UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7406

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TUPELO FLITE CENTER, INC. and
SUSAN GARY LEMMONS,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Mississippi
(CR-CRE91-34-B-D-01)

(December 20, 1993)

Before GARWOOD and BARKSDALE, Circuit Judges, and WALTER, District Judge:[1]

BARKSDALE, Circuit Judge:[2]

Susan Gary Lemmons and Tupelo Flite Center, Inc., appeal from their convictions for mail fraud and submission of false claims under a government contract, challenging the sufficiency of the evidence (in large part because of inconsistent verdicts), the admission of test results, and the limitation on cross-examination of a prosecution witness. We **AFFIRM**.

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Tupelo Flite Center, Inc. (TFC), has an aircraft refueling operation located at an airport in Tupelo, Mississippi. Lemmons was manager of TFC from 1984 through 1991.[3] In 1985, TFC entered into the first of a series of contracts with the United States Defense Fuel Supply Center to supply aviation gasoline and commercial jet fuel to military and qualified civilian aircraft, on an as-needed basis. Jet fuel supplied under the contracts was required to contain a minimum of .08% of an additive, Fuel System Icing Inhibitor (FSII).[4] FSII prevents water in the fuel from freezing, and also contains an ingredient that prohibits growth of bacteria.[5]

FSII could be added to fuel in several ways: (1) by spraying the contents from cans of FSII directly into the aircraft tank at the same time that fuel was added with a hose and nozzle; (2) by spraying the contents from cans of FSII into the tanker (pre-mixing); and (3) by using an injector system that automatically injects FSII from cans on top of the tanker while an aircraft is

[3] Lemmons was an officer of TFC, but owned no stock. Her father, Dr. William Gary, is president of TFC and owns the majority of stock in the corporation.

[4] FSII is marketed under the brand name, "PRIST".

[5] If the water freezes, it can block filters and fuel lines, causing engine starvation, which can lead to engine failure and, possibly, a crash. Bacterial growth can cause similar problems.

being refueled.[6] In addition, fuel pre-mixed with FSII at the refinery could be purchased.

When it first began supplying fuel to military aircraft, TFC used the spray can at the nozzle method. Later, it also pre-mixed FSII with the fuel in the tanker. In 1989, TFC started adding FSII with the use of automatic injectors on the tankers. Beginning in July 1989, fuel pre-mixed with FSII at the refinery was purchased by American Eagle airline and dumped into TFC's underground tank, for use in American Eagle's aircraft. TFC did not purchase any of this pre-mixed fuel.[7]

In March 1991, Lemmons and TFC were indicted on eleven counts of mail fraud and submitting false claims, arising out of their supplying fuel without the required amount of FSII on November 20, 1987, and April 8 and 24, 1990:

Count	Charge
One	Mail fraud (submission of fuel slips and invoice for 4/24/90 refueling)
Two	Mail fraud (submission of fuel slips and invoice for 4/8/90 refueling)
Three	False claim (invoice for 4/24/90 refueling)
Four	False claim (invoice for 4/24/90 refueling)
Five	False claim (invoice for 4/8/90 refueling)

[6] One ounce of FSII will effectively treat about ten gallons of fuel.

[7] An American Eagle employee testified that she became concerned that American Eagle's pre-mixed fuel was being diluted when it was placed in TFC's underground tank with untreated fuel; Lemmons told her that all of the fuel was being pre-mixed. Lemmons testified that she instructed TFC employees not to add FSII to fuel, and to turn the automatic injectors off, whenever American Eagle's pre-mixed fuel had recently been dumped into the underground storage tank; but, when untreated fuel was dumped into the tank, the injectors were turned on again.

Six	Mail fraud	(receipt of payment for 4/24/90 refueling)
Seven	Mail fraud	(submission of fuel slips and invoice for 11/20/87 refueling)
Eight	Mail fraud	(submission of fuel slips and invoice for 11/20/87 refueling)
Nine	False claim	(invoice for 11/20/87 refueling)
Ten	Mail fraud	(receipt of payment for 11/20/87 refueling)
Eleven	Mail fraud	(receipt of payment for 11/20/87 refueling)

TFC and Lemmons were acquitted of the charges arising out of the April 8 refueling (counts two and five), and of mail fraud and submission of false claims in connection with the November 20 refueling (counts seven, eight, and nine). The jury found TFC guilty of mail fraud for receipt of the checks in payment of the invoices for the November 20 refueling (counts ten and eleven), and mail fraud and submission of false claims in connection with the April 24 refueling (counts one, three, four, and six). TFC was fined $40,000 and ordered to pay $8,213.58 restitution.

