UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3795
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GENERAL C. HARRIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CR-93-52-I-2)

(July 5, 1994)

Before THORNBERRY, DAVIS and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:[*]

General Carlos Harris was convicted in a jury trial of six counts of bank fraud in violation of 18 U.S.C. § 1344. He was sentenced to a term of 63 months of imprisonment followed by three years of supervised release. He timely appeals to this Court. Here is his story.

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

General[1] Carlos Harris was an individual who at one time presented himself as a wealthy businessman and attorney. Apparently Harris was quite charming and had no trouble securing the friendship of both women and men. Often, he would befriend a person and then request that the person do special favors for him. One of Harris' most frequently requested favors was for his new friends to open credit accounts for him so that he could purchase "gifts" for them. In order for his proposal to appear credible, Harris explained that the reason for his rather unorthodox approach to buying gifts was the result of his brutal pending divorce. On other occasions, Harris explained that his situation resulted from his need to hide large sums of money from the Internal Revenue Service. Of course, Harris never paid for the gifts and often times the victims had to pay for the charged items or return them. Harris participated in a similar scheme purchasing cars for at least two of his girlfriends and one of their mothers. His scheme consisted of persuading the girlfriend to use her credit to purchase a car for which he provided the down payment in the form of a check. Of course, the checks always bounced and eventually the victims were contacted about the bounced check as well as the delinquent installment payments. Harris explained to several of his victims that he liked to play these "games" with the car dealers, but the games were really quite harmless because if no money was ever exchanged between the purchaser and the dealer,

[1]There is nothing in the record to suggest that the Appellant is a military general. His first name is simply General.

there was never any sale of the cars. Consequently, one could turn in the car and nothing would happen to the person's credit.

Harris also convinced some of his friends to open checking accounts in their own names for his use in cashing checks. Harris would then have these friends deposit checks into the new accounts. The checks deposited were drawn on other accounts that Harris controlled through other friends. Harris would then request that the friend immediately withdraw the corresponding deposit funds for him. Harris banked on the fact that many financial institutions would not hold over deposit checks for confirmed clearance, but would allow their customers to immediately draw on the deposits. He was also assured some leeway with the banks by using people who had established relations with the particular bank. Harris made sure that he was never personally involved in the banking transactions because the deposits, of course, always turned out to be worthless. When the banks and creditors began calling the actual holders of the accounts, the friends quickly learned that they, not Harris, were the ones liable for the overdrafts and corresponding charges.

The friends that Harris used were all victims of his "program" to defraud them personally. Harris actively recruited others to join in his "program" and counseled the new participants on how to implement the "program". Harris explained to his cohorts, that his scheme was implemented by getting a woman to open up a checking account, giving her worthless checks to deposit, and then waiting one or two days before withdrawing some of the funds. Harris

confided that the beauty of his scheme was that there was no paper trail connecting him to any of the bad checks. He neither opened accounts, nor signed any checks.

Harris also counseled his cohorts on forming dummy corporations for businesses that were fronts for buying furniture, fixtures, products and cars. Harris would convince his women friends to become corporate officers in one of his new ventures. He gave the appearance that the corporations were legitimate businesses, but the accounts of the corporations always soon became overdrawn and the officers were forced to make good on the losses in the accounts. As soon as the banks and the women caught on to the scheme, the accounts were closed and Harris moved on to a new victim.

It did not take long before the FBI heard about Harris' mischief. Harris was located, a search warrant was executed on his residence and corporate offices, records were seized and Harris' fraud was uncovered. Harris pleaded not guilty and requested a jury trial. At trial, both Harris' victims and cohorts testified against him at trial. Harris was sentenced to 63 months of incarceration and ordered to pay $50,000 in restitution. Harris timely appeals to this Court.

Discussion

1. Sufficiency of the Evidence

Harris asserts that the evidence was insufficient to support his convictions for bank fraud. Harris moved for judgment of

acquittal following the Government's case and did not put forth any evidence.

