

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-3496  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TODD LEE MCKAY,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CR-92-581-F)

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(January 12, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:\*

Appellant McKay was convicted after a jury trial of bank fraud and misrepresenting a social security number in connection with a bank account he briefly maintained at the Whitney National Bank in New Orleans. On appeal, he challenges the jury verdict form and the court's two-level sentence enhancement for obstruction of justice. Finding no error, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

McKay asserts that the verdict form contradicts the presumption of innocence because the word "guilty" appears on the form and before the words "not guilty" and such placement suggests that it is the preferred verdict. None of the jurisprudence on which McKay relies is pertinent. The verdict form is a standard one in the Eastern District of Louisiana and common in the federal courts. The district court thoroughly instructed the jury on the use of the form, and the polling immediately following delivery of the verdict confirmed the jury's unanimity on both counts. McKay's challenge is facially frivolous.

McKay argues that the upward adjustment was improper because it was based on an uncorroborated allegation, a threat made to the Whitney's director of security, in the PSR. The standard of review with respect to increases pursuant to obstruction of justice is "clearly erroneous." United States v. Winn, 948 F.2d 145, 161 (5th Cir. 1991), cert. denied, 112 S. Ct. 1599 (1992).

Section 3C1.1 provides for a two-level upward adjustment for obstruction of justice that may be appropriate if the defendant "threaten[s], intimidat[es], or otherwise unlawfully influenc[es] a co-defendant, witness, or juror, directly or indirectly, or attempt[s] to do so", or "commit[s], suborn[s], or attempt[s] to suborn perjury." Id. , comment. (n.3(a) & (b)).

At the sentencing hearing, the district court overruled McKay's objection to the obstruction-of-justice enhancement not only based on the threat to the witness, but also because of McKay's false testimony at trial. A district court properly

enhances a defendant's sentence for obstruction of justice if the defendant commits perjury by giving false testimony at trial, but the court is required to evaluate such testimony in a light most favorable to the defendant. United States v. Laury, 985 F.2d 1293, 1308 (5th Cir. 1993); § 3C1.1, comment. (n. 1). See United States v. Dunnigan, \_\_\_ U.S. \_\_\_, 113 S. Ct. 1111, 1116, 122 L.Ed.2d 445 (1993). In Dunnigan, the Supreme Court instructed that a "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, and, although it is preferable that specific findings be made, a determination of obstruction encompassing all of the factual predicates for perjury is sufficient. Id. McKay does not challenge that the district court considered McKay's trial testimony and demeanor at the sentencing hearing and made specific determinations that the defendant's testimony was unbelievable and rejected by the jury in every material respect. See United States v. Butler, 988 F.2d 537, 544 (5th Cir.) (upon a proper determination that the accused has committed perjury at trial, an enhancement of sentence is required by the guidelines), cert. denied, 114 S. Ct. 413 (1993). Furthermore, because the record supports the district court's findings respecting McKay's untruthfulness, the district court did not clearly err in assessing the upward adjustment for obstruction of justice.

The judgment and sentence of the district court are  
AFFIRMED.