IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1793
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL GLENN THOMPSON,
CARMJOHN (CJ) ANTHONY DeSTEFANO
and GEORGE ANTHONY DeSTEFANO,

Defendants-Appellants.

Appeal from the United States District Court for
the Northern District of Texas
(3:93-CR-0065-H)

(October 24, 1994)

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Defendants Carmjohn (CJ) Anthony DeStefano, George Anthony DeStefano and Daniel Glenn Thompson appeal their convictions and sentences for wire fraud. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

The DeStefanos and Thompson established a telemarketing company called Preferred Client Services ("PCS") in the fall of 1992. PCS marketed vitamin packages and skin products. PCS sold the products by telephoning customers and informing them that they would receive valuable awards if they paid $792 to purchase the product and to cover the costs of handling the awards. In October, 1992, the FBI infiltrated PCS. FBI agents tape recorded meetings with Thompson and the DeStefanos and sales pitches given by PCS telemarketers to FBI agents posing as customers.

Thompson and the DeStefanos were then indicted for violations of 18 U.S.C. §§ 2 and 1343. The government alleged that the defendants had used the telephone in a scheme to defraud customers. The jury returned a guilty verdict against the three defendants. Thompson and the DeStefanos appeal their convictions and their sentences.

A. *Sufficiency of the Evidence*

To prove a violation of 18 U.S.C. §§ 2 and 1343, the government must prove 1) a scheme to defraud; 2) involving the use of interstate wire communications, and; 3) that the defendants had the specific intent to commit a fraud. United States v. Aggarwal, 17 F.3d 737, 740 (5th Cir. 1994). Defendants argue that there was not sufficient evidence to show a scheme to defraud or intent. Considering the evidence in the light most favorable to the government, the evidence at trial was sufficient

to allow a rational jury to find the elements of wire fraud. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The defendants intentionally set up a scheme in which material misrepresentations were made to make a financial gain for PCS, while causing a loss to PCS customers. PCS telephoned individuals and told them that, if they participated in a promotion and sent in $792, they would receive two of the following five awards: 1) 1993 Saturn automobile; 2) his and hers diamond Oleg Cassini watches; 3) a home entertainment center, including a 50" big screen television; 4) a vacation package; 5) a $1500 cashier's check.

The evidence, seen in the light most favorable to the government, shows that customers were told that they had an equal chance to receive all of the awards. Yet, only two awards, the watches and the vacation package, were ever sent out. The evidence shows that PCS telemarketers gave false quotes as to the dollar value of each award and implied that all of the awards were of a value greater than the $792 though they were not. Salespeople also indicated that the travel package was all-inclusive and could be sold, when actually it was not transferable, included only airfare and required the purchase of an expensive land package. These misrepresentations regarding the awards went to the "nature of the bargain itself," because PCS customers sent money in the prospect of receiving benefits from the awards, not just to purchase vitamins. United States v. Regent Office Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970).

Telemarketers also made various false claims to make PCS appear legitimate, such as stating that the company was 15 years old.

Telemarketers employed by PCS, rather than the defendants, made some of the misrepresentations. However, a jury could find that the defendants knew of and encouraged the untruths. The FBI tapes and testimony show that CJ and George DeStefano supervised the telemarketers and that all of the defendants were frequently in the small room from which the telemarketers spoke with customers. The jury could easily believe that the defendants heard the falsehoods communicated by the telemarketers. The FBI tapes show that Thompson and George DeStefano themselves made misrepresentations as to the value of the awards when they worked the phones. They thereby encouraged employees to do the same. On one of the FBI tapes, the defendants praise the work of salesman Michael Haller, who is shown to have made frequent and serious misrepresentations. The jury could conclude that defendants knew of Haller's conduct and praised him as a result. The defendants' profits depended upon deception. Given the evidence, the jury could infer that they encouraged and required their salespeople to misrepresent the truth.

Defendants argue that they acted in good faith and therefore could have no specific intent to commit fraud. They assert that they created scripts, which they believed to be legal, for the telemarketers to follow in making their sales pitches. Defendants also point to the fact that they had created an "awards account," into which they deposited money from each sale

for the eventual purchase of the car, entertainment center, and cashier's check for award to existing customers.

The jury could have decided that the script and the awards account were created, not in good faith, but to create the appearance of legality in the event of investigation. The scripts avoided many of the telemarketing misrepresentations. But, the evidence discussed above shows that defendants encouraged the telemarketers to go beyond the scripts to misrepresent. Other evidence shows that PCS established the awards account only after a visit by police officers. The jury could have determined, after hearing the testimony of the defendants at trial, that the defendants' assertions that they believed their activities to be legal were simply not credible.