The standard for evaluating the sufficiency of the evidence is that enunciated in **United States v. Bell**, 678 F.2d 547, 549 (5th Cir. 1982)(en banc), **aff'd**, 462 U.S. 356 (1983):

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

In viewing the evidence in the light most favorable to the verdict, this Court affords the Government the benefit of all reasonable inferences and credibility choices. **United States v. Nixon**, 816 F.2d 1022, 1029 (5th Cir. 1987), **cert. denied**, 484 U.S. 1026 (1988).

Harris was convicted under 18 U.S.C. § 1344, which makes it a crime to knowingly execute, or attempt to execute, a scheme or artifice to defraud a financial institution. **United States v. Saks**, 964 F.2d 1514, 1518 (5th Cir. 1992). The terms scheme and artifice include any practice or course of action intended to deceive others and to obtain by some false or fraudulent device or representation money or property. **United States v. Lemons**, 941 F.2d 309, 314 (5th Cir. 1991).

We have thoroughly reviewed the record and find no merit in Harris' contention that the evidence was insufficient to support his conviction.

2. Jury Instruction

Harris argues that the district court erred in refusing his requested jury instruction on the defensive theory that among the other elements of the offense of bank fraud, the Government, in addition, must prove that the banks did not *knowingly accept the risk* of being defrauded by Harris' check writing scheme.

A district court's decision to refuse a defendant's requested jury instruction is reviewed for abuse of discretion. **United States v. Turner**, 960 F.2d 461, 464 (5th Cir. 1992). "A defendant is entitled to have the jury instructed on a theory of the defense for which there is any foundation in the evidence." **United States v. Cordova-Larios**, 907 F.2d 40, 42 (5th Cir. 1990).

This Court looks to the district court's instructions as a whole to decide whether the instructions "fairly and accurately [reflect] the law and [cover] the issues presented in the case." **Id.** In determining whether a district court abused its discretion, this Court considers whether the requested instruction is a correct statement of the law; was substantively given in the charge as a whole; and concerns an important point in the trial, the omission of which seriously impaired the defendant's ability to present a given defense effectively. **United States v. Carr**, 979 F.2d 51, 53 n.5 (5th Cir. 1992).

As stated above, Harris was convicted of bank fraud under 18 U.S.C. § 1344 which makes it a crime to knowingly execute, or attempt to execute, a scheme or artifice to defraud a financial institution. **Saks**, 964 F.2d at 1514. Harris argues that the jury

should have been instructed that the Government had to prove that not only did Harris place the banks at risk of loss, but also that none of the banks knowingly accepted the risk. Harris bases his argument on language found in a footnote containing one of the jury instructions relevant to § 1344 in the **Lemons** opinion. The instruction to which Harris speaks is as follows: Although it is not necessary for the Government to prove an actual loss of funds by either of the two banks, the Government must prove, beyond a reasonable doubt, that the defendant's scheme and artifice, if any, placed one or both of the banks at a risk of loss and that neither of the two banks *knowingly accepted such a risk*.

Lemons, 941 F.2d at 316 n.3 (emphasis added).[2]

Harris argues that testimony elicited from William H. Moran, Jr., the manager of fraud security for Hibernia National Bank, establishes that the bank accepted a potential risk of loss when the bank allowed its customers speedy access to the funds they had deposited rather than putting a hold on the checks to allow for clearance.

Harris' argument is misplaced because Moran further testified that his bank did not approve of bad checks, and the bank made a basic assumption regarding their no-hold policy that their customers were depositing valid checks and that they would not attempt to withdraw the funds if the checks deposited were no good. Moran stated that if the bank believed that there was some suspicion or concern regarding the funds being deposited in a

[2]It is clear that this jury instruction was not central to the decision of **Lemons** and the footnote served only to illustrate the central issue in **Lemons** which concerned potential loss relative to actual loss to the financial institution.

customer's account, the bank would place a hold on the funds or restrict the account from certain activity.

The essence of Harris's argument is that if the bank was not sophisticated enough to hold every customer's deposits until they cleared, then the bank accepted the risk that the deposits could be no good, and thus had no recourse against the customer who deposited checks that they knew to be of no value. From Moran's testimony, it clear that the bank did not accept the type of risk described by Harris, therefore, there is no evidence to support the requested instruction. Consequently, Harris' issue is without merit.

