**UNITED STATES COURT OF APPEALS**
**for the Fifth Circuit**

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No. 93-8183
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DEMACIO S. HERRERA,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
(SA-92-CR-127-3)

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(July 22, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Herrera appeals his conviction and sentence following an adverse jury verdict. We find no error and affirm.

I.

Demacio S. Herrera was convicted following a jury trial of conspiracy to defraud the United States Department of Housing and Urban Development (HUD) and the United States Veterans

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Administration (VA) (count one) and three counts of aiding and abetting and making false statements to the VA.

The court sentenced Herrera to a prison term of 12 months on count one and a term of 12 months on each of the three aiding and abetting and false statement counts, to run concurrently with each other and the sentence on count one. The court also imposed a three-year term of supervised release and ordered Herrera to pay $55,740 in restitution. Herrera raises a number of issues in this appeal. We consider first his challenge to the sufficiency of the evidence which will expose the factual background of this case.

II.

A.

The government charged Herrera with violating 18 U.S.C. § 1001 by making false statements to HUD and VA, agencies of the United States. **See United States v. Rodriguez-Rios**, 14 F.3d 1040, 1043 (5th Cir. 1994).

In order to obtain a conviction for a violation of § 1001,the Government must prove: "(1) a statement, that is (2) false (3) and material, (4) made with requisite specific intent, [and] (5) within the purview of government agency jurisdiction." **United States v. Puente**, 982 F.2d 156, 158 (5th Cir.), **cert. denied**, 113 S.Ct. 2934 (1993). The essential elements of a conspiracy under § 371 are "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. Davis**, 533 F.2d 921, 926 (5th Cir. 1976) (internal quotation and citation omitted).

Evidence is sufficient to uphold a jury verdict if a reasonable trier of fact could have found all the necessary elements of the crime beyond a reasonable doubt. **United States v. Lechuga**, 888 F.2d 1472, 1476 (5th Cir. 1989).

Franklin D. Pickens, a former real estate broker was the government's main witness at trial. Pickens had pleaded guilty to making false statements to the United States Government to obtain mortgage loans.

Pickens, who owned a real estate agency, organized at least 13 illegal "flip sales" involving Government financing through Federal Housing Administration (part of HUD) or the Veteran's Administration. Pickens would pay cash for property and have others apply for loans to purchase the property at a much higher price. Pickens described a flip sale as a "simultaneous close" in which the participants would close the "cash side" and the "loan side" at the title company at the same time so that "no money out-of-pocket" would be involved in the transaction. Pickens would pay borrowers between $500 and $1,000 to make loan applications to purchase homes. He would tell the nominal borrower how to make the home loan application and then have him sign a contract as the cash buyer at closing. Pickens provided false information on the loan application concerning the borrower's liquidity, employment status, or salary in order to make him a "qualified" home buyer. After closing and payment to the borrower, Pickens took over so that the borrower was no longer involved in the purchase of the home or payment of the mortgage.

Pickens testified that he arranged two flip sales with Herrera in which Herrera made false statements as the nominal purchaser/borrower in the mortgage application. According to Pickens, Herrera purchased a home on Threadneedle street in San Antonio in January or February of 1987. He stated that Herrera did not have sufficient funds to have an FHA owner-occupied loan application approved. Additionally, Herrera was working on commission instead of salary, which made it more difficult to obtain a loan. Pickens explained that they "converted his salary position from a commission to a salary position and documented the figures where he made an ample amount of income to qualify to buy that particular piece of property." Pickens identified Herrera's signature on a falsified verification of employment form submitted as part of the loan application.

Herrera, who signed the loan application form, obtained the loan. Herrera indicated on the application that his wife would be jointly obligated on the loan even though Herrera and his wife were separated at the time and his wife had no intention of being liable for the loan. Herrera forged his wife's signature on the loan. Pickens paid him between $500 and $1,000 for his role in the purchase.

Although approval of owner-occupied loans required that the purchaser move into the property or rent the property, Herrera had no involvement with the property on Threadneedle after the purchase was completed. Herrera's name was on a dummy lease indicating that he was moving out of the home that he had been occupying at the

time he purchased the Threadneedle property. Pickens testified that Herrera knew that the loan application contained false information at the time he signed it.

The other property that Herrera purchased as a nominal borrower was on Encino Grande in May or June of 1987. The value of this property was "much, much higher, so [Herrera] had to have more income." Because Herrera had insufficient funds to have a VA owner-occupied loan approved, Pickens and Herrera "produce[d] a position for [Herrera's] wife to show her making X amount of dollars so the combination of the two would qualify to buy this piece of property."

