IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1856

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARTISTE BUFORD CLIFTON, and
RICHARD GREY KIRBY,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
(3:92-CR-341-P)

(July 20, 1994)

Before GOLDBERG, KING, and WIENER, Circuit Judges.

PER CURIAM:[*]

Defendants-Appellants Artiste Buford Clifton and Richard Grey Kirby were convicted by a jury of conspiracy and money laundering in violation of 18 U.S.C. §§ 2, 371, 1956(a)(1)(B)(i) (1988). They appeal their convictions, contending that (1) there was

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

insufficient evidence to support a jury finding that the negotiable instruments involved were "proceeds of specified unlawful activity," (2) the negotiable instruments involved were not "proceeds" for purposes of the money laundering statute, (3) the trial court erred in allowing a government informant to testify as an expert, and (4) the trial court also erred in admitting the pleadings from a civil suit as evidence of Clifton's knowledge. In addition, Clifton appeals his sentence, contending that his offense level was erroneously increased for obstruction of justice and abuse of a position of trust. Finding no error, we affirm.

I

FACTS AND PROCEEDINGS

In 1988, the Internal Revenue Service ("IRS") became aware of a fraudulent investment scheme called the "peso program," reminiscent of the legendary Ponzi scheme.[1] The peso program was represented to potential investors as a currency trading enterprise which offered investors a high rate of return on their investments.[2] In reality, the peso program's "profits" were not generated by currency trading; rather, early investors received

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[1]"A `Ponzi' scheme is fraud which requires an increasing stream of investors to fund obligations to the earlier investors, with a resulting pyramiding of the liabilities of the enterprise. The name comes from Charles Ponzi, a swindler who devised such a scheme around 1919." United States v. Weiner, 988 F.2d 629, 631 (6th Cir.) (citing United States v. Shelton, 669 F.2d 446, 449 n.1 (7th Cir.), cert. denied, 456 U.S. 934, 102 S. Ct. 1989, 72 L. Ed. 2d 454 (1982)), cert. denied, ___ U.S. ___, 114 S. Ct. 142, 126 L. Ed. 2d 105 (1993).

[2]Investors were told that they could expect a 12% to 22% weekly rate of return.

returns on their investments in the form of cash payments and third-party checks of later investors, which were payable to the peso program (hereafter, "the peso program checks") and endorsed by the program's principals to early investors. Ultimately, the IRS seized the peso program's assets and prosecuted many of its principals.

Clifton, an attorney, brought a lawsuit on behalf of a class of defrauded investors. During this representation, Clifton acquired a number of checks made out to the peso program by individual investors.[3] Clifton gave Kirby, a former client of Clifton's and an investor in the peso program, some of the peso program checks with the aim of having them converted into cash. Kirby contacted Darrel Fritz, who had been peripherally involved with the peso program,[4] seeking help in converting the checks into cash. Fritz assured Kirby that he could accomplish this task through his banking connections. When Fritz was unable to do so, however, he passed the checks on to the IRS, which launched an investigation into their source.

Employing Fritz in their investigation, the IRS secretly recorded several meetings and telephone conversations in which Kirby, Clifton, and undercover IRS agents were involved. During this period, Kirby delivered another batch of peso program checks to undercover agents. In addition, James Parks, Clifton's friend,

[3]Apparently these checks had not been negotiated by the peso program's principals and had not been seized by the IRS.

[4]As a result of his involvement, Fritz had pleaded guilty to failure to report a currency transaction.

delivered yet another batch of peso program checks to undercover IRS agents. Subsequently, the IRS arranged a meeting with Clifton, promising to pay him $100,000 for the peso program checks already delivered. Both Clifton and Parks attended the meeting, and upon accepting the $100,000, they were arrested. After their arrest, Clifton urged Parks to tell the IRS that the checks belonged to Parks and that Parks had acquired the checks from the Bandito motorcycle gang. To assist Parks with this cover story, Clifton gave Parks a newspaper clipping detailing the gang's exploits. Parks, however, turned informant for the IRS, and later taped a conversation with Clifton during which Clifton again suggested that Parks use the Bandito cover story.

