

UNPUBLISHED

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

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DONALD WAYNE SITES,
Defendant-Appellant.

No. 03-4639

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CR-02-387)

Submitted: February 4, 2004

Decided: April 9, 2004

Before LUTTIG, KING, and SHEDD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Reginald M. Barley, Richmond, Virginia, for Appellant. Paul J. McNulty, United States Attorney, Michael J. Elston, G. Wingate Grant, II, Assistant United States Attorneys, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Donald W. Sites appeals the district court's denial of his motion for new trial under Fed. R. Crim. P. 33. We affirm.

We review a district court's order denying a motion for new trial under Rule 33 for abuse of discretion. *United States v. Russell*, 221 F.3d 615, 619 (4th Cir. 2000). To prevail on a claim of prosecutorial misconduct, a defendant must show: (1) the Government's remarks and conduct were improper; and (2) the remarks or conduct prejudicially affected his substantial rights so as to deprive him of a fair trial. *United States v. Golding*, 168 F.3d 700, 702 (4th Cir. 1999). Review of a district court's factual findings on a prosecutorial misconduct claim is for clear error. *See United States v. Ellis*, 121 F.3d 908, 927 (4th Cir. 1997).

We find that the district court's factual findings are fully supported by the record and that the district court did not clearly err when it concluded the prosecutor did not threaten Appellant's wife, Denise Sites. Because we conclude the prosecutor's statements to Denise Sites were not improper, we hold the district court did not abuse its discretion in denying Sites's motion for new trial. Furthermore, Sites does not contest the district court's conclusion that he waived his right to a new trial by choosing not to bring the alleged misconduct to the court's attention and choosing not to call Denise Sites as a witness. Accordingly, we affirm the decision of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED