IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2724
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LYNN MCDON WELLS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-83-1)

(May 4, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Lynn McDon Wells appeals both his jury conviction for violating 18 U.S.C. § 1954 and the sentence imposed by the district court for such conviction. Wells assigns numerous

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

points of error, including the court's failure sua sponte to give the jury a witness accomplice instruction, prosecutorial misconduct, insufficiency of the evidence, improper application of the Sentencing Guidelines, due process violations at sentencing, and ineffective assistance of counsel. Reviewing most of those complaints under the plain error standard, which is applicable for the reasons set forth below, we find no reversible error on the part of the district court and therefore affirm both the conviction and the sentence.

I

FACTS AND PROCEEDINGS

Wells was convicted by a jury of one count of accepting money to influence a company benefit plan. The district court sentenced Wells to a prison term of 24 months and a supervised release term of one year, and imposed a fine of $5,000 and a special assessment of $50.

At Wells' trial, Charles Lang, a United States Department of Labor investigator, testified that Wells became the business manager and president of Teamsters' Local Union 1111 (Local 1111) in January 1984, replacing Ralph Waymire as business manager, the highest ranking position in the union. Wells' duties included administering Local 1111's group health insurance.

Group Products and Services (Group Products),[1] a third party administrator and a broker for insurance companies and employers,

[1] A successor to another company called First Group Placement and Group Products.

helped Local 1111 select insurance coverage, and filed insurance claims on behalf of the union. Beginning in 1986, the owner and operator of Group Products was Mel Gilmore. Lang testified that, in conjunction with an audit of Local 1111, he attempted to subpoena Waymire to investigate what appeared to be unauthorized payments made to Waymire. Lang subsequently obtained, by subpoena, a tape from Waymire's former wife, Frances, of a conversation between Waymire and Gilmore.

Waymire testified that from about 1975 or 1976 through 1983, he accepted kickbacks from Gilmore in exchange for steering Local 1111's insurance business to Group Products. According to Waymire, he was paid about $300 three or four times a year by Gilmore, who confirmed that he paid Waymire kickbacks and explained that the figure of $300 three or four times a year represented the amounts that he paid Waymire initially. According to Gilmore, he was paying Waymire about $300 to $400 a month as Waymire was nearing retirement. On the tape obtained from Frances Waymire, Gilmore and Waymire discuss how prior to Waymire's retirement Wells was aware that Gilmore was paying such kickbacks.

Gilmore testified that out of concern for retaining Local 1111's business he had called Wells after learning that Wells had taken over Local 1111 and had discussed continuing the kickback arrangement. At the time of that contact, Wells was aware that Gilmore had been making such payoffs. Waymire told Wells that he would "be getting something." Gilmore called Wells and "laid out what the amount would be." After Gilmore received a subpoena from

government investigators and before he appeared before the grand jury, he called Wells. Gilmore was told by Wells not to say anything about the kickbacks, so Gilmore lied to the grand jury about the payoffs.

After being confronted with the tape of his conversation with Waymire, Gilmore confessed and pleaded guilty to paying the bribes. Gilmore agreed to cooperate with the government by surreptitiously recording conversations with Wells. During a taped conversation on September 18, 1991, Gilmore was informed by Wells that Waymire reported having received payoffs of $350 a month from Gilmore.

At one point in the conversation Wells stated that a government investigator had asked whether Wells had ever taken any kickbacks from any of the insurance companies and he "thought maybe he was talking about this thing, this Group Placement thing but he wasn't." Gilmore interpreted this to mean that Wells thought he was being asked about the payoffs Gilmore was making to him.

During a subsequent portion of the conversation Wells was told by Gilmore that he was concerned about perjuring himself in front of the grand jury regarding the payoffs he had made to Waymire and Wells. Wells did not deny having received the money but instead told Gilmore:

> There ain't no way in hell they could ever prove that you did it anyway, if, I don't give a fuck that WAYMIRE said that's true. Shit, that'd just be your word against his. I'd say fuck, they didn't give me no God damn money, you wasn't giving me none, you wasn't giving him. They'd say why wasn't you giving WELLS if you wasn't giving it to him.

Wells then told Gilmore, "I wouldn't worry about that shit, I don't

think there's a thing to it. I think if there was anything there, they'd have already come got us." On the tape Wells is heard to observe that, as Gilmore was paying Waymire out of his personal funds, the only way Waymire would break the law would be if he failed to report the money on his taxes. Wells then stated: "[y]ou can do any God damn thing . . . (Gilmore interrupts) [y]ou want to do with it. Why can't you give me, if you want to give me money, why can't you do it?"