Clifton and Kirby were subsequently indicted for conspiracy to commit money laundering and four counts of money laundering and aiding and abetting. At trial, the government sought to establish the illicit nature of the peso program by offering Fritz's testimony both as to his involvement with the peso program and as to his "expert" opinion that it was a "scam" and a "ponzi scheme." In addition, to show Clifton's knowledge of the illicit nature of the peso program checks, the government offered into evidence some of the pleadings from the civil suit which Clifton had brought on behalf of defrauded investors. Clifton and Kirby were ultimately convicted by the jury on all counts. At sentencing, Clifton's offense level was increased by two levels for obstruction of justice and by an additional two levels for abuse of a position of trust. Both Clifton and Kirby appeal their convictions, and

Clifton appeals his sentence.

II

ANALYSIS

A. *Sufficiency of the Evidence*

To obtain a money laundering conviction under § 1956(a)(1) the government was required to prove not only that Clifton and Kirby knew that the peso program checks were "proceeds of some form of unlawful activity," but also that the checks were in fact the "proceeds of specified unlawful activity."[5] The specified unlawful activities alleged by the indictment were wire fraud,[6] mail fraud,[7] and interstate transportation of money taken by fraud.[8] Clifton and Kirby contend that there was insufficient evidence to support a jury finding that the peso program checks were in fact "proceeds

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[5]See 18 U.S.C. § 1956(a)(1) (1988); United States v. West, 22 F.3d 586, 590-91 (5th Cir. 1994); United States v. Puig-Infante, 19 F.3d 929, 937-40 (5th Cir.), petition for cert. filed, (U.S. Jun. 22, 1994) (No. 93-9760). Section 1956(a)(1)(B)(i) (emphasis added) provides in pertinent part:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction *which in fact involves the proceeds of specified unlawful activity . . .* knowing that the transaction is designed in whole or in part . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . . shall be sentenced to a fine . . . or imprisonment . . . or both.

The statute defines wire fraud, mail fraud, and interstate transportation of money taken by fraud as specified unlawful activities. See 18 U.S.C. §§ 1956(c)(7)(A), 1961(1) (1988).

[6]18 U.S.C. § 1343 (1988)

[7]18 U.S.C. § 1341 (1988).

[8]18 U.S.C. § 2314 (1988).

of specified unlawful activity." Specifically, they argue that the government failed to prove that the peso program was a fraudulent scheme, and therefore, that the peso program checks were proceeds of mail fraud, wire fraud, or interstate transportation of money taken by fraud.[9] We disagree.

In resolving challenges to the sufficiency of the evidence, we view the evidence in the light most favorable to the jury verdict and affirm if a rational trier of fact could have found that the government proved all the essential elements of the crime beyond a reasonable doubt.[10] Applying this standard, we conclude that there was sufficient evidence for the jury to conclude that the checks were originally obtained by the peso program through fraudulent means.

The peso program was represented to investors as a currency trading enterprise which would yield extravagant rates of return on investments. No receipts were given to investors, paperwork normally associated with legitimate businesses was not maintained, and the peso program principals were unable to discuss the tax consequences or reporting usually associated with a legitimate investment plan. Investors were paid in the form of cash or third-party checks obtained from other investors and endorsed by the peso

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[9]Clifton and Kirby do not dispute that the checks originated from the peso program. They only dispute that the peso program was a fraudulent scheme, therefore, that the checks were the proceeds of a fraudulent scheme.

[10]Puig-Infante, 19 F.3d at 937; United States v. Pofahl, 990 F.2d 1456, 1467 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 560, 126 L. Ed. 2d 460 (1993).

program principals. Payments to investors were disbursed from desk drawers, briefcases, and envelopes. Furthermore, one investor testified that there was no indication that any currency trading was undertaken, while Fritz opined, based on his knowledge of the peso program and the currency trading market, that it was a "scam" and looked like "a ponzi scheme." Finally, just prior to the IRS's seizure of the peso program's assets, several investors failed to receive the promised returns and were refused reimbursement of their investments. On the basis of these facts, a rational jury could have concluded beyond a reasonable doubt that the peso program was a fraudulent scheme.