B. *Prosecutorial Misconduct*

Thompson argues that his case should be remanded for a new trial because of prosecutorial misconduct. The other defendants do not make this argument. A prosecutor's remarks constitute reversible error only if the prosecutor's conduct affected the "substantial rights" of the defendant and contributed to the guilty verdict. United States v. Lowenberg, 853 F.2d 295, 301-02 (5th Cir. 1988), cert. denied, 489 U.S. 1032 (1989) (citations omitted).

The prosecutor referred to the defendants as thieves, liars, and scum in his opening argument. In cross-examination of Thompson and in his closing argument, the prosecutor referred to Thompson and the others as con men. Because there was no

objection to the statements made in opening and closing argument, reversal is required only upon a showing of plain error. United States v. Murphy, 996 F.2d 94, 98 (5th Cir.), cert. denied, 114 S.Ct. 457 (1993).

Prosecutors should not engage in name calling. The use of "shorthand characterization[s]" of a defendant has always been discouraged. Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969). However, the prosecutor's statements in this case were not sufficiently prejudicial to require reversal. In using the term "liar", the prosecutor did not impermissibly express a personal belief that the defendants were not credible. Rather, he argued that the evidence would show the defendants to be liars. The labels placed upon the defendants were not especially inflammatory or prejudicial and had a basis in the evidence. The evidence against Thompson, who raises this point, was sufficiently strong that the remarks probably had no effect on the final verdict against him. See United States v. McPhee, 731 F.2d 1150, 1152 (5th Cir. 1984) (citation omitted) (evaluating the degree of any prejudice and the weight of the evidence against the defendant in deciding whether prosecutorial misconduct required reversal).

Thompson also argues that the prosecutor told the jury that the defendants did not have the benefit of a presumption of innocence. In closing argument, the prosecutor declared that defendants' "presumption of innocence has been stripped away." (Record at IX, 157). The prosecutor was saying that the

presumption had been overcome by the evidence. This meaning was clear, and there was no error.

C. *Sentencing*

1. Vulnerable Victim Enhancement

Allowing the trial court "due deference," we decide that a sentencing enhancement for preying on vulnerable elderly victims was appropriately assessed against the DeStefanos and Thompson, under United States Sentencing Guidelines § 3A1.1. See United States v. Rocha, 916 F.2d 219, 244 (5th Cir. 1990), cert. denied, 500 U.S. 934 (1991). There is no evidence that the defendants concentrated on calling elderly persons. The phone lists used by defendants did not contain an indication of the ages of the persons on the list. However, defendants clearly demonstrated in their meeting with FBI agents that they knew that older people were most likely to join in the promotion. Thompson described characteristic PCS customers as older persons whose "family has left them . . . and they're rotting." (Record at III, 95). Defendants effectively targeted elderly persons, because they knew that, when throwing out their promotion net, they were most likely to catch vulnerable elderly persons.

The trial court reasonably concluded that these elderly victims were "unusually vulnerable." U.S.S.G. § 3A1.1. Older persons "*as a group*, are more susceptible than the general public" to the type of fraud perpetrated by PCS. United States v. Brown, 7 F.3d 1155, 1160-61 (5th Cir. 1993). Lonely elderly persons may be drawn in by the exciting prospect of winning

prizes. As Thompson noted, they may be "willing to pay $792 just so . . . you will sit and talk to them." (Record at III, 96).

2. Enhancement for Loss of More than $200,000

The district court determined that the defendants' fraud caused a loss of over $200,000 and increased the defendants' sentencing offense level by eight levels under United States Sentencing Guidelines § 2F1.1. As part of the loss figure, the district court multiplied $792 by the number of names found on lead lists of telephone numbers possessed by defendants. Some of the individuals on those lists may not ever have been called or may have refused to purchase goods. But, the correct loss figure is "intended loss" if that amount is greater than actual loss. U.S.S.G. § 2F1.1, comm. 7. The defendants hoped and intended to convince the individuals on their contact lists to send in $792. The court did not commit clear error in including the contact lists in its factual determination of loss. See Brown, 7 F.3d at 1159.

In his brief on appeal, Thompson argues that the district court erred, as a matter of law, by failing to subtract the value of the PCS products and awards from the total loss amount. The Sentencing Guidelines provide that the amount of loss, in cases such as this one, is "the difference between the amount paid by the victim for the product and the amount for which the victim could sell the product received." U.S.S.G. § 2F1.1, comm. 7(a). However, we have searched the record and find no presentation of

this argument to the trial court. Since objection on this point was not made below, we will not consider the argument on appeal.

AFFIRMED.