As part of the application Pickens: (1) prepared and sent to Herrera falsified W-2 forms that showed Herrera was receiving a salary; (2) altered Herrera's pay stubs; (3) prepared and showed Herrera falsified W-2 forms for Herrera's wife; and (4) prepared and discussed with Herrera the need for a falsified verification of employment form for his wife. Pickens paid Herrera $2,000 for his role in the purchase of the Encino Grande property after Herrera demanded more money. Herrera forged his wife's signature on this document. She had no intention of being obligated on the loan, and she was not employed at the time.

FBI Special Agent Donald Baker testified that he and another FBI agent interviewed Herrera about the false statements on the HUD and VA loans involving Pickens. Herrera told Baker: (1) that he signed the loan application involving the Threadneedle property; (2) that he forged his wife's signature on the application; (3)

that he "inflated or overstated" his income; and (4) that Pickens was going to rent the property and use the proceeds to pay the loan. Baker also asked Herrera about discrepancies in the Encino Grande loan application. Herrera told Baker that contrary to the information supplied in the application, his wife had never worked. An FBI report from an earlier interview with Herrera contained information indicating that Herrera signed his wife's name on the application without her knowledge.

Don Welder, whose wife trained Herrera to work at an insurance company, testified that Herrera came to his house and boasted that Welder could earn $1,000 if he allowed Pickens to use his name on a loan application form and that he had just received $1,000 from Pickens for his role in the purchase of the home on Threadneedle. In response to Welder's protests that he could not afford a home, Herrera told him that Pickens would arrange for him to become qualified, that Pickens would pay the down payment on the home, and that it did not matter that Welder "was just getting by." Welder elected not to purchase a home with Pickens' assistance.

Juries are permitted to make reasonable inferences and to use their common sense in weighing evidence. **Lechuga**, 888 F.2d at 1476. The jury is the final authority on the credibility of witnesses. **United States v. Lerma**, 657 F.2d 786, 789 (5th Cir. 1981), **cert. denied**, 455 U.S. 921 (1982). The evidence was ample in this case for a reasonable jury to find beyond a reasonable doubt that all the elements necessary to secure a conviction for

violation of § 1001 existed and that Herrera conspired to violate § 1001.

B.

Herrera next argues that the district court erred by preventing him from demonstrating witness Welder's bias against him with extrinsic evidence during the defense's case in chief. More specifically, Herrera asserts that the court erred by refusing to permit Welder to introduce: (1) a tape of an allegedly harassing call Welder's wife made to Herrera's home on which Welder's voice is supposedly audible; (2) certified copies of pleadings from civil and criminal cases filed by members of the Welder family against Herrera; and (3) evidence that Welder's wife had a sexual affair with Herrera.

During his testimony Welder denied that he bore any hostility towards Herrera and admitted that his wife did, agreed that his wife was involved in a criminal assault charge filed against Herrera and that he testified that Herrera had assaulted his wife; denied that he made harassing phone calls to Herrera, was present when his wife did, or was told that his wife had made such calls; explained that his wife refiled fraud charges against Herrera in 1991 and that there had been three assault cases; denied that he was aware of an assault charge filed by his wife against Herrera in 1991 or 1992; and denied that his wife had a sexual relationship with Herrera.

We review the district court's refusal to admit evidence under an abuse of discretion standard. **United States v. Martinez**, 962

F.2d 1161, 1164 (5th Cir. 1992). Ordinarily Fed. R. Evid. 608(b) prohibits admission of extrinsic evidence used solely to attack the credibility of a witness. **Id**. Extrinsic evidence is admissible, however, to demonstrate a witness' bias or motive to lie. **United States v. Thorn**, 917 F.2d 170, 176 (5th Cir. 1990). The court must determine whether evidence offered to show bias is probative of bias, and, if so, whether its probative value outweighs the risks of prejudice. **Id**. Fed. R. Evid. 403 also provides for the exclusion of evidence that confuses the issues at trial or is needlessly cumulative.

As an initial matter, contrary to Herrera's representation, Welder's testimony was not the only evidence corroborating Pickens' testimony that Pickens paid Herrera money for his role in the purchase of one of the properties. FBI Agent Baker's testimony was arguably more important corroboration than Welder's that Herrera made false statements in the government loan applications and operated in conjunction with Pickens. Even had Welder not testified, there was extensive evidence supporting Herrera's conviction.

The tape of the allegedly harassing call that supposedly contained Welder's voice would have been probative of both bias and truthfulness. However, considering the substantial evidence of Herrera's guilt, the relatively peripheral nature of Welder's testimony, Mrs. Herrera's testimony that Welder made harassing calls and that his voice was on the tape and Herrera's defense counsel's closing argument to the jury incorporating Mrs. Herrera's

testimony and reference to the tape, the district court did not abuse its discretion by refusing to allow admission of the tape.