Lemmons was found guilty of mail fraud for submitting the fuel slips and invoices for the April 24 refueling, and for receipt of payments for the November 20 refueling (counts one, ten, and eleven); she was acquitted on the counts charging her with mail fraud and making false claims in connection with the submission of invoices and receipt of payment for the April 24 refueling (counts three, four, and six). Lemmons was sentenced to 21 months imprisonment (a downward departure from the 41-50 month Sentencing Guidelines range), fined $7,500, and ordered to pay $8,213.58 restitution. The district court granted Lemmons' motion for bail pending appeal.

II.

The appellants contend that the evidence is insufficient to sustain their convictions and, in the alternative, that they are entitled to a new trial because the district court erroneously admitted fuel sample test results, and because their cross-examination of a prosecution witness was improperly limited.

A.

When reviewing a challenge to the sufficiency of the evidence, we examine the evidence and the inferences which may be drawn from it in the light most favorable to the verdict, to determine whether a rational jury could have found the essential elements of the offenses beyond a reasonable doubt.[8] ***United States v. Restivo***, ___ F.3d ___, ___, 1993 WL 478494, at *4 (5th Cir. 1993). "The evidence need not exclude every rational hypothesis of innocence or be wholly inconsistent with every conclusion except guilt, provided a reasonable trier of fact based upon the evidence could find guilt beyond a reasonable doubt". ***Id***. "We further accept all credibility choices which tend to support the jury's verdict". ***Id***.

It is well established that "a jury may return inconsistent verdicts in criminal cases, even where the inconsistency is the result of mistake or compromise". ***United States v. Williams***, 998 F.2d 258, 262 (5th Cir. 1993). "An acquittal does not necessarily

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[8] Another way of stating this is that "[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government to support it". ***United States v. Bryan***, 896 F.2d 68, 74 (5th Cir. 1990) (internal quotation marks and citation omitted); *see also* ***United States v. Williams***, 998 F.2d 258, 261 & n.4 (5th Cir. 1993).

equate with a finding that the defendant was innocent. The not guilty verdict may be the result of compromise, confusion, leniency, and so forth". ***United States v. Straach***, 987 F.2d 232, 241 (5th Cir. 1993).[9] "[A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts". ***Powell***, 469 U.S. at 67. Review for sufficiency of the evidence is "independent of the jury's determination that evidence on another count was insufficient". ***Id***.[10]

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[9] *See also* ***United States v. Powell***, 469 U.S. 57, 66 (1984) ("The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable".); ***Harris v. Rivera***, 454 U.S. 339, 346 (1981) (a jury has "unreviewable power ... to return a verdict of not guilty for impermissible reasons"); ***Dunn v. United States***, 284 U.S. 390, 393 (1932) ("The most than can be said [of inconsistent verdicts] ... is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt".); ***United States v. Straach***, 987 F.2d at 240 (even if two counts are related factually, an acquittal on one of the counts would not necessarily bar a guilty verdict on the other count).

[10] The appellants cite ***United States v. Caro***, 569 F.2d 411, 418 (5th Cir. 1978), for the proposition that inconsistent jury verdicts "should engage our judicial skepticism. A critical analysis of the facts is required when such a contrariety of results does appear". The inconsistency referred to in ***Caro*** was a conviction on a conspiracy charge and an acquittal of the substantive offense. We do not interpret ***Caro*** as providing for a different, more stringent, standard of review for sufficiency of the evidence in any case in which a jury returns seemingly inconsistent verdicts.

A violation of the mail fraud statute, 18 U.S.C. § 1341,[11] is established by proof beyond a reasonable doubt of "(1) a scheme to defraud; and (2) ... use of the mails for the purpose of executing the scheme". *E.g.*, ***United States v. El-Zoubi***, 993 F.2d 442, 445 (5th Cir. 1993). "The element of fraudulent intent ... requires a showing that defendants contemplated or intended some harm to the property rights of their victims". ***United States v. Stouffer***, 986 F.2d 916, 922 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 115 (1993).

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[11] 18 U.S.C. § 1341 provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both....

18 U.S.C.A. § 1341 (West Supp. 1993).

In order to establish a violation of 18 U.S.C. § 287,[12] which prohibits the making of false claims to the government, the prosecution was required to prove beyond a reasonable doubt that the appellants (1) made or presented a claim to an agency of the United States, (2) knowing such claim to be false, fictitious, or fraudulent. *See* ***United States v. Ewing***, 957 F.2d 115, 119 (4th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3008 (1992).

1.

The appellants contend that the evidence is insufficient for counts ten and eleven (mail fraud for receipt of payments for the November 20 refuelings),[13] because there was no proof of intent to defraud. They assert that the insufficiency is demonstrated by the jury's inconsistent verdicts acquitting them of the other counts involving those refuelings (counts seven, eight, and nine, charging mail fraud and making false claims in connection with the submission of fuel slips and invoices).

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[12] 18 U.S.C. § 287 provides:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

18 U.S.C.A. § 287 (West Supp. 1993).

[13] The two checks that are the subject of counts ten and eleven represented payment for ten separate refuelings on November 20, by three different TFC employees, from the same tanker.