Gilmore testified that he paid Wells kickbacks in the belief that if he had not done so Wells would have taken the union's insurance business elsewhere. When Gilmore met with Wells, he was told by Wells that Waymire had indicated to him (Wells) that he could expect a payoff. According to Gilmore, he paid Wells 70 cents per insured member. Between May 1987 and December 1988 Gilmore made three payments to Wells of about $700 each. Gilmore explained that he would wait to be called by Wells before making payments to him.

Gilmore had not been sentenced at the time of Wells' trial. After calling several other witnesses, the government rested its case. Wells did not make a motion for a judgment of acquittal.

Wells testified that Gilmore offered him $1.50 per member per month for new insurance business; and that he told Gilmore that he did not have the authority to make such arrangements. According to Wells, the union negotiated insurance contracts with the companies where its members worked, and both the companies and the membership were involved in selecting insurance coverage. Wells denied that

Gilmore ever told him "I've got something for you," or that Wells ever told Gilmore that he (Gilmore) owed him money, or that he said that he would take the insurance business elsewhere if Gilmore did not bribe him, or that Gilmore ever gave him money. Specifically, Wells asserted that he never received any of the three payments of approximately $700.

During one of the taped conversations Gilmore told Wells that he was concerned about the tape that Frances Waymire possessed describing the kickbacks that Waymire was receiving from Gilmore. On the tape Gilmore told Wells, "[y]eah, but he can talk about the, you know, the, he can talk about the, the thing that he set up." Wells responded on the tape, "[w]ell, but that didn't set nothing up. He's a lying son of a bitch if he says that." Wells later explained, "I don't have any faith in [Waymire] at all, but I just know he ain't going, he ain't going to incriminate his god damn self."

At trial, Wells interpreted the statement that Waymire was lying as meaning that Waymire did not arrange for Gilmore to make payoffs to Wells. Wells denied that Waymire ever told him to expect a payoff from Gilmore. It does not appear that Wells made a motion for a judgment of acquittal at the close of all the evidence, but now appeals his conviction and his sentence.

II

ANALYSIS

Most of Wells' arguments are raised for the first time on appeal. "Plain errors or defects affecting substantial rights may

be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b).

A. Witness Accomplice Instruction

Wells argues that the district court committed plain error by failing to issue an accomplice witness instruction sua sponte concerning Waymire's testimony at trial. Wells' defense counsel did not request such an instruction at trial. According to Wells, Waymire was Wells' unindicted co-conspirator. Wells asserts that Waymire and Gilmore conspired "to cover up their own criminal acts by seeking to draw [Wells] into the kickback scheme."

An accomplice witness is "[a] person who either as principal, accomplice, or accessory, was connected with crime by unlawful act or omission on his part, transpiring either before, at time of, or after commission of offense, and whether or not he was present and participated in crime." Black's Law Dictionary 7 (abridged 5th ed. 1983). An accomplice witness instruction ordinarily represents "no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity." Cool v. United States, 409 U.S. 100, 103, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972). Here, the court issued an accomplice witness instruction concerning Gilmore only.

Omission of an accomplice witness instruction "may be raised on appeal as plain error pursuant to Fed. R. Crim. P. 52(b), but only in egregious instances." United States v. Arky, 938 F.2d 579, 582 (5th Cir. 1991), cert. denied, 112 S.Ct. 1268 (1992) (internal quotation and citation omitted). Wells must show that the district

court's failure to issue the instruction was "more than reversible error; he must show that it resulted in a grave miscarriage of justice." Id. (internal quotation and citation omitted).

The plain error standard may be satisfied if the testimony is both uncorroborated and unreliable or if the issue of guilt is close. Id. Assuming arguendo that Waymire was Wells' accomplice, the failure of the court to issue the instruction without prompting from defense counsel was not plain error; Waymire's testimony was both reliable and corroborated by Gilmore, and there was strong evidence of guilt in light of Waymire's and Gilmore's testimony and Wells' statements recorded on tape.

B. AUSA Misconduct

Wells appears to assert that the district court committed reversible error by not responding to misconduct on the part of the Assistant United States Attorney (AUSA) when the AUSA elicited Gilmore's opinion that Wells was guilty, and during opening statements when the AUSA told the jury that the offense under consideration was a kickback and not a bribe.