Related to their claims of insufficiency, Clifton and Kirby argue that the peso program checks were not "proceeds" for purposes of § 1956(a)(1) because the two of them were not payees or holders in due course of the checks, and therefore, they were not legally entitled to payment thereon. Absent legal entitlement to payment upon presentment of the checks, argue Clifton and Kirby, there were no illicit proceeds to be laundered. We find this argument specious.

First, Clifton and Kirby cite no persuasive authority that one must have legal entitlement to payment on an instrument before that instrument can be considered "proceeds" for purposes of § 1956(a)(1). On the contrary, one of the purposes of § 1956(a)(1) is to prohibit the laundering of property by persons who have no legitimate interest in such property. Second, even if Clifton and Kirby were not legally entitled to payment on presentment of the

peso program checks, those checks were property which had value, albeit a black market value, and which had originally been obtained by fraud. Thus, Clifton and Kirby engaged in conduct proscribed by § 1956(a)(1); namely, they engaged in a financial transaction which involved property))the checks))which were "proceeds of specified unlawful activity."[11]

B. *Evidentiary Rulings*

1. The Expert Informant

Clifton and Kirby protest the admission of Fritz's opinion that the peso program was a "scam and it looked as if it were a ponzi scheme."[12] They contend that allowing Fritz to give opinion

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[11]Thus this case is unlike United States v. Johnson, 971 F.2d 562 (10th Cir. 1992). In Johnson, the Tenth Circuit held that a money laundering conviction under 18 U.S.C. § 1957(a) (1988) could not be based on wire transfers to the defendant's bank account because the transferred funds were not "criminally derived property" as defined by the statute. The government had argued that the wire transfers had been fraudulently induced by the defendant, and therefore, the transferred funds were "criminally derived property." The court reasoned, however, that § 1957(a) proscribes transactions involving proceeds that have already been obtained from an underlying criminal offense. As the defendant did not obtain the funds until they were transferred and credited to his account, the wire transfers (or monetary transaction) did not involve "criminally derived property" for purposes of § 1957(a). See Johnson, 971 F.2d at 967-70. Unlike the Johnson situation, the peso program checks, or property, had already been obtained by the peso program through wire fraud, mail fraud, and interstate transportation of money taken by fraud. As such, Clifton and Kirby's subsequent attempts to convert those checks into cash clearly violated § 1956(a)(1).

[12]That an expert offers his opinion as to an ultimate issue to be decided by the jury does not make that opinion inadmissible, so long as the expert does not "state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto." FED. R. EVID. 704(a), (b); United States v. Moore, 997 F.2d 55, 57-58 (5th Cir. 1993); United

testimony was error because he was not qualified as an expert to offer an opinion as to the fraudulent nature of the peso program.[13] The Federal Rules of Evidence permit one "qualified as an expert by knowledge, skill, experience, training, or education" to offer an opinion when his "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[14] Whether a witness is qualified as an expert is a preliminary question within the sound discretion of the trial court,[15] and we will not disturb that court's determination unless it is manifestly erroneous.[16] Having perused

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States v. Webster, 960 F.2d 1301, 1308-09 (5th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 355, 121 L. Ed. 2d 269 (1992).

[13]Clifton and Kirby objected contemporaneously only to the basis for the opinion that Fritz offered, not to his qualifications to render such an opinion. Generally, "questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." Viterbo v. Dow Chem. Co., 826 F.2d 420, 422 (5th Cir. 1987). The basis of Fritz's opinion was not so unreliable as to require exclusion. In any event, it does not appear that Clifton and Kirby raised this issue on appeal, relying instead on Fritz's qualifications or lack thereof; any error, therefore, was waived. Atwood v. Union Carbide Corp., 847 F.2d 278, 280 (5th Cir.), reh'g granted in part, 850 F.2d 1093 (1988), cert. denied, 489 U.S. 1079, 109 S. Ct. 1531, 103 L. Ed. 2d 836 (1989).

[14]FED. R. EVID. 702. An expert's opinion is admissible "if it `serves to inform the jury about affairs not within the understanding of the average man.'" Moore, 997 F.2d at 57 (quoting United States v. Webb, 625 F.2d 709, 711 (5th Cir. 1980)).