Even if the verdicts are truly inconsistent, "[j]uries are free to return inconsistent verdicts, for whatever reason, provided their convictions are supported by adequate evidence". ***United States v. Merida***, 765 F.2d 1205, 1220 (5th Cir. 1985). In any event, as stated, our review of the sufficiency of the evidence with respect to counts ten and eleven is independent of the jury's determination that the appellants were not guilty of the other charges arising out of the November 20 refuelings. *See* ***Powell***, 469 U.S. at 67.

The appellants do not dispute the accuracy of the test results showing that there was no FSII in the fuel supplied on November 20. Instead, they assert that the evidence demonstrates only that the absence of FSII was an isolated non-compliance problem that occurred as the result of an accident or mistake rather than an intent to defraud.

Lemmons testified that William Lyon, a quality assurance representative for the Government, called her on November 19, 1987, and told her that he was coming to TFC the next day for the regular, six-month inspection. She testified that, after Lyon called, she received a call from the National Guard facility, advising that the Guard would have "a big day" on the 20th, and that, therefore, she instructed an employee to pre-mix FSII with the fuel in the tanker used for refueling military aircraft.

On November 20, Lyon conducted the scheduled inspection at TFC. He observed a helicopter being refueled by TFC employee Gillard, and asked why FSII was not being added in the normal

manner, with a 20-ounce spray can; Gillard responded that the fuel had been pre-mixed with FSII in the tanker. A sample of fuel from the tanker was tested, and the results revealed that there was no FSII in the fuel.

Lemmons testified that the employee she had instructed to pre-mix the fuel the night before failed to do so. The Government requested corrective action pursuant to contract procedures; in response, TFC informed the Government that FSII would be added at the nozzle as it had been in the previous months, and that it had fired the employee who had failed to pre-mix the fuel.[14]

Several former TFC employees (each of whom refueled military aircraft on November 20) testified that, prior to November 20, TFC had stopped adding FSII to military fuel on a regular basis, often running out of the additive and using it only when it was available. Elgin Gillard, who worked at TFC as general line service supervisor from 1984 until November 1991, when he was suspended for failing a drug test,[15] testified that Lemmons told him to tell Lyon that the fuel was pre-mixed, but that he did not believe her, because she previously had made similar representations that were untrue. Gillard testified that he did not tell Lyon the truth because he was afraid of losing his job.

Travis Davis, who was employed by TFC from May 1985 through February 1989, and was employed by TFC's competitor at the time of trial, testified that when TFC first got the contract (in 1985),

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[14] That person did not testify.

[15] Gillard denied that he had used cocaine.

FSII was added with spray cans at the nozzle every time an aircraft was refueled; but, after about a year, they started pre-mixing. According to Davis, TFC would run out of FSII, and it would be added only when it was available; he testified that it was more often unavailable than available. He testified that Lemmons instructed him to mark fuel slips to indicate that FSII was added,[16] regardless of whether that was true, and told him that, if customers asked about FSII, he should tell them it had been added.

Michael Watson, who worked at TFC during the summer of 1987 and, off and on through the summer of 1989, testified that Lemmons told him that FSII was pre-mixed in the fuel. He doubted the truth of her statement, because he was never involved with the pre-mixing process, and saw it done only a very few times.[17]

Others who were employed by TFC at the time of trial testified that they were never instructed not to put FSII in military aircraft. Dr. Gary (Lemmons' father and the owner of TFC) acknowledged that TFC did not add enough FSII when refueling military aircraft, but maintained that it was not intentional. He

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[16] A Defense Fuel Supply Center employee testified that the invoices would not have been paid if the slips had not reflected that FSII had been added.

[17] Peggy Livingston, who worked as a bookkeeper for TFC from September 1986 through June 1991, testified that she had heard customers ask Lemmons if FSII was pre-mixed in fuel, and that Lemmons responded that it was pre-mixed in the truck. She also testified that she had heard Lemmons instruct TFC employees to tell customers who inquired about FSII that it was pre-mixed in the truck. Livingston stated that she had reason to believe that Lemmons was not telling the truth, because Lemmons had just been informed that TFC was out of FSII.

and Bob Lemmons (Lemmons' husband, who was manager of TFC at the time of trial, and worked at TFC as a lineman and mechanic from 1988-90), denied that TFC had run out of FSII. Susan Lemmons testified that she was not aware of any occasions when FSII was not added, as required, and that, to her knowledge, TFC had never run out of it.

