IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1353

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEFFREY R. SPAKOWSKI,
FRANK A. TRAINOR, JR. and
REGGIE PAUL STEINMARK,
a/k/a Reggie Stein,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CR-106(30))

(July 26, 1994)

Before GOLDBERG, KING, and WIENER, Circuit Judges.

PER CURIAM:*

Jeffrey R. Spakowski, Frank A. Trainor, and Reggie Paul Steinmark were convicted of various offenses in connection with the operations of a telemarketing company, including conspiracy, wire fraud, bank fraud, and money laundering. Spakowski, Trainor, and Steinmark appeal. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

This case centers on the operations of a Fort Worth based telemarketing company called Multicorp Inc., d/b/a Water Source Distributors, W. S. Distributors, and Wireless Security Distributors (Multicorp). In approximately March or April of 1989, Richard Fregien set up Multicorp to market water purifiers and alarm systems. Multicorp remained in operation until February 21, 1990, when United States Postal Inspectors executed a search warrant on the company.

A. SALES

Multicorp produced sales for its merchandise by generating phone calls from potential customers in response to postcards mailed to the individuals by the company. The postcards were mass mailed throughout the United States and each provided that the card's recipient was guaranteed to receive one of the five following "Fabulous Premiums": (1) Jeep Cherokee, retail value $20,000, (2) retail merchandise checks for $5,000, (3) $5,000 cashier's check, (4) men's and ladies' genuine diamond designer watches, retail value $400, and (5) $1,000 series EE United States savings bond. The postcard further provided that no purchase was necessary; however, the card stated that the recipient must call immediately or the prize might pass to someone else.

When an individual called to claim his "Fabulous Premium," a salesperson would answer the phone and attempt to sell the individual a water filter or home security system. Multicorp's

salespeople were given scripts, which were created by Multicorp's various owners, to follow when an award recipient called. Initially, the salesperson would ask the individual what color postcard he had received; Multicorp mailed out white and pink cards. Once the individual told the salesperson the color of the card, the salesperson would inform the recipient that he had received a "top award notification." The salesperson then asked the award recipient the expiration date on his credit card so that the salesperson would be able to cross-reference the expiration date with the "control number" on the postcard to ensure that the individual was an award winner. After verifying that the caller was an award winner, the salesperson would then attempt to sell the individual either an alarm system or a water purifier.

Each award recipient was also told that if he ordered an alarm system or water purification system that day, the salesperson was authorized to give the individual two of the listed awards. However, the only awards ever given to any of the callers were the watches and the retail merchandise checks.[1] If the caller decided to purchase a water purifier or alarm system, the salesperson obtained the caller's Visa or Mastercard number

[1] At trial, the government presented evidence which demonstrated that the merchandise checks were actually discount coupons which allowed the individual to purchase an item from a catalog. The merchandise checks were actually discount coupons because no item could be purchased from the catalog unless the individual sent in a specified amount of his own money in addition to a specified amount which the individual would write out on one of the merchandise checks.

for payment. If the caller did not want to make a purchase, the salesperson informed the award winner that he could collect his award by sending Multicorp $12.95 for shipping and handling. All callers who chose not to purchase any merchandise were sent the merchandise checks as their prize.

Once a sale was made and the salesperson obtained all the pertinent information, i.e., correct address and credit card number, a Multicorp manager would conduct a "button up." A "button up" was designed to verify the information the caller had given the salesperson and to ensure that the caller understood that he had made a purchase.

At trial, the government presented evidence tending to show that the postcards and scripts contained numerous misrepresentations. For example, the watches were listed as having a retail value of $400 when in fact they cost only about $50 a pair. Further, the government presented evidence that the script, in response to a caller's question concerning how the company obtained his name, falsely provided that "we use reports from the EPA, and other sources, that inform us of areas that are having problems with their water now, or have had them in the past." The script also stated that "the problem [contaminants in the water supply] has grown to such proportion, that even the government can no longer protect us. This is why the EPA has estimated that by the early 1990's, every home will have a purification system of some kind." The government presented

evidence which tended to show that this statement was included in the script without any knowledge as to its truth.

In addition to the misrepresentations contained in the scripts and the postcards, the government presented evidence that many of the salespeople improvised misrepresentations of their own. For example, some witnesses testified that when they called Multicorp, they were told they had won the Jeep Cherokee when in fact they had not. Further, many customers received charges on their credit cards for merchandise they never ordered.

B. Processing the Sale

Because Multicorp was engaged in a telemarketing business, it was unable to obtain a merchant account necessary to process its credit card charges. Typically, telemarketing companies are unable to obtain merchant accounts because the company's sales generally lead to a substantial number of charge backs,[2] which the bank with the merchant account would have to bear unless there was sufficient funds in the merchant account to cover the charge. One of the problems that a bank faces with charge backs is that, usually, several months elapse between a sale and a charge back. Yet, merchants are generally allowed to withdraw funds upon deposit of the charge slips. Thus, a telemarketer could open a merchant account, withdraw funds for several months, and then close the account before the charge backs were received.

