IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1270

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CECIL EVERITTE NIXON,
a/k/a Nick Nixon,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(5:92-CR-0112-C)

(May 24, 1994)

Before POLITZ, Chief Judge, and DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

In this direct appeal of his jury conviction for defrauding a financial institution, Defendant-Appellant Cecil Everitte Nixon contests an evidentiary ruling by the district court; specifically,

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*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the court's admission of a government exhibit pursuant to the public records exception to the hearsay rule, as provided in Federal Rule of Evidence 803(8). Building on that allegation of error, Nixon insists that when the improperly admitted document is removed from consideration the government's remaining evidence is insufficient to support his conviction. Finding no reversible error in the admission of the subject exhibit, however, we affirm.

I

FACTS AND PROCEEDINGS

As a result of a financial scheme purportedly orchestrated by Nixon, Caprock Savings & Loan Association (Caprock) lost in excess of $38,000. A one-count indictment was subsequently returned against Nixon, charging that he engaged in a scheme and artifice to defraud Caprock, in violation of 18 U.S.C. § 1344(a)(1). Nixon's case eventually went to trial before a jury, producing a conviction.

During the trial the government introduced an instrument (Exhibit C-16) furnished by the Office of Thrift Supervision (OTC) of the United States Department of the Treasury. Exhibit C-16 is the government's sole evidentiary basis for the proposition that Caprock was federally insuredSQan essential element of the crime proscribed in 18 U.S.C. § 1344(a)(1)SQat the time when Nixon was alleged to have committed the instant fraud.[1]

Exhibit C-16, entitled Certificate of Continual Insurance,

[1] The requirement that the defrauded institution be federally insured is no longer an essential element of that crime. See Pub. L. 101-73, 103 Stat. 500 (1989).

bore the seal of the OTC and verified the fact that between March 1, 1982, and July 31, 1989, Caprock was insured by the federal government without interruption. The district court admitted Exhibit C-16 into evidence over Nixon's contemporaneous hearsay objection.[2] The government produced no other evidence to prove that Caprock was federally insured during the time Nixon's offense was being perpetrated.

The jury found Nixon guilty, and the district court sentenced him to serve 15 months in prison and three years of supervised release. His notice of appeal was timely filed.

II

ANALYSIS

On appeal Nixon challenges his conviction on two related grounds: that the district court erred in admitting Exhibit C-16 to prove the essential element of the financial institution's federally-insured status at the time of the offense; and that, when the erroneously admitted evidence is stricken, the record is otherwise devoid of evidence sufficient to prove the federally insured element and is thus insufficient to support his conviction. As Nixon concedes sufficiency of the evidence if on appeal Exhibit C-16 is held to have been admissible, and as the government concedes that the evidence is insufficient to support Nixon's

[2] Nixon also objected to the admission of Exhibit C-16 on the ground that it was not self-authenticating. As Nixon failed to raise the objection to authentication in this court, though, it is waived on appeal. See Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988) (requiring argument to be urged in brief to be preserved on appeal).

conviction if on appeal Exhibit C-16 is held to have been inadmissible, we need only determine whether the district court abused its discretion in admitting Exhibit C-16 into evidence over Nixon's hearsay objection.[3]

When we review evidentiary decisions for abuse of discretion, we refrain from disturbing them absent a showing that a substantial right was impaired to such an extent as to constitute prejudice.[4] The core of Nixon's hearsay argument lies in his insistence that Exhibit C-16 does not fall within Fed. R. Evid. 803(8)'s exception to the hearsay rule. That rule contains an exception for:

> (8) Public Records and Reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel . . . .

Nixon reasons that Rule 803(8) is inapplicable to Exhibit C-16 because it is not a regularly maintained record but rather was prepared solely for purposes of his trial. We perceive two problems with Nixon's analysis, either of which scuttles his

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[3] For the first time on appeal, Nixon argues that admitting Exhibit C-16 into evidence violates the "best evidence rule" of Fed. R. Evid. 1001 and 1002, insisting that the subject exhibit is admitted in an effort to prove the contents of the actual FSLIC Certificate of Insurance by a source other than the original certificate. As this is an issue raised for the first time on appeal, we review Nixon's best evidence claim for plain error only; and when we do we find none. See, e.g., United States v. Sliker, 751 F.2d 477 (2d Cir. 1984), cert. denied, 470 U.S. 1058, 105 S.Ct. 2679, 86 L.Ed.2d 697 (1985).

[4] United States v. Pretel, 939 F.2d 233, 239 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 327, 116 L.Ed.2d 267 (1991).

argument.

First, Nixon had the burden of proving that the subject certificate was prepared solely for use in his prosecution; and in this we discern a failure to bear such burden. True, the certificate was prepared shortly before Nixon's trial and covers only the financial institution he purportedly defrauded. But the subject exhibit makes no reference to the defendant, to his trial, or to the dates of his alleged offense. Rather, the certificate denotes the inclusive dates of Caprock's FSLIC insurance coverage and summarizes general, objective facts contained in the records of the OTC. The dates of federal insurance coverage and the other factual information from the OTC records do not pertain exclusively to Nixon's prosecution, but are general factual data relevant to the insured status of the subject institution. As nothing contained in the record of this case evidences that Exhibit C-16 was prepared solely for use in Nixon's prosecution, we cannot say that Nixon met his burden of proving that the exhibit was thus prepared. Absent that, we cannot say that the district court abused its discretion in admitting the certificate into evidence.