"Proof of an intent to defraud may arise by inference from all of the facts and circumstances surrounding a transaction". ***United States v. Restivo***, ___ F.3d at ___, 1993 WL 478494, at *4 (internal quotation marks and citation omitted). Although the evidence was conflicting, the jury could have found intent to defraud in connection with the receipt of payments for the November 20 refueling on the basis of the test results and the testimony of former TFC employees. *See* ***id***. at ___, 1993 WL 478494, at *4 ("We ... accept all credibility choices which tend to support the jury's verdict".). In addition, there was other circumstantial evidence of intent to defraud, including records of TFC's purchases of FSII during the contract period, which demonstrated that TFC purchased only enough FSII to treat 49.7% of the fuel supplied to the military.[18] We conclude that the evidence is sufficient to support the verdicts on counts ten and eleven.

[18] This calculation assumes that all of the FSII purchased by TFC during the contract period was supplied to military aircraft, even though there was evidence that other TFC customers also used it.

2.

Next, the appellants challenge the sufficiency of the evidence concerning the April 24 refuelings.

a.

With respect to count one (mail fraud in the submission of fuel slips and invoices for April 24), both appellants contend that there is no evidence that they intended to commit fraud.

On April 24, a military helicopter (tail no. 2132) was refueled twice at TFC.[19] The employees who then refueled the helicopter were Bob Lemmons (Lemmons' husband) and George Westbrooks. Both testified that the injector system for FSII was used. Bob Lemmons testified that the injector was working properly, and that he could see FSII coming through the line.[20]

The next day, federal agents, acting on information furnished by Mark Tomlinson, a former TFC employee, executed a search warrant at TFC. During the raid, records were seized and fuel samples were taken from helicopter no. 2132 and one of the tankers. The samples were tested and found to contain less than the required amount of FSII.[21]

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[19] Helicopter 2132 was refueled several times on April 24, but the last two refuelings were at TFC. It has a 209-gallon-capacity fuel tank; 208 gallons were purchased from TFC on April 24.

[20] Nevertheless, the appellants introduced evidence that, in May 1990, an Exxon inspector found problems with the injector system.

[21] The evidence was contradictory as to whether the tanker sample was taken came from the tanker that was used to refuel helicopter no. 2132 on April 24. In April 1990, TFC had two jet fuel tankers: a Ford (no. 8063) and a GMC (no. 8163). The fuel sample tested by the Government was taken from no. 8163 (the GMC). The Ford ordinarily was used for general aviation refueling, and the GMC was

Gillard testified that the can of FSII on the tanker used on April 24 was empty and that military aircraft had not been getting FSII for a couple of weeks prior to that date. Bob Lemmons acknowledged, on cross-examination, that the FSII container was nearly empty on April 25, and that he ordered more FSII on that date (during the execution of the search warrant). The invoice for that order states "must ship today", followed by 14 exclamation points.

The appellants' contention that injector failure, rather than intent to defraud, was responsible for the lack of FSII, was a classic jury issue, which was presented to, and rejected by, the jury. After carefully reviewing the evidence, in the light most favorable to the jury's verdict, we conclude that it is sufficient to sustain the convictions on count one.

b.

Lemmons also asserts that, because she was acquitted on counts three and four (which alleged a fraudulent scheme between her and TFC to submit false claims for the April 24 refuelings) and on count six (mail fraud for receipt of payment for the April 24 refuelings), her conviction on count one (aiding and abetting mail

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set aside for use in refueling military aircraft. Bob Lemmons and Westbrooks both testified that they used the Ford, no. 8063, to refuel helicopter 2132 on April 24, because the GMC was inoperable on that date. On cross-examination, Bob Lemmons testified that no. 8163 probably was inoperable for two or three weeks. Lemmons, however, testified that no. 8163 was operable on April 25. Charles Piper testified on behalf of the Government that no. 8163 was used to refuel a military aircraft on April 25, that Gillard did not mention any problems with it, and that he noticed nothing wrong with it. There was no evidence of any repairs to no. 8163 between April 24 and 25.

fraud by submitting fuel slips and invoices for the April 24 refuelings) is inconsistent. In a similar vein, TFC, which was convicted on all four of the counts related to the April 24 refuelings, contends that its convictions on counts three, four, and six are inconsistent with Lemmons' acquittals on those counts.

First, we note that the verdicts are not necessarily inconsistent: the jury might have found that Lemmons was responsible for the lack of FSII on April 24, and thus found her guilty on count one, while finding that she had no direct involvement in the preparation of fuel slips and invoices or the receipt of payment, as charged in counts three, four, and six. Nevertheless, the jury could have found that those offenses were committed by employees of TFC, acting within the scope of their employment, and thus found TFC guilty on all four of the counts. But, as stated, even if the verdicts are truly inconsistent, that is not a ground for reversal of convictions supported by sufficient evidence.

TFC's challenge to the sufficiency of the evidence on counts three, four, and six is a variation on the theme of inconsistency. TFC maintains that its convictions on those counts must be reversed, as a matter of law, because Lemmons was acquitted on those counts and no other employees or agents of TFC were accused of having directed the alleged actions. TFC cites no authority for this novel proposition, and we can find none.