[2] A charge back occurs when the cardholder refuses to pay a charge to his credit card.

In order to process its charge slips, Multicorp entered into agreements with credit card "factors." A factor, for a substantial fee, would process these charges for Multicorp through his own merchant accounts. Not surprisingly, a factor typically had to operate in violation of his merchant account agreement to be able to process the charges generated by a telemarketing company such as Multicorp. Apparently, Multicorp used at least twelve different credit card factors.

Trainor was one of the individuals whom Multicorp recruited to process its credit card charges. Trainor had his own business called Aquarius Associates which was attempting to market a water filtration system. Trainor's company had a merchant account at First Eastern Bank. Beginning in October, as a part of Multicorp and Trainor's agreement, Multicorp would send Trainor, via facsimile, credit card charges which Trainor would deposit into his merchant account. Once the funds were deposited, Trainor had immediate access to the funds, and he then wired the funds into other accounts at other banks. A portion of the funds was then wired to Multicorp. First Eastern Bank would present the credit card charge to the credit cardholder's bank, who in turn would bill the cardholder. Aquarius Associates' merchant account stated that the bank would not "accept the payment from any sales draft for a transaction which was not originated as a result of a direct transaction between the merchant and a card holder."

The government presented evidence that Trainor, in October 1989, told First Eastern Bank officials that he was going to be

making large deposits in association with sales of water purifiers through his own salespeople at kiosks located at various malls. In November of 1989, because a large number of charges were being deposited into Aquarius Associates' account and then wired out to another bank, an official from First Eastern Bank froze Trainor's merchant account and set up a meeting with Trainor. Once again, Trainor informed First Eastern Bank that the sales were originating from kiosks in various malls. Trainor further told First Eastern Bank that some phone sales were being generated by his salespeople. The phone sales occurred when Trainor's salespeople made call backs to people that had stopped by the kiosks. After Trainor agreed to put up a letter of credit, First Eastern Bank allowed him to continue to use the account.

Eventually, First Eastern was able to conclude that the credit card sales being deposited into Trainor's merchant account were being generated from telemarketing and not from Trainor's salespeople at malls. The bank closed Trainor's account and froze the funds going into the account.

After Multicorp's operations were halted, a grand jury returned an indictment against thirty-two individuals for various offenses including conspiracy, wire fraud, mail fraud, bank fraud, and money laundering. Later, a grand jury returned a superseding indictment against Spakowski, Steinmark, Trainor, and several other defendants to the same offenses as were charged in the original indictment. Spakowski, Steinmark, and Trainor were

the only defendants that did not plead guilty. The jury convicted Spakowski of conspiracy in violation of 18 U.S.C. § 371, and eight counts of wire fraud in violation of 18 U.S.C. § 1343; the district court sentenced him to forty-six months imprisonment on each count, to run concurrently, and three years supervised release on each count, to run concurrently, and ordered him to pay a $450 special assessment. The jury convicted Steinmark of conspiracy in violation of 18 U.S.C. § 371, and seven counts of wire fraud in violation of 18 U.S.C. § 1343; the district court sentenced him to sixty months imprisonment on each count, to run concurrently, and three years supervised release on each count, to run concurrently, and ordered him to pay a $400 special assessment. The jury convicted Trainor of conspiracy in violation of 18 U.S.C. § 371, one count of bank fraud in violation of 18 U.S.C. § 1344, and one count of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i); the district court sentenced him to ninety months imprisonment on the bank fraud and money laundering counts, and to sixty months imprisonment on the conspiracy count, all to run concurrently, and three years supervised release on each count, to run concurrently, and ordered him to pay a $150 special assessment.

II. ANALYSIS

A. TRAINOR'S CLAIMS ON APPEAL

1. *Denial of Independent Expert Witness*

Initially, Trainor argues that the district court erred in refusing to authorize at public expense an independent expert pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(e)(1). Trainor argued to the district court that an expert witness, Charles Martin, was necessary in order for Trainor to be provided adequate representation because the expert would have been able to testify that First Eastern Bank knew or should have known that the credit card charges going through Trainor's account were the result of telemarketing.

Section 3006A(e)(1) provides:

> (e) Services other than counsel.--
>
> > (1) Upon Request.--Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

We review the district court's denial of the employment of an independent expert under 18 U.S.C. § 3006A(e)(1) for an abuse of discretion. United States v. Williams, 998 F.2d 258, 263 n.10 (5th Cir. 1993), cert. denied, 114 S. Ct. 940 (1994). We have interpreted this section to provide that when "the government's case rests heavily on a theory most competently addressed by expert testimony, an indigent defendant must be afforded the

opportunity to prepare and present his defense to such a theory with the assistance of his own expert." United States v. Patterson, 724 F.2d 1128, 1130 (5th Cir. 1984).

