

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

SUMMARY ORDER

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1 **At a stated term of the United States Court of Appeals for the Second Circuit,**
2 **held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of**
3 **New York, on the 26th day of April, two thousand twenty-four.**

4
5 **PRESENT:**

6 **DENNIS JACOBS,**
7 **MICHAEL H. PARK,**
8 **ALISON J. NATHAN,**
9 ***Circuit Judges.***

10 _____
11
12 **United States of America,**

13
14 ***Appellee,***

15
16 **v.**

22-1552

17
18 **Nicholas Joseph,**

19 ***Defendant-Appellant.***
20 _____
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23 **FOR APPELLEE:**

ANDREW K. CHAN (Emily A. Johnson and Danielle R. Sasson, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

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29 **FOR APPELLANT:**

RANDA D. MAHER, Great Neck, NY.

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1 Appeal from a judgment of the United States District Court for the Southern District of
2 New York (Castel, *J.*).

3 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
4 **DECREED** that the judgment of the district court is **AFFIRMED**.

5 Appellant Nicholas Joseph was a member of a violent street gang based in the Bronx called
6 the Castle Hill Crew (“CHC”). The CHC engages in acts of violence against rival gang members,
7 including members of a gang called the Monroe Houses Crew (“MHC”). Joseph was tried and
8 convicted on five counts for his involvement in gang violence, including a shooting that occurred
9 on April 28, 2017 (the “April Shooting”), and gun possession: Count One for participating in a
10 racketeering conspiracy in violation of 18 U.S.C. § 1962(d); Count Two for assault with a
11 dangerous weapon and attempted murder in aid of racketeering in violation of 18 U.S.C.
12 §§ 1959(a)(3), (a)(5), (a)(6), and 2; Count Three for using, carrying, brandishing, and discharging
13 a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(i),
14 (ii), (iii), and 2; Count Four for being a felon in possession of a firearm and ammunition on or
15 about July 10, 2020 in violation of 18 U.S.C. §§ 922(g)(1); and Count Five for being a felon in
16 possession in or around November and December 2020 in violation of 18 U.S.C. §§ 922(g)(1).

17 Joseph filed a motion for a judgment of acquittal under Federal Rule of Criminal Procedure
18 29 and a motion for a new trial under Rule 33. He argued that the district court should enter a
19 judgment of acquittal for Counts Two and Three because the government failed to prove that the
20 April Shooting was gang-related. He then argued, among other things, that he deserved a new
21 trial because the district court failed to voir dire on implicit or unconscious racial bias in violation
22 of his Sixth Amendment right to an impartial jury. The district court denied these motions,

1 finding “overwhelming evidence” in support of Counts Two and Three, and concluding that the
2 court’s voir dire questioning was proper. A1033. The day before sentencing, Joseph filed a
3 second Rule 33 motion, claiming among other things that he was entitled to a new trial because
4 Nasir Vincent, an MHC member targeted by Joseph at the April Shooting, was now willing to
5 testify that Joseph did not shoot at him at the April Shooting. Vincent did not testify at trial
6 because his counsel informed the district court that he planned to assert his Fifth Amendment
7 privilege. The district court denied the motion because Vincent’s identity and alleged role were
8 known to the defense prior to trial; “the evidence [was] at most newly available but not newly
9 discovered.” A1151. Joseph was sentenced to 264 months of imprisonment.

10 Joseph now appeals, arguing that (1) the evidence was insufficient for conviction on Counts
11 Two, Three, and Five; (2) the district court abused its discretion in the voir dire process by failing
12 to include his proposed instructions on unconscious or implicit bias; and (3) the district court
13 abused its discretion by failing to consider Vincent’s newly available affidavit. We assume the
14 parties’ familiarity with the underlying facts, the procedural history of the case, and the issues on
15 appeal.

16 **I. Sufficiency of Evidence**

17 A. Standard of Review

18 We “review[] de novo a challenge to the sufficiency of evidence supporting a criminal
19 conviction, and must affirm if the evidence, when viewed in its totality and in the light most
20 favorable to the government, would permit any rational jury to find the essential elements of the
21 crime beyond a reasonable doubt.” *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004)
22 (citation omitted). “A defendant challenging the sufficiency of the evidence bears a heavy

1 burden.” *United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). “We must credit every
2 inference that the jury might have drawn in favor of the government because the task of choosing
3 among competing, permissible inferences is for the [jury], not for the reviewing court.” *United*
4 *States v. Atilla*, 966 F.3d 118, 128 (2d Cir. 2020) (citations and quotation marks omitted). “The
5 jury may reach its verdict based upon inferences drawn from circumstantial evidence.” *United*
6 *States v. Persico*, 645 F.3d 85, 104 (2d Cir. 2011) (internal quotation marks omitted).