Because Welder admitted that his wife and Herrera were involved on opposite sides of numerous civil and criminal court cases, admission of certified pleadings from these cases would have been needlessly cumulative and potentially confusing to the jury. **See** Fed. R. Evid. 403. The court did not abuse its discretion by refusing to admit this evidence.

Herrera also sought to have one of Herrera's attorneys involved in the litigation between Herrera and Mrs. Welder testify about information concerning a sexual relationship between Mrs. Welder and Herrera that came out during the earlier trial. Herrera's defense counsel asked Welder whether his wife had a sexual relationship with Herrera. Mr. Welder's response was, "[i]n his dreams -- in his dreams." Herrera effectively placed before the jury the question of whether Welder felt hostile towards Herrera. Because further development on this peripheral issue would have tended to confuse the jury, the district court acted within its discretion by refusing to admit further testimony concerning the subject.

C.

Herrera contends next that the district court erred by ordering him to pay $55,740 in restitution without considering his financial condition or his future ability to pay. Herrera did not object to the order of restitution at sentencing or in objections

to the PSR. The applicable fine was a maximum of $111,480 on count one and a maximum of $250,000 on each of the other three counts.

Because Herrera did not object to the PSR in the district court, he may not raise an objection now, for the first time on appeal, absent plain error. **United States v. Lopez**, 923 F.2d 47, 49 (5th Cir.), **cert. denied**, 111 S.Ct. 2032 (1991). Plain error is error which viewed "in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity, or public reputation of judicial proceedings." **Id** at 50. It is a mistake which would result in a miscarriage of justice if ignored. Questions of fact capable of resolution in the district court upon proper objection at sentencing can never amount to plain error. **Id**.

The court adopted the facts contained in the PSR. According to the PSR, the Government lost $55,740 on the two loans. Herrera had a 30-year career in the United States Air Force as an aircraft mechanic. From 1984 to 1986 Herrera was employed as an insurance salesman. Herrera owned and operated H & P Financial Services starting in 1986 and made an average monthly income of $900 through this business. The PSR described Herrera's net worth as minus $16,800 and his net monthly cash flow as $573.50. A "defendant's indigency at the time restitution is ordered is not a bar to the requirement of restitution." **United States v. Ryan**, 874 F.2d 1052, 1054 (5th Cir. 1989) (referring to predecessor statute 18 U.S.C. § 3580). Neither a negative net worth nor a negative cash flow

renders a restitution order illegal. **See United States v. Stafford**, 896 F.2d 83, 84 (5th Cir. 1990).

Herrera asserts that the district court made no fact findings concerning his ability to pay and ordered restitution despite finding that he could not afford to pay a fine. The PSR suggested that Herrera could not afford to pay both a fine and restitution, implying that he could afford one or the other. The district court adopted the facts and recommendations contained in the PSR. The court is not required to make specific findings addressing the statutory requirements. **Ryan**, 874 F.2d at 1053. The district court did not commit plain error in making its restitution award.

D.

Herrera argues that he was entitled to a two-level reduction in his sentencing guidelines' offense-level because he was a minor participant. U.S.S.G. § 3B1.2(b) (Oct. 1987). He raised this issue at sentencing.

"[A] minor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." § 3B1.2(b), comment. (n.2). The determination of a defendant's role in an offense is a factual question that is reviewed for clear error. **United States v. Zuniga**, 18 F.3d 1254, 1261, (5th Cir. 1994).

Herrera contends that he "had no knowledge or understanding of the scope and structure of the conspiracy, nor did he have knowledge of the activities of the other participants." Herrera notes that Pickens testified that a processor filled out the loan

applications for the two properties, that he himself put together much of the paperwork, and that he did not know whether Herrera filled out the handwritten portion of the Encino Grande loan application. Pickens provided the information on the falsified verification of employment forms, put together the false W-2 tax statement, and prepared the false lease agreements. **Id**. at 566-68.

However, the evidence shows that, at the very least, Herrera was an average participant. Herrera made false statements on two Government loan applications involving Pickens. Pickens testified that Alfred Eudy applied for mortgage loans using false statements on four occasions involving Pickens, that Gary Malone made false statements in three applications, that Bill Ellis made false statements in two applications, and that Don Lawson and Dave Conger made false statements in one application each. In the context of the conspiracy, Herrera was significantly less culpable than Pickens, but equally culpable with most of the other participants. According to the PSR, Herrera was responsible for causing HUD and the VA to lose $55,740. Herrera has not demonstrated that the information in the PSR which the district court relied upon was untrue or unreliable. The district court's determination that Herrera was not a minor participant was plausible in light of the entire record.

E.