During direct examination of Gilmore the AUSA questioned Gilmore about a taped statement that Wells made about Waymire: ". . . Waymire is the first son of a bitch they would've went and got if there had been anything to it. He was the guilty party, wasn't nobody else guilty of nothing. . . . Hell he was the only one . . . ." The following exchange took place concerning this and another similar statement Wells had made on tape:

> Q: (AUSA) "Line 21, he was the only one. Then on page 30, line 8, again, he's the only

> one that was guilty of anything. What is the defendant referring to here, Mr. Gilmore, and who is "he"?
>
> A: He's referring to Ralph Waymire.
>
> Q: And what is he basically trying to say here, or saying?
>
> A: I took that to mean that he was the guilty one because he didn't pay taxes.
>
> Q: Pay taxes on what?
>
> A: On the money that I had given him.
>
> Q: Is this the truth, in your mind, Mr. Gilmore, these statements, nobody else is guilty of nothing?
>
> A: No, that's not the truth.
>
> . . .
>
> Q: Who are the guilty parties in this case, Mr. Gilmore?
>
> A: Myself, Mr. Waymire and Mr. Wells.

According to Wells, the AUSA's only purpose in eliciting this testimony was "to create an inference of [Wells'] guilt, and destroy the presumption of his innocence."

The other purported incident of prosecutorial misconduct occurred when the AUSA in his opening statement explained the elements of 18 U.S.C. § 1954 to the jury. The AUSA stated that "[t]he third primary area of the law with regard to these elements is that, in fact, a kickback was paid. Did a kickback exist? What is a kickback? It's not a bribe. Don't confuse bribery with graft. A kickback can be something simply because of one's position." Wells did not object to this statement.

As Wells did not object to the AUSA's question or Gilmore's

response or to the AUSA's opening statement about the elements of § 1954, Wells under Rule 52(b) must demonstrate to us that the district court committed an obvious error that prejudiced him by affecting the outcome of his case. United States v. Olano, ___ U.S. _____, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993). We "should correct a plain forfeited error affecting substantial rights if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. at 1779 (internal quotation and citation omitted); cf. United States v. Carter, 953 F.2d 1449, 1457 (5th Cir.), cert. denied, 112 S.Ct. 2980 (1992) (holding that prosecutorial misconduct objected to at trial must cast serious doubt upon the correctness of the jury's verdict before a judgment will be reversed).

In a case applying a less rigorous standard of review, we ruled that the district court did not abuse its discretion by admitting a witness' commentary on the meaning of a conversation that should have been left to the jury to interpret when there was other evidence establishing guilt. See United States v. Sanchez-Sotelo, 8 F.3d 202, 210-11 (5th Cir. 1993), cert. denied, 1994 U.S. LEXIS 2765 (U.S. Apr. 4, 1994).

Wells fails to demonstrate how the AUSA's statement that Wells' behavior was not a bribesQone sentence out of six volumes of trial testimony and argumentsQamounted to prosecutorial misconduct. Neither this statement, nor Gilmore's elicited opinion had any demonstrable effect on the jury verdict, and neither affected Wells' substantial rights.

C. Insufficient Evidence

Wells also appears to contend that there was insufficient evidence upon which to support his conviction. Again, as Wells did not move for a judgment of acquittal when the government rested its case or at the close of all the evidence, his conviction is reviewed for plain error. United States v. Pierre, 958 F.2d 1304, 1310 (5th Cir.) (en banc), cert. denied, 113 S.Ct. 280 (1992); Fed. R. Crim. P. 29. Plain error, or a manifest miscarriage of justice, occurs only if the record contained no evidence suggesting guilt or if evidence on a key element of the offense was so weak that a conviction would be shocking. Id.

The statute punishes an administrator or officer of an employee welfare benefit plan who:

> receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan . . . .

18 U.S.C. § 1954; United States v. Grubbs, 776 F.2d 1281, 1289 n.8 (5th Cir. 1985).

Wells apparently argues that there is insufficient evidence because Waymire could not remember the precise details of certain of the early payments he made to Wells and because "[a]side from the testimony of Gilmore and Waymire, and the tainted tape conversation on September 18, 1991, there is no independent evidence that [Wells] accepted or solicited either a bribe or a gratuity from Gilmore."

At trial Wells testified that he was the president and business manager of Local 1111 between May 1987 and December 1988[2]; that Local 1111 represented employee groups; and that Local 1111 sponsored a group health and disability plan that was covered by the Employee Retirement Income Security Act (ERISA). Gilmore testified in detail about three specific kickbacks of about $700 that he paid to Wells. As the tapes and the testimony of Waymire and Gilmore provide strong evidence of Wells' guilt, there was no manifest miscarriage of justice.