3. Sentencing

Harris argues that the district court erred in calculating the amount of loss involved in his offense. He contends that the actual money loss is $79,825.20, not the $515,282.62 attributed in the presentence report (PSR).

The calculation of the amount of loss is a factual finding, reviewed for clear error. **United States v. Wimbish**, 980 F.2d 312, 313 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 2365 (1993). If a factual finding is plausible in light of the record as a whole, it is not clearly erroneous. **United States v. Watson**, 966 F.2d 161, 162 (5th Cir. 1992).

"A defendant who objects to the use of information [in a PSR] bears the burden of proving that it is `materially untrue, inaccurate or unreliable.'" **United States v. Kinder**, 946 F.2d 362, 366 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 1677, 2290 (1992)

(citation omitted). Harris objected to the loss calculation in the PSR as the figure represented actual loss that had been repaid by his victims, as well as potential loss that never actually occurred. However, Harris offered no evidence that the PSR's information regarding the calculation of the loss amount was materially untrue, inaccurate, or unreliable.

"[I]f an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss." U.S.S.G. § 2F1.1 comment. (n.7). The total intended loss by Harris was $515,282.62. This figure represents the total exposure loss to the banks plus the exposure losses to two of his victims. Based on this calculation, the district court adopted the loss calculation of over $500,000, which increased Harris's offense level by 10. Thus, the district court did not clearly err in the calculation of the full intended loss to the victims relevant to his sentence.

4. Leadership Role

Harris argues that the district court erred in determining that he was an organizer or leader of a criminal activity that involved five or more participants such that his offense level was increased by four levels.

A reviewing court will only disturb a district court's factual findings regarding a defendant's role in a criminal activity if those findings are clearly erroneous. **United States v. Barreto**, 871 F.2d 511, 512 (5th Cir. 1989) (quoting U.S.S.G. § 3B1.1, comment. (n.3)). A factual finding is not clearly erroneous if it

is plausible in light of the record read as a whole. **Watson**, 966 F.2d at 162.

The district court referred to information contained in the PSR to determine that no revision regarding the assessment of Harris's leadership role would be given. The PSR reflected that Harris had a "program" for obtaining money through defrauding banks. He actively recruited persons for his "program" and instructed and directed his "associates" how to use his method of obtaining money through bank fraud. This evidence of recruitment, control over others, and primary involvement in planning was sufficient to find that Harris had a leadership role in the offense. **Barreto,** 871 F.2d at 512. The district court may consider any relevant evidence with sufficient indicia of reliability, and a PSR generally has that type of reliability. **United States v. Alfaro**, 919 F.2d 962, 966 (5th Cir. 1990). Furthermore, Harris had the burden of proving that the evidence objected to was unreliable. **Kinder,** 946 F.2d at 366. Harris has not provided any evidence to rebut the information in the PSR. The district court was free to adopt the information in the PSR, and therefore, its finding that Harris held a leadership role in the scheme was not clearly erroneous. **United States v. Mir**, 919 F.2d 940, 943 (5th Cir. 1990).

5. Obstruction of Justice

Harris challenges the two-level adjustment to his sentence for obstructing justice by threatening victims and potential witnesses. He contends that there was no identification of anyone who

indicated they had been threatened or the nature of those threats. This Court reviews the finding that Harris obstructed justice under the clearly erroneous standard. **United States v. McDonald**, 964 F.2d. 390, 392 (5th Cir. 1992).

The PSR reported three incidents where Harris threatened witnesses and victims. Harris presents no evidence demonstrating that the information in the PSR is inaccurate or unreliable. Therefore, the district court did not clearly err in giving Harris a two-level upward adjustment for obstruction of justice.

6. Motions for Mistrial

Harris argues that, because the district court erroneously denied him a mistrial, his conviction should be reversed. Harris asserts that the Government elicited such egregious prejudicial testimony on two separate occasions that he was entitled to a mistrial.