The same evidence that supports TFC's conviction on count one also supports its convictions on these counts. There is ample

evidence that TFC employees were acting within the scope of their employment, and for the benefit of TFC, in refueling military aircraft and completing and submitting false fuel slips and invoices. On cross-examination, Dr. Gary testified that TFC employees acted within the scope of their employment in refueling military aircraft. And, Lemmons testified that the invoices and fuel slips for the April 24 refuelings were mailed from her office by TFC employees. Accordingly, TFC's convictions on these counts are supported by sufficient evidence. *See* ***United States v. Bi-Co Pavers, Inc.***, 741 F.2d 730, 737 (5th Cir. 1984) ("a corporation is criminally liable for the unlawful acts of its agents, provided that such conduct is within the scope of the agent's authority, actual or apparent"); ***United States v. Cadillac Overall Supply Co.***, 568 F.2d 1078, 1090 (5th Cir.) (a corporation is criminally liable under the Sherman Act for the acts of its agents in the scope of their employment, even though such acts are contrary to general corporate policy and expressed instructions to the agents), *cert. denied*, 437 U.S. 903 (1978); ***United States v. Ridglea State Bank***, 357 F.2d 495 (5th Cir. 1966) (corporation may be liable for violations of the False Claims Act if its employees were acting within the scope of their authority, for a purpose that benefited the corporation).

B.

In the alternative, the appellants maintain that two evidentiary errors entitle them to a new trial.

1.

The appellants assert that the district court abused its discretion by admitting test results on fuel samples taken at TFC on April 25, 1990, because a proper chain of custody for the samples was not established. "Evaluating the admissibility of evidence is a matter within the sound discretion of the district court". ***United States v. Sparks***, 2 F.3d 574, 582 (5th Cir. 1993). "A trial judge is correct in allowing physical evidence to be presented to the jury as long as a reasonable jury could decide that the evidence is what the offering party claims it to be". ***United States v. Casto***, 889 F.2d 562, 568 (5th Cir. 1989), *cert. denied*, 493 U.S. 1092 (1990). "Any question as to the authenticity of the evidence is then properly decided by the jury. Thus, a break in the chain of custody affects only the weight and not the admissibility of the evidence". ***Id***. at 569; *see also* ***United States v. Shaw***, 920 F.2d 1225, 1229-30 (5th Cir.) ("This court has repeatedly held that any break in the chain of custody of physical evidence does not render the evidence inadmissible but instead goes to the weight that the jury should accord that evidence".), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2038 (1991).[22]

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[22] Fed. R. Evid. 901 governs the authentication of evidence, and its principles apply also to establishing the chain of custody of an exhibit. The Advisory Committee's Note to this rule states that in determining whether to admit evidence of disputed authenticity, the court should use the same procedures set forth in Rule 104(a), which discusses relevance conditional on fact. The Advisory Committee's Notes to Rule 104(b) require the judge to make a preliminary determination whether a jury could reasonably conclude the

George Bernatti testified that he took fuel samples from the helicopter (tail no. 2132) and tanker (no. 8163) on April 25, and that he tagged the samples and assigned numbers to them as he took them. The containers in which the samples were placed were introduced into evidence, and Bernatti identified them as those in which he placed the samples. Bernatti testified that he sealed the sample containers and transported them in his car from Tupelo to Atlanta, Georgia. The next morning, he gave the samples to Bob Kieffer at Law Laboratories. According to Bernatti, no one handled the samples between when he took them and gave them to Kieffer.

Kieffer, a chemist and part owner of Law Laboratories, testified that his initials and laboratory numbers were on both the tags and sample cans, and that Bernatti had brought the samples to him on April 26. He testified that he is "confident" that the samples he tested were the same ones Bernatti brought to him that day. After conducting tests on the samples, Kieffer sent them to Oxford, Mississippi, via Federal Express. Bernatti testified that he removed the fuel samples from a Federal Express package when they arrived in Oxford (where the trial was conducted).

The appellants point out that Kieffer testified that the samples were not sealed when he received them; that the test result reports contain a contract number that does not correspond with TFC's government contract number; and that no record was kept of

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disputed condition is fulfilled.

United States v. Jardina, 747 F.2d 945, 951 (5th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985).

who handled the samples at the testing laboratory. These alleged deficiencies were the subject of thorough cross-examination, and affect the weight, rather than the admissibility, of the test results on the samples. There was no abuse of discretion in their admission.[23]

2.

