

FEB 23 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

REGINALDO CORTEZ
DELOSSANTOS,

Defendant - Appellee.

No. 11-10203

D.C. No. 3:10-cr-047-RCJ

MEMORANDUM*

Appeal from the United States District Court
District of Nevada
Robert C. Jones, Chief District Judge, Presiding

Argued and Submitted February 13, 2012
San Francisco, California

Before: HUG, B. FLETCHER, and PAEZ, Circuit Judges.

Reginaldo C. Delossantos, an employee of the United States Postal Service, was convicted of unlawful destruction of mail by a Postal Service employee in violation of 18 U.S.C. § 1703(a).

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Following the advice of his counsel, Delossantos did not testify at trial on the theory that there was nothing to corroborate his proposed testimony, *i.e.* that he was at the dumpster to throw away trash but not mail, and therefore he would appear to be lying because multiple witnesses testified that the dumpster was empty except for the mail.

After trial, pictures of the inside of the dumpster taken by one of the government's witnesses surfaced. They showed items of trash, including some items Delossantos would have testified he threw away, in the dumpster. Delossantos filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33 arguing that the newly discovered evidence would corroborate his testimony and that he would now testify. The district judge granted the motion for a new trial. That decision was not an abuse of discretion. *See United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc).

AFFIRMED.