Herrera contends next that he was prejudiced because the district court refused to sever his trial from that of his co-defendant Alfred E. Eudy. Herrera filed a pre-trial motion to

sever pursuant to Fed. R. Crim. P. 14 on the grounds that he would be prejudiced by: (1) the other defendants raising conflicting defenses; (2) the disparity of evidence; (3) the spill-over effect; (4) being tried with the other defendants; and (5) the complexity of the issues. The court denied his motion.

A district court's denial of a Fed. R. Crim. P. 14 motion for severance is reviewed for abuse of discretion. **United States v. Pofahl**, 990 F.2d 1456, 1483 (5th Cir.), **cert. denied**, 114 S.Ct. 266 (1993). This court should reverse only if Herrera is able to demonstrate "compelling prejudice against which the trial court was unable to afford protection," **id**. (internal quotation and citation omitted), or if Herrera was unable to obtain a fair trial without the severance. **United States v. Harrelson**, 754 F.2d 1153, 1174 (5th Cir.), **cert. denied**, 474 U.S. 908, 1034 (1985). A defendant must also demonstrate that the prejudice which he has experienced outweighs the "[G]overnment's interest in economy of judicial administration." **United States v. Buckhalter**, 986 F.2d 875, 876 (5th Cir.), **cert. denied**, 114 S.Ct. 203, 210 (1993).

As a rule, people indicted together should be tried together, "especially in conspiracy cases." **Id**.; **Zafiro v. U.S.**, ___ U.S.___, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993). Pickens, Eudy, and Herrera were indicted together.

Herrera argues that he was prejudiced mainly because he was tried with Eudy and because there was no proof that Herrera or Eudy knew each other or knew of the others' acts. According to Herrera, evidence that was admitted against Eudy and which had no bearing on

Herrera's case could have confused the jury. However, the mere presence of a spill-over effect does not ordinarily warrant severance. **Pofahl**, 990 F.2d at 1483.

Moreover, limiting instructions usually are sufficient to cure any risk of prejudice. **United States v. Stouffer**, 986 F.2d 916, 924 (5th Cir.), **cert. denied**, 114 S.Ct. 115, 314 (1993). The district court explicitly instructed the jury to consider each alleged crime and each defendant separately. There is no indication that the jury was incapable of keeping the evidence separate for each of the defendants.

Citing **United States v. Levine**, 546 F.2d 658 (5th Cir. 1977), which sets out a figurative analogy to determine conspiracy that is no longer followed in this circuit, Herrera argues that he was prejudiced because the only connection between himself and Herrera was Pickens. Such a "wheel conspiracy" Herrera believes was not sufficient to warrant a joint trial. This court "eschew[s] utilization of figurative analogies such as wheels, rims and hubs." **United States v. Richerson**, 833 F.2d 1147, 1153 (5th Cir. 1987) (internal quotation and citation omitted). "A single conspiracy exists where a `key man' is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal." **Id**. at 1154.

Pickens was such a key man and Herrera and Eudy both participated in his illegal activities that had a goal of defrauding the U.S. Government to enrich the members of the conspiracy. "The members of a conspiracy which functions through

a division of labor need not have an awareness of the existence of the other members, or be privy to the details of each aspect of the conspiracy." **Id**. Herrera has failed to specify any compelling prejudice against which the district court could not protect him or show that his trial was unfair because the court did not sever his trial.

F.

Finally, Herrera asserts that the district court erred by not striking the testimony of Government witnesses who were subject to and violated Fed. R. Evid. 615, which prohibits witnesses from hearing each others' testimony.

Herrera's defense counsel invoked the rule immediately before the testimony of Steven Williams, the former Chief of the Mortgage Credit Branch for HUD, and the Government's first witness. Three violations of the rule subsequently occurred. First, Williams talked with another Government witness, Ray Bustos, Supervisor of the Property Management Unit of the VA office in San Antonio, during breaks during Williams' testimony the day before and that morning. Second, Williams spoke with a Government attorney within hearing of Bustos. Williams and Bustos described how the loan application process worked in both of their respective agencies. Third, Bustos spoke with Pickens, who was a Government witness.

Neither Williams nor Bustos testified concerning specific aspects of Herrera's alleged criminal activity. Williams identified HUD forms that listed Herrera as a borrower and described the information supplied on the form. Bustos did the

same for VA forms. Williams also identified many other forms that did not pertain to Herrera. Neither Bustos nor Williams discussed whether Herrera had misrepresented any of the information on the forms; they only explained hypothetically how supplying false information would have affected his application.

The district court was entitled to conclude that none of these discussions affected the substance of any of the witnesses' testimony. The district court, pursuant to the dictates of **United States v. Wylie**, 919 F.2d 969, 976 (5th Cir. 1990), permitted defense counsel to explore fully the conversations during cross-examination. The district court did not abuse its discretion by permitting these witnesses to testify.

AFFIRMED.