The affidavit for the April 25 search warrant was based, in significant part, on information provided by Mark Tomlinson, a former TFC employee who had left his employment under suspicion of theft. In a statement under oath given to the Tupelo Airport Authority in December 1989, which was attached to the application and affidavit for the warrant, Tomlinson leveled numerous accusations against Lemmons and TFC. In addition to allegations that fuel supplied to military aircraft did not contain the required amount of FSII, and that Lemmons instructed TFC employees to falsely inform customers that FSII had been pre-mixed with the fuel, Tomlinson's accusations included the following: that TFC falsified records to avoid paying the proper amount of rent to the

[23] For the first time in their reply brief, the appellants assert additional "missing links" in the chain of custody, including: (1) helicopter no. 2132 was refueled at other locations on April 24, and no witness testified that the fuel sample taken from it consisted solely of fuel sold by TFC; (2) Agent Bernatti did not see the sample being taken from the helicopter and did not know whether it was taken properly from the sump; (3) contract sampling procedures were not followed; and (4) the fuel sample from tanker no. 8163 should not have been admitted, because that tanker was not used to refuel helicopter 2132 on April 24. Generally, we do not consider matters raised for the first time in a reply brief. *See, e.g.*, ***United Paperworkers Int'l Union v. Champion Int'l Corp.***, 908 F.2d 1252, 1255 (5th Cir. 1990). In any event, these "missing links" affect only the weight, and not the admissibility, of the test results.

airport authority; that TFC allowed unlicensed student pilots to fly under TFC's fire patrol contract with the Mississippi Forestry Commission, while listing commercial pilots as having flown; that TFC employees, at Lemmons' direction, dumped fuel and oil in storm drains; that Lemmons and Dr. Gary (her father and the owner of TFC) pocketed cash from fuel sales; and that TFC failed to give him a W-2 form, failed to withhold taxes and social security from his pay, and failed to pay him for overtime work. In an interview with Maureen Grosser, special agent with the Defense Criminal Investigative Service (the agent who signed the warrant affidavit), Tomlinson made additional accusations, including that Lemmons received a military radio from the Commander of the Tupelo National Guard, in violation of Army regulations.

Lemmons and TFC contend that the district court violated the confrontation clause of the Sixth Amendment by limiting their ability to attack Tomlinson's credibility through cross-examination about the other accusations he had made against them.[24] "A party challenging a witness generally is given the opportunity to pursue all relevant lines of inquiry aimed at discovering and disclosing bias". ***United States v. Anderson***, 933 F.2d 1261, 1276 (5th Cir. 1991). "While it is within the discretionary authority of the trial court to limit cross-examination, that authority comes into play only after there has been permitted as a matter of right

[24] Tomlinson's credibility was placed at issue early in the trial. During his opening statement, appellants' counsel referred to Tomlinson's accusations, and the Government objected. Defense counsel responded that "the entire lawsuit hinges on the credibility of Mark Tomlinson...."

sufficient cross-examination to satisfy the Sixth Amendment". ***United States v. Garza***, 754 F.2d 1202, 1206 (5th Cir. 1985) (internal quotation marks and citation omitted).

> The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him. The right of confrontation ... means more than being allowed to confront the witness physically. Indeed, the main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*. Of particular relevance here, ... the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. It does not follow, of course, that the Confrontation Clause ... prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as to the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.... [T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986) (emphasis in original; internal quotation marks, brackets, and citations omitted). "The Confrontation Clause of the Sixth Amendment is satisfied where defense counsel has been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness". ***United States v. Restivo***, ___ F.3d at ___, 1993 WL 478494, at *2 (5th Cir. 1993) (internal quotation marks and citation omitted).

Because "the focus of the Confrontation Clause is on individual witnesses[,] ... the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial". ***Van Arsdall***, 475 U.S. at 680. "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness". ***Id***. (internal quotation marks and citation omitted). "The relevant inquiry is whether the jury had sufficient information to appraise the bias and motives of the witness". ***United States v. Tansley***, 986 F.2d 880, 886 (5th Cir. 1993).

Tomlinson worked for TFC as a lineman from 1985 through September 1986, and during summers, holidays and spring breaks until September 1989. He testified that when TFC first entered into the government contract, FSII was used on a regular basis, added at the nozzle. Later, FSII was mixed with the fuel while the tanker was being refilled from the ground tank. After about six months or a year, no FSII was on hand at TFC. Tomlinson testified that he informed Lemmons, who ordered the supplies, when the FSII supply was low or there was none, and that, at times, it would be unavailable for as long as a month. Tomlinson stated that Lemmons

instructed him to tell anyone who asked about FSII that it was pre-mixed in the tanker, even when there was none available.

On direct examination, the Government questioned Tomlinson about TFC's accusations against him, including theft of cash, unauthorized use of TFC's telephone to make long distance calls, use of an aircraft without permission, and drinking on the job; Tomlinson denied any wrongdoing. In addition, Tomlinson testified that Lemmons took corporate cash generated from cash fuel sales and deposited it in her personal checking account.