[15]United States v. Stokes, 998 F.2d 279, 281 (5th Cir. 1993).

[16]See United States v. Chappell, 6 F.3d 1095, 1100 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1235, 127 L. Ed. 2d 579 (1994); Moore, 997 F.2d at 57; Sullivan v. Rowan Cos., 952 F.2d 141, 146 (1992).

the trial transcript, however, we are unable to discern any objection to Fritz's qualifications to testify as an expert; therefore, we review the trial court's determination that Fritz was qualified to testify as an expert only for plain error.[17] "Plain error is `error so obvious and substantial that failure to notice it would affect the fairness, integrity, or public reputation of (the) judicial proceedings and would result in manifest injustice.'"[18] No error is present here.

2. The Civil Pleadings

Clifton and Kirby also challenge the admission of the pleadings from the civil suit which Clifton brought on behalf of the defrauded investors.[19] Specifically, Clifton and Kirby contend that these pleadings are irrelevant and inadmissible hearsay. The admissibility of evidence is reviewed under an abuse of discretion standard.[20] We discern no abuse here.

The government offered the pleadings as proof that Clifton

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[17]FED. R. CRIM. P. 52(b); United States v. Caldwell, 820 F.2d 1395, 1405 (5th Cir. 1987); United States v. Gutierrez, 560 F.2d 195, 196 (5th Cir. 1977).

[18]United States v. Carreon, 11 F.3d 1225, 1240 (5th Cir. 1994) (quoting United States v. Pofahl, 990 F.2d 1456, 1479 (5th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 560, 126 L. Ed. 2d 460 (1993)).

[19]The trial court admitted the civil pleadings with an limiting instruction that they were only to be considered as evidence of Clifton's knowledge. Kirby asserts that the admission of the pleadings harmed him too because the indictment alleged a conspiracy.

[20]United States v. McAfee, 8 F.3d 1010, 1017 (5th Cir. 1993); United States v. Loney, 959 F.2d 1332, 1340 (5th Cir. 1992).

knew that the peso program checks were "proceeds of some unlawful activity," an essential element of the crime of money laundering.[21] No great leap of the imagination is needed to see the relevance of the pleadings to the issue of Clifton's knowledge. The civil pleadings alleged that the peso program defrauded thousands of investors and were signed, and presumably drafted or reviewed, by Clifton. That the pleadings are mere allegations and not conclusive proof of wrongdoing is of no moment,[22] as they at the very least suggest that Clifton should have harbored suspicions regarding the illicit origins of the checks that he had acquired. Thus, the pleadings tend to make it more probable that Clifton had knowledge that the checks were from the peso program and had been obtained by fraud. The pleadings were, therefore, relevant.[23]

Clifton and Kirby's hearsay argument is similarly feckless. An out-of-court statement is inadmissible as hearsay only if it is offered to prove the truth of the matter asserted.[24] Here the pleadings were offered as evidence of Clifton's knowledge, not as

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[21]See United States v. West, 22 F.3d 586, 590-91 (5th Cir. 1994).

[22]Contrary to Defendants-Appellants' suggestions, relevance does not depend on whether evidence conclusively establishes a material fact; rather, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

[23]See id.

[24]See FED. R. EVID. 801(c), 802; United States v. Carrillo, 20 F.3d 617, 619 (5th Cir. 1994); United States v. Vizcarra-Porras, 889 F.2d 1435, 1439 (5th Cir. 1989), cert. denied, 495 U.S. 940, 110 S. Ct. 2192, 104 L. Ed. 2d 520 (1990).

evidence that the peso program obtained the checks through fraud, as asserted in the pleadings. Indeed, the trial court gave a limiting instruction, directing the jury to consider the pleadings as evidence only of Clifton's knowledge. As the pleadings were not offered by the government))or admitted by the district court))to prove the truth of the matters asserted therein, the pleadings were not inadmissible hearsay.