In the instant case, Trainor asserts that the key issue in the government's case against him was whether he defrauded First Eastern Bank as to the source of the credit card charges being deposited into his account, i.e., whether the charges came from telemarketing. According to Trainor, his expert would have been able to testify that First Eastern Bank either knew or should have known that the charge slips were originating from a telemarketing operation. Thus, he could not have defrauded the bank as to the origin of the charge slips.

Under the facts of this case, we cannot say that the district court abused its discretion in denying Trainor's request for an expert witness. Initially, we note that it is very questionable whether the government's case "rests heavily on a theory most competently addressed by expert testimony." Further, Trainor's merchant agreement with First Eastern Bank prohibited him from depositing charge slips that were not derived from his own business. The government presented evidence that Trainor, on numerous occasions, told First Eastern Bank that the charge slips were being generated by his employees who were selling water purifiers from kiosks at various malls. In fact, Trainor even told the bank that his employees were generating phones sales at the kiosks. Consequently, even if an expert could have shown that bank officials knew or should have known that the charge

slips flowing through Trainor's account were telemarketing charge slips, such testimony would not have addressed the fact that these officials were unaware that the charge slips were factored.[3]

2. *Confrontation Clause*

Next, Trainor asserts that the district court violated his Sixth Amendment right to confront a witness by preventing him from using an admitted exhibit to impeach the testimony of William McCallick, a vice-president of First Eastern Bank. In order to prove that the district court violated the Confrontation Clause, Trainor must show that "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [Trainor's] counsel been permitted to pursue his proposed line of cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). Further, the constitutionally improper denial of a defendant's opportunity to impeach a witness is subject to harmless error analysis. Id. at 684.

During trial, the government moved for the introduction of a transcript, exhibit 835, from an injunction hearing held in connection with Trainor's civil lawsuit against First Eastern Bank in which he requested a court order requiring First Eastern

[3] We further note that Trainor was able to elicit some of the testimony which his expert would have provided through other witnesses. During cross-examination of Dennis Fiene, chief of Visa credit card systems security, Trainor's counsel was able to elicit testimony that the lack of signatures on credit card sales drafts would indicate a telemarketing operation. Further, Trainor was able to establish that James Payne, a manager of First Eastern Bank, had stated earlier that many of the slips deposited in Trainor's account were telemarketing type deposits.

Bank to release money held in his merchant account. Specifically, in moving for the introduction of exhibit 835, the government requested that "the testimony of Mr. Trainor, the defendant, taken on February 5th, 1990" be admitted into evidence. The district court entered the transcript into evidence. Following the exhibit's introduction into evidence, the government called three more witnesses but made no further reference to the transcript.

During Trainor's cross-examination of McCallick, Trainor sought to impeach McCallick by referring to his testimony given at the injunction hearing. The exchange between Trainor and the district court is as follows:

> THE COURT: Are you getting ready to read from an exhibit?
>
> MR. CLEMENTE: It is not an exhibit, Your Honor. I'm going to -- I am going to ask that it be marked as an exhibit but I am going to read from it. I was going to --
>
> THE COURT: Well, if you are going to mark it as an exhibit, let's just get it in evidence and then you can read from it instead of asking him if it says that.
>
> MR. CLEMENTE: All right. I would ask that the transcript of the proceedings before the Judge -- Honorable Judge Patrick O'Toole dated February 5th be admitted.
>
> THE COURT: What exhibit is that on your exhibit list?
>
> MR. CLEMENTE: I don't have it. The one we provided to the court we didn't.
>
> THE COURT: Well, then we can't start over again. I am going to deny that admission, then.
>
> MR. CLEMENTE: All right.
>
> THE COURT: If it is not going to be an exhibit, just go on to something else.
>
> MR. CLEMENTE: Well, I was going to question him from it.

> THE COURT: Something that is not even in evidence?
>
> MR. CLEMENTE: Well, I am asking him does he remember. That's --
>
> THE COURT: No, I am not going to permit that kind of examination. It won't be in evidence. If you want to ask him if he said something on a certain date, that's fine, but we are not going to use the document.

Trainor asserts that the use of McCallick's testimony at the injunction hearing was of paramount importance because this previous testimony would have impeached McCallick's lack-of-knowledge concerning Trainor's telemarketing sales. Trainor also asserts that the error in this case is compounded because the testimony had already been admitted into evidence as government's exhibit 835.

Initially, we note that there is much confusion on the part of Trainor concerning the contents of government's exhibit 835. Trainor asserts that the exhibit is the entire transcript from the injunction hearing and, thus, contains McCallick's testimony. However, the transcript which the government introduced into evidence contains only Trainor's testimony from the injunction hearing. In fact, as we have already stated, when the government sought to have exhibit 835 introduced into evidence, it stated that the exhibit was "the testimony of Mr. Trainor, the defendant, taken on February 5th, 1990." Thus, Trainor's assertion that the district court did not allow him to utilize previously admitted evidence to impeach McCallick is without merit.

The district court refused to allow Trainor to introduce McCallick's testimony into evidence because the exhibit was not listed on Trainor's exhibit list. Initially, we note that much of the testimony from the transcript which Trainor refers to in his brief concerns factual assertions which were either established during trial or which Trainor should have been able to elicit from McCallick on cross-examination. For example, Trainor asserts that had he been able to cross-examine McCallick as to the bank's lack of knowledge of his telemarketing sales, he would have been able to establish that "First Eastern Bank handled telephone sales without sales slips being signed." The testimony to which Trainor is referring states, "[I]t's permissible to have telephone sales without having the customer sign the sales slip, isn't it? Yes." We are unable to discern the damning effect of this testimony. The record at trial clearly reflected that there were no signatures associated with telephone sales. Further, we note that much of the rest of the testimony which Trainor hoped to use in his cross-examination of McCallick was actually comments by the judge at the injunction hearing. In fact, of the eight references to the unadmitted portions of the transcript cited to us by Trainor in his reply brief, four are actually comments by the judge in reaction to what McCallick had testified to, two are mere comments by the judge, and two are comments by the judge in relation to what First Eastern Bank's attorney was telling him. For example, after questioning McCallick as to why the bank had insisted that

Trainor sign another agreement with the bank when the bank already had an agreement, the judge, at the injunction hearing, stated, "I just wonder how the bank does that when you have a contract and you insist somebody else sign another one because you no longer like the first one." We do not understand, and Trainor does not tell us, how the judge's comments at the injunction hearing would have been admissible at trial to impeach McCallick.

The most damaging remark which Trainor asserts he would have been able to cross-examine McCallick with occurs in the following exchange:

> THE WITNESS (McCallick): If he would have been -- if he would have told me that he was going to do that type of business, I would have instructed him we weren't going to do business with him.
>
> THE COURT: I thought you said that was the reason why you stopped it, the first freeze order, was because you had some concerns about that?
>
> THE WITNESS: I didn't have any concern with telemarketing per se, that I knew he was doing telemarketing. I was concerned with the amount of volume all of sudden, the increase in volume, the sales being deposited in the bank.

Trainor asserts that the underlined portion of McCallick's testimony is devastating to the government's case. However, we do not believe that this statement is particularly useful in impeaching McCallick's testimony. The import of the statement is that at the time McCallick first froze Trainor's account he did not think that Trainor was involved in telemarketing.

Therefore, after reviewing the evidence which Trainor asserts he would have used to impeach McCallick, we conclude that

even if the district court erred in not admitting the transcript or in not allowing Trainor to impeach McCallick with his previous testimony, the error was harmless error beyond a reasonable doubt.

3. *Severance*

Trainor further asserts that the district court erred in denying his motion to sever pursuant to FED. R. CRIM. P. 14. We review a district court's denial of a motion to sever for an abuse of discretion. United States v. Forrest, 623 F.2d 1107, 1115 (5th Cir.), cert. denied, 449 U.S. 924 (1980). The general rule is that persons who are indicted together should be tried together. United States v. Harrelson, 754 F.2d 1153, 1174 (5th Cir.), cert. denied, 474 U.S. 908 (1985). To demonstrate an abuse of discretion, the defendant must bear the heavy burden of showing that he suffered specific and compelling prejudice against which the district court was unable to afford protection and that this prejudice resulted in an unfair trial. United States v. Dillman, 15 F.3d 384, 393-94 (5th Cir. 1994), petition for cert. filed, (U.S. June 28, 1994) (No. 93-9796); see also Zafiro v. United States, 113 S. Ct. 933, 938 (1993) ("[A] district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.").

Trainor asserts that he was prejudiced by the "spill-over" effect of evidence offered by the government against the other

defendants, Spakowski and Steinmark. Trainor complains of the following evidence: (1) the testimony of twenty-five victim witnesses who testified to false representations made by the other defendants, (2) evidence regarding GTP, a completely separate telemarketing business which had previously employed other defendants but with which Trainor had no connection, and (3) evidence that part of the scheme involved the sale of home security systems, when there was no evidence that Trainor was ever involved in marketing home security systems.

Trainor has not demonstrated to us how the district court's denial of a severance in this case resulted in specific and compelling prejudice. We note that much of this testimony was relevant to his conspiracy conviction to demonstrate the defendants' scheme to defraud. Thus, we do believe that the district erred in denying Trainor's motion for a severance.

4. *Change of Venue*

Next, Trainor asserts that the district court erred in denying his motion for a change of venue to the Eastern District of Pennsylvania pursuant to FED. R. CRIM. P. 21(b). Rule 21(b) provides that "[f]or the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any one or more of the counts thereof to another district." We review a district court's denial of a motion to transfer venue under the abuse of discretion standard. United States v. Fagan, 821 F.2d 1002, 1008 (5th Cir. 1987), cert. denied, 484 U.S. 1005

(1988); United States v. Walker, 559 F.2d 365, 372 (5th Cir. 1977). A defendant does not have a right to be tried in his own home district; trial is proper in any federal judicial district in which venue may lie. Walker, 559 F.2d at 372.

Trainor's argument on appeal concerning the prejudicial effect of the district court's denial of his motion to change venue is merely a repeat of his claim that the district court erred in denying his motion for a severance. Specifically, Trainor alleges that "had the motion for change of venue been granted all the victim testimony, which was irrelevant to the case against [Trainor], would not have been produced at his trial." Likewise, Trainor asserts that had his motion for change of venue been granted "an extraordinary amount of cumulative and very prejudicial testimony regarding [Trainor's] co-defendants, which was irrelevant to the case against him, would have been eliminated." Trainor also asserts that a trial in Pennsylvania would have saved substantial money and have been more convenient for the witnesses. While Trainor further contends that the arguments made in his motion for change of venue support his assertion that the district court abused its discretion in denying this motion, we are unable to glean from this general reference how the district court abused its discretion. We have already rejected Trainor's claims of prejudice in regard to the evidence which Trainor asserts implicates only Spakowski and Steinmark in the context of his severance claim. Accordingly, we

do not believe that the district court abused its discretion in denying Trainor's motion for a change of venue.

5. *Sufficiency of the evidence*

Trainor also contends on appeal that there was insufficient evidence to support his conviction for conspiracy in violation of 18 U.S.C. § 371.[4] We review the district court's denial of a motion for judgment for acquittal de novo. United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993). The well established standard in this circuit for reviewing a conviction allegedly based on insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt. Id. We view the evidence in the light most favorable to the government to determine whether the government proved all elements of the crimes alleged beyond a reasonable doubt. United States v. Skillern, 947 F.2d 1268, 1273 (5th Cir. 1991), cert. denied, 112 S. Ct. 1509 (1992). Furthermore, the evidence does not have to exclude every reasonable hypothesis of innocence. United States v. Leed, 981 F.2d 202, 205 (5th Cir.), cert. denied, 113 S. Ct. 2971 (1993).

In order to find Trainor guilty of conspiracy under 18 U.S.C. § 371, the government must prove "an agreement by two or more persons to combine efforts for an illegal purpose and an overt act by one of the members in furtherance of the agreement." United States v. Gordon, 780 F.2d 1165, 1170 (5th Cir. 1986).

[4] Trainor does not assert that there was insufficient evidence to support his convictions for bank fraud and money laundering.

Further, the government must prove that the defendant knew of the essential nature of the conspiracy and intended to join or associate with the objective of the conspiracy. United States v. Saenz, 747 F.2d 930, 939 (5th Cir. 1984), cert. denied, 473 U.S. 906 (1985). Trainor asserts that the government presented insufficient evidence to prove that he knew of the conspiracy. We disagree.

First, we note that the government presented evidence that Multicorp's principals sent Trainor a "care package" which contained the scripts used by Multicorp's salespeople, a copy of the postcards which Multicorp mailed out, a water filter, the watches, and the retail merchandise checks. Further, Trainor testified that he read the script and the postcard, and looked at the watches. Moreover, the government offered extensive evidence concerning Trainor's involvement in "factoring" Multicorp's credit card charges. The government presented evidence which showed that Trainor concealed the source of the credit card charges being processed through his merchant account by telling First Eastern Bank officials that his employees were generating the credit card charges through sales of water filters generated at kiosks in malls. In sum, we conclude that there was sufficient evidence for a reasonable jury to conclude that Trainor was guilty of conspiracy beyond a reasonable doubt.

6. *Enhancement of Trainor's Sentence for Obstruction of Justice*

Further, Trainor asserts that the district court erred in enhancing his base offense level by two points for obstructing or impeding the administration of justice pursuant to § 3C1.1 of the sentencing guidelines. At the sentencing hearing, the district court determined, from a preponderance of the evidence, that Trainor had perjured himself at trial, and thus, he was subject to a two level increase pursuant to § 3C1.1.

Trainor's sentence will be upheld on appeal unless he demonstrates that the sentence was imposed in violation of the law, was an incorrect application of the guidelines, or was outside the range of applicable guidelines and was unreasonable. United States v. Goodman, 914 F.2d 696, 697 (5th Cir. 1990). A sentencing court's factual findings must be supported by a preponderance of the evidence, and we review such findings under the clearly erroneous standard. United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994). The sentencing court's interpretations of the guidelines, being conclusions of law, are reviewed de novo. Id. A sentencing court must apply the version of the guidelines effective at the time of sentencing unless application of that version would violate the Ex Post Facto Clause of the Constitution. United States v. Mills, 9 F.3d 1132, 1136 n.5 (5th Cir. 1993).

Sentencing Guideline § 3C1.1 states in full: "If the defendant willfully obstructed or impeded, or attempted to

obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the [defendant's] offense level by 2 levels." United States Sentencing Commission, Guidelines Manual, § 3C1.1 (Nov. 1992). A district court may enhance a defendant's sentence for obstruction of justice when the defendant committed perjury by giving false testimony at trial. United States v. Dunnigan, 113 S. Ct. 1111, 1115-17 (1993); United States v. Laury, 985 F.2d 1293, 1308 (5th Cir. 1993). Further, in applying § 3C1.1 based on a defendant's false testimony, the defendant's statements should be evaluated in a light most favorable to the defendant. U.S.S.G. § 3C1.1, comment (n.1).

In United States v. Dunnigan, the Supreme Court defined perjury as follows: "A witness testifying under oath or affirmation [commits perjury under § 3C1.1] if the witness gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." Dunnigan, 113 S. Ct. at 1116. The Court went on to state that if a defendant objects to an obstruction of justice enhancement resulting from the defendant's trial testimony, the district court must review the evidence and "make independent findings necessary to establish a willful impediment to or obstruction of justice, or an attempt to do the same, under the perjury definition we have set out." Id. at 1117. The Court further noted that it is sufficient if the district court "makes a finding of obstruction or impediment of

justice that encompasses all of the factual predicates for a finding of perjury." Id.[5]

On appeal, Trainor asserts that pursuant to United States v. Colletti, 984 F.2d 1339 (3d Cir. 1992), the district court erred in enhancing his sentence under § 3C1.1. In Colletti, the Third Circuit determined that in order to enhance a defendant's sentence under § 3C1.1 based upon a finding that the defendant perjured himself at trial, "the perjury of the defendant must not only be clearly established and supported by evidence other than the jury's having disbelieved him, but also must be sufficiently far-reaching as to impose some incremental burdens upon the government, either in investigation or proof, which would not have been necessary but for the perjury." Id. at 1148. Trainor asserts that, in this case, the government cannot establish any "incremental burdens upon the government, either in investigation or proof, which would not have been necessary but for the perjury."

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[5] The Court held, in Dunnigan, that the following findings by the district court were sufficient:

> The court finds that the defendant was untruthful at trial with respect to material matters in this case. The defendant denied her involvement when it is clear from the evidence in the case as the jury found beyond a reasonable doubt that she was involved in the conspiracy alleged in the indictment, and by virtue of her failure to give truthful testimony on material matters that were designed to substantially affect the outcome of the case, the court concludes that the false testimony at trial warrants an upward adjustment by two levels.

Dunnigan, 113 S. Ct. at 1117.

However, we cannot conclude that the Third Circuit's decision in Colletti is controlling to our determination in this case. The Supreme Court issued its decision in Dunnigan several months after Colletti was decided, and it does not require a district court to find that the defendant's perjury created "incremental burdens upon the government, either in investigation or proof, which would not have been necessary but for the perjury." Rather, Dunnigan and Fifth Circuit cases since Dunnigan have interpreted § 3C1.1 as allowing a two point enhancement based solely on a finding that the defendant perjured himself at trial. Dunnigan, 113 S. Ct. at 1116; Laury, 985 F.2d at 1308.

In the instant case, we believe that the record supports the district court's decision to enhance Trainor's base offense level pursuant to § 3C1.1 for giving false testimony at trial. In reference to Trainor's objection to the presentence report's recommendation for an upward departure based on Trainor's perjury, the district court stated, "Well, I heard the testimony, and in my view he did perjure himself. I don't think he gave the bank the disclosure he testified he gave the bank. So I find from a preponderance of the evidence that he did give false testimony." The district court further stated, "I'm satisfied he gave that false testimony in an effort to persuade the jury to find him not guilty." Finally, the district court stated, "Okay. Well, I find, as I've indicated, and conclude that the two-level increase for obstruction of justice was properly made." In his

brief, Trainor asserts that this case does not present a situation in which his perjury "is clearly established." However, as we have already stated, the relevant inquiry is whether the district court's factual finding that Trainor committed perjury is clearly erroneous, not whether Trainor's perjury was clearly established. We conclude that the district court's determination was not clearly erroneous. At trial, Trainor asserted that he fully disclosed his business relationship with Multicorp to First Eastern Bank. However, several other witnesses testified that First Eastern Bank was not fully apprised of Trainor's business relationship with Multicorp. In fact, much of the evidence demonstrated that Trainor actively hid his relationship with Multicorp from First Eastern Bank. Thus, viewing Trainor's statements in the light most favorable to him, we cannot say that the district court's conclusion that Trainor had committed perjury was clearly erroneous. We uphold the district court's decision to increase Trainor's base offense level pursuant to § 3C1.1.

B. Spakowski's and Steinmark's claims on appeal

1. *Sufficiency of the evidence*

On appeal, Spakowski and Steinmark, salespeople for Multicorp, both assert that there was insufficient evidence to support their convictions for conspiracy and wire fraud. In order to convict Spakowski and Steinmark of conspiracy under 18 U.S.C. § 371, the government must prove "an agreement by two or more persons to combine efforts for an illegal purpose and an

overt act by one of the members in furtherance of the agreement." United States v. Gordon, 780 F.2d 1165, 1170 (5th Cir. 1986). In order to convict Spakowski and Steinmark of wire fraud under 18 U.S.C. § 1343, the government must prove (1) a scheme to defraud and (2) the use of, or causing the use of, wire communications in furtherance of the scheme. United States v. St. Gelais, 952 F.2d 90, 95 (5th Cir.), cert. denied, 113 S. Ct. 439 (1992). "Not only must a defendant intend to defraud or deceive, but he must intend for some harm to result from the deceit." Id.

In relation to their claims of insufficient evidence on both the conspiracy and wire fraud counts, Spakowski and Steinmark both assert that their convictions should be reversed because the government failed to prove that they intended to join in the conspiracy or that they knew that the statements that they were making to callers were fraudulent, i.e, they did not intend to defraud the callers. We disagree. Initially, we note that Spakowski and Steinmark both concede that the government proved that there was an ongoing conspiracy; however, they both contend that the government failed to prove that they knowingly entered into an agreement for an illegal purpose. In support of their claimed lack of knowledge, Spakowski and Steinmark point out, first, that several owner/managers of Multicorp testified that they tried to create an "aura of legitimacy" regarding Multicorp by (1) telling the salespeople that the company awarded all the prizes on the postcard, (2) firing one salesperson and threatening to fire any other salesperson who made

misrepresentations, and (3) using standard business practices such as properly withholding taxes from employee paychecks. Second, the sales scripts were prepared by management, and Multicorp separated the salespeople from the rest of the organization. Accordingly, Spakowski and Steinmark contend that they were unable to learn of the nature of Multicorp's organization or the extent of the misrepresentations contained in the sales scripts. Spakowski and Steinmark also assert that they were paid commissions at a rate--Spakowski averaged $375 a week while Steinmark averaged between $150 and $175--which gave no indication that they were involved in a conspiracy. Finally, Steinmark and Spakowski argue that because they worked at Multicorp for only a few months, they would not have been able to become aware of all the aspects of such a complicated conspiracy in such a short period of time.

The government, however, offered extensive evidence from which a reasonable jury could conclude beyond a reasonable doubt that Steinmark and Spakowski were guilty of the conspiracy count. The government presented testimony that Spakowski and Steinmark had both told callers that they had won the Jeep Cherokee. Further, the government presented testimony from callers that they had given Spakowski and Steinmark their credit card numbers in order to verify that they were award winners. Some of these callers also testified that they told Spakowski and Steinmark that they did not wish to make a purchase; however, they were eventually billed for Multicorp merchandise. One caller even

testified that he had agreed to purchase the water purifier after a salesperson named Reggie informed the caller that he had won the Jeep Cherokee, but in order to claim his prize he had to purchase the water purifier. Further, Steinmark and Spakowski both testified that to their knowledge no Jeep Cherokees were ever given away by Multicorp. The government also presented evidence that tended to establish that all of Multicorp's employees knew that the only awards that any of the callers won was the merchandise checks and the watches, and that the prizes were not computer selected as represented in the script. Additionally, the government presented testimony from former Multicorp employees that after working at Multicorp for only a short period of time, they were able to determine that the operation was a sham.

After reviewing the record, we conclude that there was sufficient evidence to convict Steinmark and Spakowski of conspiracy and wire fraud. Their arguments on appeal do nothing more than present a hypothesis of innocence; however, as we have already stated, the government need not exclude every reasonable hypothesis of evidence. United States v. Leed, 981 F.2d 202, 205 (5th Cir.), cert. denied, 113 S. Ct. 2971 (1993). We further note that the "conspirators need not know each other nor be privy to the details of each enterprise comprising the conspiracy as long as the evidence is sufficient to show that each defendant possessed full knowledge of the conspiracy's general purpose and

scope." United States v. Becker, 569 F.2d 951, 961 (5th Cir.) (internal citations omitted), cert. denied, 439 U.S. 865 (1978).

2. *Limitation of Cross-Examination and Denial of Due Process*

a. Limitation of cross-examination

Spakowski further asserts that his convictions should be reversed because the district court violated his right to confront his accusers under the Sixth Amendment by unduly limiting his right to cross-examine witnesses. Specifically, Spakowski asserts that the district court improperly limited his cross-examination of two government witnesses. The Confrontation Clause does not prohibit a trial judge from limiting cross-examination when the testimony would confuse the issues, is repetitive, or is only marginally relevant. In order to prove that the district court violated the Confrontation Clause, Spakowski must show that "[a] reasonable jury might have received a significantly different impression of [the witness's] credibility had [Spakowski's] counsel been permitted to pursue his proposed line of cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986). Further, the constitutionally improper denial of a defendant's opportunity to impeach a witness is subject to harmless error analysis. Id. at 684.

First, Spakowski claims that the district court erred in limiting his cross-examination of Postal Inspector Steven Caver who had testified on direct examination that he made several recorded undercover telephone calls to Multicorp including a call in which he spoke to Spakowski. The transcript of that

conversation was introduced into evidence and read to the jury. During Spakowski's cross-examination of Caver, the following exchange took place between the district court and Spakowski's counsel:

> MR.DAVIDSON: So it is your ruling I can't refer to anything in the transcript; is that right?
>
> THE COURT: My ruling is that you are not going to ask the witness what the transcript said when we have already heard the transcript.
>
> . . . .
>
> Q. Mr. Caver, isn't it a fact that Jeff Spakowski did not ask for your credit card number?
>
> THE COURT: You are through with your examination. You may be seated.

Spakowski's only argument on appeal concerning the district court's actions is that they were too restrictive. However, it appears to us that Spakowski was simply attempting to have the government witness repeat favorable portions of the transcript to the jury. Spakowski does not inform us what questions he would have asked the witness had he been allowed to continue his cross-examination. Accordingly, we cannot see how the district erred in limiting Spakowski's cross-examination of Caver.

Next, Spakowski asserts that the district court erred in limiting his cross-examination of James Kent, one of the government's victim witnesses. James Kent testified on direct examination that after receiving a postcard in the mail, he called the number and spoke to Jeff Spakowski on the phone. He further testified that he was billed for a water purifier even though he did not agree to such a purchase. Spakowski attempted

to question Kent concerning a letter he had written to his credit card company claiming that the charge was unauthorized. Spakowski's theory was that the letter, which also contained Kent's return of his two credit cards, could be used to show that Kent had had financial difficulties and, hence, his motive to claim that the charge was unauthorized. The district court concluded that this line of questioning had only slight relevance and accordingly cut-off Spakowski's line of questioning.

However, even if the district court's limitation of Spakowski's cross-examination violated his Sixth Amendment rights, we believe that the error was harmless error. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Kent's testimony was cumulative of other victim-witness testimony. Several other witnesses testified to the same fraudulent statements as Kent did. Therefore, we conclude that any error by the district court in limiting the cross-examination of Kent was harmless beyond a reasonable doubt.

b. Due Process

Finally, Spakowski asserts that the district court's behavior substantially prejudiced his case and denied him Due Process. In support of this claim, Spakowski asserts that the trial judge instructed the attorneys nearly one hundred times to speed up what they were doing, denigrated Spakowski's attorney at one point, and placed significant limits on the time that the attorney's would have for closing argument. In order to constitute reversible error, Spakowski must demonstrate that any

errors committed by the judge were substantial and prejudicial to his case. United States v. Adkins, 741 F.2d 744, 748 (5th Cir. 1984), cert. denied, 471 U.S. 1053 (1985).

While Spakowski generally refers us to numerous instances in the record in which the district court instructed the attorneys to proceed more quickly, he makes no specific references to how he was prejudiced by the admonishments. See United States v. Davis, 752 F.2d 963, 975 (5th Cir. 1985) (noting that it is the trial court's duty to maintain the orderly progress of the trial). Further, Spakowski makes only the general assertion that despite the complexity of the case, the district court severely restricted the time that the attorneys would have for closing arguments. Finally, Spakowski cites the following excerpt from the trial to demonstrate that the district court prejudiced Spakowski in the eyes of the jury:

> Q. All right. The telemarketers did not have access to those computers; is that right?
>
> A. That is correct.
>
> Q. I wanted to make sure I heard this right. I think you said--
>
> THE COURT: Generally speaking, I think you do hear right. Go ahead and ask questions instead of doing that.

While it is possible that the district court could have moved the proceedings on in a more "friendly" manner, the clear import of the exchange is that the district court did not want the attorneys asking witnesses to repeat favorable testimony. We do not believe that Spakowski has demonstrated any substantial error on the part of the district court which prejudiced his case.

Accordingly, we conclude that Spakowski's argument is without merit.

IV.

For the foregoing reasons, we AFFIRM the convictions and sentences of Spakowski, Steinmark, and Trainor.