On cross-examination, defense counsel attempted to question Tomlinson about other allegations he had made about TFC, including his statement to the airport authority. Although the Government did not object, the district court interrupted that line of questioning, admonishing defense counsel: "[W]e will not get off into things that have no bearing on the case.... [A]sk him a direct question about whether or not he made a certain statement. Let's get to the point". Defense counsel then asked Tomlinson if he had accused TFC of falsifying its records so that it would not have to pay rent to the airport authority. The Government objected, on the ground that the question was irrelevant to the charges in the indictment. Defense counsel responded:

> It is certainly pertinent. This is a case the defendant has been charged with fraud and numerous allegations made against the defendant, and we are entitled to prove that these allegations were maliciously done and false.

The district court sustained the Government's objection as "to any other allegations, other than what is in the indictment".

Defense counsel later attempted to question Tomlinson about whether he had ever told anyone that he did not receive a W-2 form from TFC. The Government objected that the testimony was irrelevant. Defense counsel responded that "it goes to the credibility of this witness". The district court sustained the objection.

Later, defense counsel questioned Tomlinson about his allegations that the tankers at TFC were in bad repair, that fuel filters had never been changed, that meters on the tankers were never calibrated, and that the ground wires on the tankers were unsafe. Although the Government did not object to this line of questioning, the district court interrupted, and the following colloquy occurred:

> THE COURT: Gentlemen, evidently government's counsel doesn't care how long we sit here, but I do. It is irrelevant to this case what he told her [special agent Grosser] about things that are not connected with the charges. I don't care how many ground wires were connected or not connected; I don't care how many filters were changed or how often they were changed. It has nothing to do with this case, so let's get on with it.
>
> [DEFENSE COUNSEL]: Your Honor, with all due respect to the Court, I think I am entitled to attack the witness' credibility through the --
>
> THE COURT: -- not on irrelevant matters. You are not entitled to attack his credibility on irrelevant matters, and that is an irrelevant matter.

Defense counsel then attempted to question Tomlinson about other employees' access to the cash box at TFC, but the district court sustained the Government's objection that such testimony was

repetitive. Defense counsel objected to the limitation of cross-examination, and the district court responded:

> I am not limiting your cross-examination, although maybe I should as far as overall time is concerned. I am sustaining the objection.

Defense counsel then "reluctantly" tendered the witness for redirect examination. At the conclusion of Tomlinson's testimony, defense counsel informed the court that Tomlinson had been subpoenaed by the defense; however, Tomlinson was not called as a witness by the appellants.

a.

The fact that Tomlinson had made other, apparently unfounded, allegations against TFC, to the airport authority and to a special agent with the Defense Criminal Investigative Service, about matters unrelated to the charges in the indictment, was relevant to his credibility and, therefore, an appropriate subject for cross-examination.[25] *See* ***United States v. Anderson***, 933 F.2d at 1276

[25] Because the substance of the excluded testimony is apparent from the questions, no proffer was required. *See* Fed. R. Evid. 103(a)(2). Although the appellants did not use the word "bias" in their objections, the objections nevertheless were adequate to preserve for appeal their contention that they were not allowed to cross-examine Tomlinson about matters affecting his credibility and bias. Demonstrating that a witness is biased is simply one of the methods of attacking the witness' credibility. *See* J. Strong, ***McCormick on Evidence***, § 33, at 111-12, and § 39, at 130-34 (4th ed. 1992); *see also* ***United States v. Abel***, 469 U.S. 45, 52 (1984) ("Bias is a term used in the `common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.... Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony".).

("Any incentive a witness may have to falsify his or her testimony is relevant to the witness' credibility and the weight the jury should accord to the testimony".). The Government's assertion that "[n]one of the cross-examination questions to which objections were sustained had any bearing on [Tomlinson's] bias, prejudice or motive to testify falsely" is specious. If the appellants had been allowed to establish, through cross-examination, that Tomlinson had made other false accusations against TFC and Lemmons, the jury would have been entitled to infer that his testimony at trial was motivated by bias, malice, or prejudice. *See* ***United States v. Abel***, 469 U.S. at 51 ("A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony".). Because "[a] reasonable jury might have received a significantly different impression of [Tomlinson's] credibility had [appellants'] counsel been permitted to pursue [their] proposed line of cross-examination", we conclude that the appellants' rights under the confrontation clause were violated.

We note that, in their post-trial motion for a new trial or, in the alternative, for judgment of acquittal, the appellants challenged the court's "ruling denying ... the right on cross-examination to attack the credibility of ... Tomlinson". However, for the first time on appeal, they assert that the Government "opened the door" to matters unrelated to the indictment by questioning Tomlinson about his allegations that Lemmons had misappropriated corporate cash and deposited it into her personal checking account. Because this ground was not presented to the district court, we will not consider it for the first time on appeal. *E.g.*, ***United States v. Garcia-Pillado***, 898 F.2d 36, 39 (5th Cir. 1990). In any event, the claim is simply cumulative, because as discussed *infra*, we conclude that the examination was improperly curtailed.