C. *Sentencing*

We will uphold a sentence imposed under the Sentencing Guidelines when the sentence is the product of a correct application of the Guidelines to factual findings that are not clearly erroneous.[25]

1. Obstruction of Justice

Clifton maintains that the district court erred by increasing his base offense level by two for obstruction of justice. The district court concluded that the two level increase was warranted by Clifton's urging Parks to lie about the source of the peso program checks. U.S.S.G. § 3C1.1 provides for a two level increase in the offense level "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." A district court's finding of obstructive

[25]United States v. Jackson, 22 F.3d 583, 584 (5th Cir. 1994); United States v. Alfaro, 919 F.2d 962, 964 (5th Cir. 1990).

conduct is reviewed for clear error.[26]

Relying on United States v. Surasky,[27] Clifton insists that his conduct did not constitute obstruction of justice because the district court did not find that such conduct "significantly obstructed or impeded the official investigation."[28] In Surasky, we held that "a false statement made by a defendant to law enforcement officers cannot constitute obstruction of justice unless the statement obstructs or impedes the investigation at issue significantly."[29] This case, however, does not involve a false statement by a defendant to law enforcement officers, but rather involves a defendant who urged a material witness to lie to investigators. Under such circumstances we cannot say that the finding of obstruction of justice was clearly erroneous.

2. Abuse of Trust

Clifton also contends that the district court erroneously increased his offense level by two based on a finding that he abused a position trust. The Guidelines provide for a two level increase in the offense level "[i]f the defendant abused a position of public or private trust . . . in a manner that significantly facilitated the commission or concealment of the offense." As this

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[26]United States v. Graves, 5 F.3d 1546, 1555 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1829, 128 L. Ed. 2d 454 (1994); United States v. Pofahl, 990 F.2d 1456, 1481 (5th Cir.), cert. denied, ___ U.S. ___, 114 S. Ct. 560, 126 L. Ed. 2d 460 (1993).

[27]976 F.2d 242 (5th Cir. 1992).

[28]U.S.S.G. § 3C1.1, Application Note 3(g).

[29]Surasky, 976 F.2d at 246.

enhancement involves a sophisticated factual determination, we will reverse only for clear error.[30] This enhancement encompasses two factors: (1) Whether the defendant occupied a position of trust and (2) whether the defendant abused his position in a manner that significantly facilitated the commission or concealment of the offense.[31] The defendant's position of trust "significantly facilitated" the commission of the offense if the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of his job.[32]

Clifton indisputably held a position of trust with respect to the class of defrauded investors that he was representing as legal counsel.[33] As their attorney, he was charged with recovering monies invested in the peso program by class members. This entailed not only that he secure a fair apportionment of the monies seized by the IRS, but also that he attempt to recover additional monies from other sources. By failing to surrender the peso program checks to the IRS or the court, Clifton abused his position of trust.

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[30]United States v. Fisher, 7 F.3d 69, 70 (5th Cir. 1993).

[31]Id.

[32]United States v. Brown, 941 F.2d 1300, 1304 (5th Cir.), cert. denied, ___ U.S. ___, 112 S. Ct. 648, 116 L. Ed. 2d 665 (1991).

[33]Clifton argues that he did not occupy a position of trust with respect to the individuals whose checks he attempted to launder because he attempted to launder checks that originated only from people who were not members of the class. As Clifton acknowledges, however, this shameless argument is factually wrong as at least eleven of the ninety-six checks that he attempted to launder "were purchased by class claimants and made payable to one of the class defendants."

Clifton argues that his position of trust did not significantly facilitate the commission of the crime. The evidence indicates just the opposite: he acquired the peso program checks while he was representing the class (suggesting that he acquired them in connection with his representation), and his position as class representative brought him into contact with individuals who could aid him in laundering the checks. These facts strongly suggest that Clifton was in a superior position, relative to others in a position to commit the offense, as a result of his representation of the class. The district court's finding of abuse of trust, therefore, was not clearly erroneous.

III

CONCLUSION

Having reviewed the briefs of the parties, heard oral argument, and reviewed the record, we conclude for the foregoing reasons that there are no grounds to reverse the jury's verdict. Likewise, we conclude that there was no error in Clifton's sentence imposed under the Guidelines. The judgment of the district court, therefore, is

AFFIRMED.