7 “In order to avoid usurping the role of the jury, courts must defer to the jury’s assessment
8 of witness credibility . . . when reviewing the sufficiency of the evidence.” *United States v.*
9 *Triumph Cap. Grp., Inc.*, 544 F.3d 149, 158-59 (2d Cir. 2008). “[A] conviction may be sustained
10 on the basis of the testimony of a single accomplice, so long as that testimony is not incredible on
11 its face and is capable of establishing guilty beyond a reasonable doubt.” *United States v. Duron*,
12 No. 22-1559-cr, 2023 WL 8253056, at *2 (2d Cir. Nov. 29, 2023) (quoting *United States v. Diaz*,
13 176 F.3d 52, 92 (2d Cir. 1999)).

14 B. Counts Two and Three

15 At trial, the government introduced the testimony of several witnesses. Angel Arroyo, a
16 former MHC member and one of the government’s cooperating witnesses, testified that in
17 November 2015, he was stabbed multiple times by Joseph and another CHC member in retaliation
18 for an earlier violent altercation between CHC and MHC members; that on April 27, 2017, Vincent
19 shot at Joseph for invading MHC territory; and that the next day, Joseph shot at MHC members,
20 including Vincent, in the Story Playground next to a public elementary school in retaliation for the
21 shooting that occurred the day before. Joseph missed his target and instead shot and injured a 12-
22 year-old boy.

1 The government introduced ShotSpotter (a gunshot detection software), surveillance video,
2 and DNA evidence. ShotSpotter evidence showed three gunshots near Joseph’s building around
3 the time of the April Shooting, but no gunshots in the vicinity of the shooting that occurred the day
4 before. Surveillance video showed Joseph, right before the April Shooting, running out of his
5 building with gun in hand towards the Story Playground. The government’s second cooperating
6 witness and member of the CHC, Christopher Cruz, testified that after the April Shooting, CHC
7 members bragged about how Joseph had “put in work” for the CHC, and that Joseph gained status
8 and “became somebody.” The government also provided evidence from social media, rap videos,
9 and the contents of Joseph’s cellphone in which he bragged about “spinning” or “beefing” with
10 rival members.

11 Joseph argues that the evidence did not sufficiently establish that his purpose in discharging
12 his gun at the April Shooting was to maintain or increase his position in the CHC as required for
13 conviction on Counts Two and Three.¹ “We consistently have construed the ‘maintaining or
14 increasing position’ language in § 1959 . . . liberally. This element is satisfied if the jury could
15 properly infer that the defendant committed his violent crime because he knew it was expected of
16 him by reason of his membership in the enterprise or that he committed it in furtherance of that
17 membership.” *United States v. White*, 7 F.4th 90, 101 (2d Cir. 2021) (quotation marks omitted).
18 The government is not required to prove that Joseph’s “sole or principal motive was maintaining

¹ “Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or *maintaining or increasing position* in an enterprise engaged in racketeering activity” commits a crime of violence, shall be punished. 18 U.S.C. § 1959(a) (emphasis added).

1 or increasing his position, so long as it prove[s] that enhancement of status was among his
2 purposes.” *United States v. Farmer*, 583 F.3d 131, 143-44 (2d Cir. 2009) (cleaned up).

3 There was ample evidence, in the form of cooperator testimony and social media, rap
4 videos, and content in Joseph’s cellphone, of the long-standing acts of violence and retribution
5 between the CHC and the MHC, from which the jury could find that one of Joseph’s purposes in
6 committing the shooting was to increase or maintain his status in the CHC. Cruz’s testimony
7 showed Joseph’s status in the CHC did in fact increase as a result of the shooting. The jury acted
8 well within its discretion to assess the credibility of witnesses, including Arroyo and Cruz, to make
9 permissible inferences, and to weigh the evidence in reaching its conclusion. We affirm the
10 district court’s judgment convicting Joseph of committing violent crimes in aid of racketeering
11 under Count Two and discharging a gun in furtherance of the violent crimes under Count Three.

12 C. Count Five

13 On December 10, 2020, police recovered a loaded silver pistol with a white handle at a
14 construction site in the vicinity of where Joseph was arrested and the path by which another CHC
15 member, Malik James, was chased. DNA evidence indicated James likely contributed to the
16 mixture of DNA found on the gun, but Joseph likely did not. Only hours before the arrest, Joseph
17 sent text messages claiming he had a gun. Moreover, multiple videos found on Joseph’s phone
18 from November to December 2020 showed Joseph and James brandishing the same white and
19 silver gun.

20 Joseph claims that the evidence was insufficient to prove Joseph possessed the gun. We
21 disagree. The evidence was sufficient for the jury to conclude that Joseph possessed the gun in

1 and around November and December 2020, and at the very least constructively possessed² it on
2 December 10, 2020. Given that Joseph and James were together at the time of Joseph’s arrest,
3 the jury made reasonable inferences based on evidence of James’s DNA on the gun that James
4 abandoned the gun at the construction site during the police chase and that Joseph at least shared
5 possession of the gun. We affirm the district court’s judgment convicting Joseph of being a felon
6 in possession of a firearm under Count Five.