Delaware v. Van Arsdall, 475 U.S. at 680. Our constitutional inquiry now proceeds to the next stage: determining whether the error was harmless beyond a reasonable doubt. *See* ***United States v. Moody***, 903 F.2d 321, 329 (5th Cir. 1990).

b.

"[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt". ***Delaware v. Van Arsdall***, 475 U.S. at 681. In evaluating the harmfulness of the denial of a defendant's opportunity to impeach a witness' credibility, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt". ***Id*** at 684. Factors relevant to this analysis include

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id.

Consideration of these factors convinces us that the limitation of cross-examination was harmless beyond a reasonable doubt. Contrary to the appellants' claim, Tomlinson's testimony was not "key to the government's allegation that Susan Lemmons directed [TFC] employees to mark fuel slips to show the presence of [FSII] in fuel, when there was actually no [FSII] in the fuel".

Instead, he was only one of several former TFC employees who testified similarly. As noted, Gillard, Davis, and Watson testified that Lemmons instructed them to indicate on fuel slips that FSII was in fuel when it was not, and instructed them to tell customers who asked about FSII that the fuel had been pre-mixed. Unlike Tomlinson -- who was not involved with any of the refuelings at issue -- Gillard, Davis, and Watson all refueled military aircraft on November 20, 1987. Tomlinson's cumulative testimony thus cannot be characterized as crucial to the Government's proof that Lemmons instructed employees to mark fuel slips to show the presence of FSII when none had been added.

The direct examination of Tomlinson comprises 17 of the over-1,000-page trial transcript; the cross-examination, 53 pages. The appellants were allowed to cross-examine Tomlinson fully about matters relevant to the charges, including the use of FSII at TFC, the government contract, completion of fuel slips, refueling of aircraft, mixing of aviation gasoline and jet fuel, and the ordering of supplies. They also were allowed to cross-examine him about other matters relevant to his credibility as a witness, including the handling of cash at TFC, his use of TFC's telephone to make long distance calls, and statements he made to the agent who signed the affidavit for the search warrant.

We also note that the appellants were allowed to attack Tomlinson's credibility through the testimony of other witnesses. On direct examination, Tomlinson testified that Peggy Livingston, TFC's bookkeeper, had given him permission to make long distance

calls on TFC's telephone, and had agreed to let him know how much he owed for the calls when TFC received the telephone bill. Livingston, who also testified for the Government, stated on cross-examination that she did not give Tomlinson permission to make those calls, and that she did not know whether TFC was ever paid for them.

In addition, Tomlinson testified on cross-examination that Lemmons was at TFC "the majority of the time" while he was working there from June to September 1989. Lemmons testified, however, that she was sick "most of 1989", and delivered a premature baby in August of that year. Her husband, Bob Lemmons, testified that she was sick and did not spend much time at TFC in 1989; and her physician testified that he ordered bed rest for her during that summer.[26]

Tomlinson also testified on cross-examination that Dr. Gary was at TFC "maybe once a week" in June through August 1989. Dr. Gary, however, testified that he had coronary bypass surgery in July 1989, and was not often at TFC from July through September 1989.

George Westbrooks, who worked as a refueler for both TFC and the Mississippi Air National Guard, was called as a witness by the appellants. He testified that, on Tomlinson's last day of work for TFC at the end of the summer of 1989, Tomlinson took money from a cash sale of fuel and put the fuel ticket and receipt in the

[26] Other TFC employees testified that Lemmons managed TFC by telephone when she was absent in 1989.

garbage can. He also testified that Tomlinson had taken money from the TFC cash box to buy beer while Dr. Gary and Lemmons were on vacation, and that Tomlinson had flown an aircraft from Tupelo to Oxford after having drunk a 12-pack of beer. Lemmons testified that she suspected Tomlinson (along with Livingston and Gillard) in connection with $20,000 in missing cash receipts for 1989, which was discovered in March 1990.

Finally, we note that the Government's case did not rest solely on the testimony of former TFC employees. In addition to the fuel sample test results which indicated that there was no FSII in the fuel supplied on November 20, and that FSII was present in concentrations less than required on April 24, the Government introduced evidence of TFC's purchases of FSII, which reflected that TFC had purchased quantities of FSII sufficient to treat only 49.7% of the fuel supplied under the contracts.[27] Considering all of the evidence, including the fact that Tomlinson's credibility was thoroughly impeached, the fact that Tomlinson's testimony was similar to that of other TFC employees, and the fact that Tomlinson had no knowledge of matters pertinent to the November 20 or April 24 refuelings, we conclude that the limitation of the appellants' cross-examination of Tomlinson was harmless beyond a reasonable doubt.

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[27] As noted *supra*, *see* note 18, this calculation was based on assumptions favorable to TFC.

III.

For the foregoing reasons, the judgments are **AFFIRMED**.