The second flaw in Nixon's argument is even more telling. In his insistence that Exhibit C-16 does not come within the ambit of Rule 803(8)'s exception, Nixon places great reliance on United States v. Stone.[5] We find such reliance to be misplaced.

In Stone, the government used a "progress sheet" from the Regional Disbursing Center of the United States Department of the

[5] 604 F.2d 922 (5th Cir. 1979).

Treasury to prove that the check allegedly stolen by the defendant had been in the mail. The progress sheet was an official disbursement form which verified that almost 100,000 checks or bonds were disbursed on the date the check in question was issued. The progress sheet was authenticated by an attached affidavit executed by the government official who had custody of the progress sheets. He verified that the sheet in question was a true copy of the records of the Department of the Treasury.

In rejecting the government's argument that the extraneous information contained in the verification affidavit itself was admissible under Rule 803(8), we concluded that the public records exception to the hearsay rule covers admissibility of only those official records and reports that are prepared for purposes "independent of specific litigation."[6] We held, therefore, that the exception did not apply to the government official's "personal statements prepared solely for purposes of this litigation" because they were likely to reflect a lack of trustworthiness inherent in statements oriented to litigation.[7]

The risk of bias inherent in the Stone affidavit and the type of extraneous information it contained simply are not present in the document under consideration in the instant case. Exhibit C-16 and its purely objective data extracted from regularly maintained official records of the OTC more closely approximate law

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[6] Id. at 925 (citations omitted).

[7] Id. at 926 (citing Palmer v. Hoffmann, 318 U.S. 109, 63 S.Ct. 477, 87 L. Ed. 2d 645 (1983).

enforcement reports prepared in a routine, non-adversarial setting. Exhibit C-16 is also analogous to certificatesSQlike those attesting to such matters as good standingSQprepared by employees of state corporate regulatory agencies such as the Office of Secretary of State when, for example, verification of the status of a corporation is needed to determine standing in litigation. Although in a literal sense such certificates are prepared for particular litigation, their contents are so objective and general as to withstand any realistic contention that they do not fall within the ambit of the exception specified in Rule 803(8). The distinction we make here between the evidence excluded in Stone and that admitted in the instant case is in keeping with the position we took in United States v. Wiley.[8]

In Wiley, the IRS offered documentary evidence of the fact that it had frozen an account and placed the taxpayer under investigation in response to a suspicious income tax return. The defense objected on grounds of hearsay, insisting that the evidence was outside the public records exception to the hearsay rule because it concerned "matters observed by . . . law enforcement personnel."[9] In affirming the admissibility of that evidence, we distinguished "between law enforcement reports prepared in a routine, non-adversarial setting, and those resulting from the arguably more subjective endeavor of investigating a crime and

[8] 979 F.2d 365 (5th Cir. 1992).

[9] Id. at 369.

evaluating the results of that investigation."[10] We were convinced that the mere facts that the IRS had frozen an account and placed the taxpayer under investigation did not implicate a subjective investigation and evaluation of the results of that investigation. Thus the evidence was not excludable as hearsay, but instead was admissible under the public records exception to the hearsay rule. Paralleling that situation, we find the objective fact of Caprock's federally-insured status closely analogous to law enforcement reports prepared in a routine, non-adversarial setting and to governmental agency reports of corporate status.

The government's argument in the instant case in support of the court's evidentiary ruling finds additional support in our opinion in United States v. Quezada.[11] In Quezada we addressed the admissibility of an Immigration and Naturalization Service (INS) deportation warrant, evidence of which was crucial to the government's ability to prove an essential element of its case. When analyzing the underlying purpose of Rule 803(8)'s exception to the hearsay rule, we noted two key elements: the trustworthiness of the public document and the necessity of using such a document in light of the likelihood that a public official would have no specific recollection of a particular action when his or her duties require constant repetitive tasks.[12] We also noted in Quezada that the inapplicability of Rule 803(8)'s exception to matters observed

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[10] Id.

[11] 754 F.2d 1190 (5th Cir. 1985).

[12] Id. at 1193.

by law enforcement personnel results from the inherent unreliability of observations made by such personnel at crime scenes or in the course of investigating crimes. In holding the INS deportation warrant admissible under Rule 803(8)'s exception to the hearsay rule, we noted:

> [i]n the case of documents recording routine, objective observations, made as part of the everyday function of the preparing official or agency, the factors likely to cloud the perception of an official engaged in the more traditional law enforcement functions of observation and investigation of crime are simply not present. Due to the lack of any motivation on the part of the recording official to do other than mechanically register an unambiguous factual matter . . ., such records are, like other public documents, inherently reliable.[13]

Our reasoning in Quezada is equally applicable to Exhibit C-16. The OTC certificate verifies a "routine, objective observation []," (Caprock's insured status) and does not include any investigative conclusions, either objective or subjective. As such, we find inescapable the conclusion that the district court did not abuse its discretion when it admitted the subject exhibit into evidence on authority of Rule 803(8)'s exception to the hearsay rule.

As the court's admission of that evidence does not constitute reversible error, Exhibit C-16 provides the necessary evidentiary support for the fact that Caprock was federally insured, thereby supplying that element of the offense with which Nixon was charged and for which he was convicted. We need not consider further,

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[13] Id. at 1194 (citing Smith v. Ithaca, 612 F.2d 215, 22 (5th Cir. 1980)); see also United States v. Puente, 826 F.2d 1415, 1418 (5th Cir. 1987).

therefore, Nixon's challenge to the sufficiency of the evidence.

For the reasons set forth above, Nixon's conviction is AFFIRMED.