7 **II. Voir Dire Instructions**

8 Joseph argues that the district court abused its discretion by not including instructions or
9 questions on implicit bias in its voir dire. A district court has broad discretion in conducting voir
10 dire, which we review for abuse of discretion. See *United States v. Nieves*, 58 F.4th 623, 632 (2d
11 Cir. 2023). The “deferential standard applies to both the general manner in which [voir dire] has
12 been conducted, and the specific questions a district court elects to ask, or not to ask.” *Id.* “[W]e
13 have never reversed a conviction for the failure to ask a particular question of prospective jurors.”
14 *Id.* at 626 (quoting *United States v. Bright*, No. 20-3792, 2022 WL 53621, at *1 (2d Cir. Jan. 6,
15 2022)). If a plaintiff fails to object to voir dire in the district court, we review for plain error
16 instead of abuse of discretion. *United States v. Colabella*, 448 F.2d 1299, 1302-03 (2d Cir. 1971).

17 There is “no *per se* constitutional rule . . . requiring inquiry as to racial prejudice.”
18 *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981). “Only when there are more substantial
19 indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case

² “Constructive possession exists when a person has the power and intention to exercise dominion and control over an object, and may be shown by direct or circumstantial evidence.” *United States v. Facen*, 812 F.3d 280, 286–87 (2d Cir. 2016) (quotation marks omitted).

1 does the trial court’s denial of a defendant’s request to examine the jurors’ ability to deal
2 impartially with this subject amount to an unconstitutional abuse of discretion.” *Id.*; *see also*
3 *United States v. Diaz*, 854 F. App’x 386, 388 (2d Cir. 2021) (quoting *Rosales-Lopez*).

4 We review for plain error because Joseph did not object to the district court’s voir dire.
5 District courts retain broad discretion over how to screen jurors for bias. They can ask subtler or
6 generalized questions about impartiality, or they can warn jurors of the general duty of impartiality,
7 provided the juror has sufficient context about the case. *See Nieves*, 58 F.4th at 639. And even
8 if the court doesn’t ask any of these bias-related questions, the district court could ask “sufficiently
9 detailed question[s] to allow [a] defendant[] to indirectly ferret out more subtle biases through
10 *peremptory* challenges based on circumstantial indicators of bias.” *Id.* (internal quotation marks
11 omitted). The district court did all of the above. The district court did not commit error, much
12 less plain error, by not including instructions or questions on implicit bias in its voir dire.

13 **III. Newly Discovered Evidence**

14 Finally, Joseph argues that the district court erred by denying his Rule 33 motion for a new
15 trial based on newly discovered evidence in the form of Vincent’s testimony. Rule 33(a) provides
16 that “the court may vacate any judgment and grant a new trial if the interest of justice so requires.”
17 Fed. R. Crim. P. 33(a). A motion for a new trial may be brought on newly discovered evidence.
18 *See* Fed. R. Crim. P. 33(b)(1). “We review the denial of a Rule 33 motion for a new trial for abuse
19 of discretion.” *United States v. James*, 712 F.3d 79, 107 (2d Cir. 2013). “To merit relief based
20 on a claim of newly discovered evidence, the burden is on the defendant to satisfy five elements:
21 (1) that the evidence is newly discovered after trial; (2) that facts are alleged from which the court
22 can infer due diligence on the part of the movant to obtain the evidence; (3) that the evidence is

1 material; (4) that the evidence is not merely cumulative or impeaching; and (5) that the evidence
2 would likely result in an acquittal.” *Id.* (quotation marks omitted).

3 “Evidence is not new if the defendant knew of it prior to trial, and is not considered newly
4 discovered if, with the exercise of reasonable diligence, it could have been discovered before or
5 during the trial.” *United States v. Parse*, 789 F.3d 83, 109 (2d Cir. 2015). Moreover, “evidence
6 is excluded from the meaning of ‘newly discovered’ under Rule 33 where . . . there was a *legal*
7 basis for the unavailability of the evidence at trial, such as the assertion of a valid [Fifth
8 Amendment] privilege.” *United States v. Forbes*, 790 F.3d 403, 408 (2d Cir. 2015).

9 Vincent’s testimony is not “newly discovered” under our precedent in *Forbes* and cannot
10 be considered under Rule 33, as the testimony was known to Joseph and Vincent asserted his Fifth
11 Amendment privilege as the basis for his unavailability. The district court thus acted well within
12 its discretion to deny Joseph’s motion for a new trial.

13 We have considered all of Joseph’s remaining arguments and find them to be without merit.
14 For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

15 FOR THE COURT:
16 Catherine O’Hagan Wolfe, Clerk of Court