"This Court will reverse a district court's refusal to grant a mistrial only for an abuse of discretion." **United States v. Limones**, 8 F.3d 1004, 1007 (5th Cir. 1993), **cert. denied**, 114 S.Ct. 1543, 1562 (1994). Moreover, "where a motion for a mistrial involves the presentation of prejudicial testimony before the jury, a new trial is required only if there is a `significant possibility' that the prejudicial evidence had a `substantial impact' upon the jury verdict, viewed in light of the entire record." **Id**. at 1007-08 (citation omitted).

Harris contends that on two occasions, the Government elicited prejudicial testimony. The first instance involved testimony by

Melody Cherry who was one of Harris' former girlfriends. Cherry testified that she had been duped by Harris in one of his car buying schemes. Cherry stated during direct examination that she would not give her work address because threats had been made on her life. Harris immediately moved for a mistrial, stating that Cherry's statement could be interpreted to mean that Harris had made those threats and that there was no evidence indicating such an interpretation. Upon being questioned by the court, Cherry directly stated that the threats on her life did have something to do with Harris. The district court allowed her testimony. Harris was given the opportunity to cross-examine her on the subject. Harris did not cross-examine Cherry on the matter, and the Government did not further pursue any questions regarding the alleged threats.

On another occasion, Joanne Laurdine-Scott testified that she was the mother of one of Harris' girlfriends. Ms. Scott was persuaded to work for one of Harris' newly formed corporations and she got stuck with paying several of the corporation's debts. During Ms. Scott's testimony, she made an unfavorable racial remark which she attributed to Harris. Harris objected and requested a mistrial. The motion was denied, but the district court instructed the jury to disregard the statement.

The district court's denial of the motions for mistrial were not an abuse of discretion. There is no indication that the fleeting reference to the alleged threats on Cherry's life influenced the verdict in light of the entire evidence presented at

trial. Additionally, the jury was admonished to ignore the racial statement allegedly made by Harris. These two witness's testimony simply did not present a significant possibility of having a substantial impact on the jury verdict viewing the entire record as a whole. There is no error. **Limones**, 8 F.3d at 1007.

7. Admission of 404(b) Evidence

Harris contends that throughout the trial, the district court erroneously allowed the Government to introduce evidence under Fed. R. Evid. 404(b). However, Harris does not identify any allegedly erroneously admitted evidence. Consequently, this argument need not be examined because it has not been briefed. **See Brinkman v. Dallas County Deputy Sheriff Abner**, 813 F.2d 744, 748 (5th Cir. 1987) (explaining that issues not briefed are deemed abandoned).

8. Motion to Dismiss Indictment or Grant New Trial

Harris argues that his indictment should be dismissed or he should be given a new trial because the Government improperly suppressed **Brady**[3], **Giglio**[4], and Jenck's Act[5] information. Harris argues that two months after his trial, he learned of alleged deferred prosecution agreements between the Government and two of the witnesses who testified against him at trial. Additionally, Harris contends that the Government possessed a tape-recorded conversation made between Alfonzo Bolden and Carlos Conner, two of

---

[3]**Brady v. Maryland**, 373 U.S. 83, 86, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[4]**Giglio v. United States**, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

[5] 18 U.S.C. § 3500(b).

Harris' cohorts who Harris trained on the merits of his "program". Harris contends that the Government did not reveal the taped conversation to him before trial.

In order to prevail on a **Brady** claim, the defendant must prove that material evidence, favorable to him, was suppressed. **United States v. Ellender**, 947 F.2d 748, 756 (5th Cir. 1991). Exculpatory evidence as well as impeachment evidence falls under the **Brady** rule. **Giglio**, 405 U.S. at 154. Under the Jencks Act, the Government must produce any "`statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.'" **United States v. Fragoso**, 978 F.2d 896, 899 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 1664 (1993) (quoting 18 U.S.C. § 3500(b)). Harris' argument is, in effect, an argument of suppression of Jencks Act information.

We have carefully reviewed the entire record on this matter and find no statements made by any witness that were favorable to Harris. Consequently, the district court properly denied Harris's motion to dismiss the indictment, or in the alternative, for a new trial. **Ellender**, 947 F.2d at 756.

Conclusion

Based on the foregoing, we affirm Harris' conviction and sentence.

AFFIRMED.