making its
16 own independent findings”). “Nothing in Dunnigan can be read to suggest
17 that a separate finding of willful perjury is unnecessary where the perjury is
18 obvious.” Williams, 79 F.3d at 337. Whatever we think of the evidentiary

1 record, the District Court was separately required to make specific factual
2 findings to support the application of the perjury enhancement. Because the
3 District Court failed to make those findings, we remand to permit it to do so
4 in the first instance.

5 CONCLUSION

6 For the foregoing reasons, the case is **REMANDED IN PART** to the
7 District Court to make any further findings in support of its enhancement
8 under § 3C1.1. If the District Court determines on remand that the facts do
9 not justify the enhancement for committing perjury, then Rosario must be
10 resentenced. We consider and reject as without merit Rosario's remaining
11 arguments in a summary order filed simultaneously herewith.