D. Sentencing Guidelines

Wells asserts that the district court imposed a sentence in violation of law because the sentence was the result of an incorrect application of the guidelines. At sentencing Wells objected to the figure of $10,380, which the presentence investigation report (PSR) stated as the amount of kickbacks he had accepted from Gilmore during the course of their relationship. At trial, Gilmore testified that he paid Wells kickbacks between early 1984 and late 1988.

The district court's decision to overrule the objection was based on the probation officer's statement that the records reflected payments of over $10,000 between 1984 and 1988, and that the FBI case agent and Gilmore would be willing to testify to that amount. The PSR indicates that these records were Gilmore's business records.

Wells argued at sentencing, as he does now on appeal, that he

[2] The dates alleged in the indictment.

should have been held responsible only for the three payments of $700, or $2,100, about which Gilmore testified during trial. The difference in the two figures accounts for a difference of two offense levels. See U.S.S.G. § 2E5.1(b)(2) (October 1987); U.S.S.G. § 2F1.1(b)(B),(D) (June 1988). The AUSA told the district court that evidence of the 70 cents a member per month formula presented at trial as having been established by Wells and Gilmore would have accounted for a figure of over $10,000. The court ruled that the information contained in the PSR was reliable.

"The PSR is considered reliable and may be considered as evidence by the trial judge in making factual sentencing determinations." United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate, or unreliable. United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991). Further, a district court may use hearsay evidence when making sentencing determinations as long as that evidence has "sufficient indicia of reliability to support its probable accuracy." United States v. Billingsley, 978 F.2d 861, 866 (5th Cir. 1992), cert. denied, 113 S.Ct. 1661 (1993) (internal quotation and citation omitted).

Under U.S.S.G. § 1B1.3, a defendant is responsible for "all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that

occurred during the commission of the offense of conviction . . ." and "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." § 1B1.3(a)(1)-(2) (Jan. 1988). Payoffs that occurred prior to the incidents alleged in the indictment would thus constitute relevant conduct. The commentary to § 2F1.1 directs the court to § 2B1.1 to determine how to evaluate loss. § 2F1.1, comment. (n.7) (June 15, 1988). The commentary explains that "[t]he loss need not be determined with precision, and may be inferred from any reasonably reliable information available, including the scope of the operation." § 2B1.1, comment. (n.3) (June 15, 1988; Jan. 15, 1988).

As Wells is not being convicted of an extraneous offense, proof beyond a reasonable doubt is not necessary. United States v. Byrd, 898 F.2d 450, 452 (5th Cir. 1990). Instead, the court's determination need be supported by a preponderance of the evidence only. United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993), petition for cert. filed, ___U.S.L.W.___ (U.S. March 4, 1994) (No. 93-8169). Wells did not establish that the $10,380 figure was materially untrue, inaccurate, or unreliable. There is no support for Wells' allegation that the district court included Gilmore's payoffs to Waymire in the total attributed to Wells. The court did not clearly err by including these kickbacks in its sentencing determination.

E. Due Process; Jury Trial

Wells argues that the AUSA's statement that Wells' offense

involved a kickback but not a bribe resulted in a greater guidelines offense level and thereby violated his due process rights and his right to a jury trial.

Under § 2E5.1, the guideline that applies to violations of 18 U.S.C. § 1954, the base offense level is ten if the offense involves a bribe and six if the offense involves a gratuity. § 2E5.1(a)(1)-(2). A bribe is "the offer or acceptance of an unlawful payment with the specific understanding that it will corruptly affect an official action of the recipient." § 2E5.1, comment. (n.1). A gratuity is "the offer or acceptance of an unlawful payment other than a bribe." § 2E5.1, comment. (n.2).

Wells' argument that the AUSA's statement to the jury that his actions do not constitute a bribe, and that this somehow affected his sentence, is incomprehensible. It was not raised before the district court, and we will not consider issues raised for the first time on appeal unless they involve purely legal questions and failure to consider them would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). Wells does not explain how the AUSA's statement resulted in manifest injustice.

Finally, Wells asserts that each of the arguments he raised above establishes that he received ineffective assistance of counsel. We consider alleged ineffective assistance of counsel on direct appeal only in "rare cases where the record allow[s] [the Court] to evaluate fairly the merits of the claim." United States v. Higdon, 832 F.2d 312, 314 (5th Cir. 1987), cert. denied,

484 U.S. 1075 (1988). As this is not such a "rare case," we decline to consider the issue, albeit we do so without prejudice to Wells' right to raise the issue in a proper proceeding pursuant to 28 U.S.C. § 2255. See id.

AFFIRMED.