IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8286
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIAM A. GRABLE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(M-92-CR-66)

(December 30, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

William Grable appeals his conviction of, and sentence for, interstate transportation of money by fraud, in violation of 18 U.S.C. § 2314. We affirm the conviction, vacate the sentence, and remand for resentencing.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Grable was convicted by a jury of interstate transportation of money by fraud (causing a wire transfer of $26,000 by fraudulent inducement). He received a 21-month term of incarceration, a 3-year term of supervised release, a $50 special assessment, and a restitution order of $26,000. He objected to the presentence investigation report ("PSR"), alleging, inter alia, that paragraphs 6 through 9 lacked a minimum indicium of reliability and involved conduct unrelated to the instant offense.

Grable reurged his objection at sentencing. The district court sustained his objections as to paragraphs 6, 7, and 8 but denied them as to paragraph 9. Paragraphs 6, 7, and 8, which the district court explicitly stated it would not consider, set forth allegations of other fraudulent acts by Grable, whereby he allegedly fleeced three other individuals in various oilfield transactions. Paragraph 9, which the district court did consider, detailed the aggregate amount of loss pertaining to the conduct outlined in paragraphs 6, 7, and 8.

II.

A.

Grable contends that there is insufficient evidence to support his conviction. He did not reurge his motion for a judgment of acquittal following the close of all the evidence, so the evidence is reviewed to determine whether there was "plain error" or "a manifest miscarriage of justice." A miscarriage exists "only if

the record is devoid of evidence pointing to guilt" or if the evidence on a key element is "so tenuous that a conviction would be shocking." United States v. Pierre, 958 F.2d 1304, 1310 (5th Cir.), cert. denied, 113 S.Ct. 280 (1992) (internal quotations and citations omitted).

The evidence is viewed in a light most favorable to the jury's verdict, including all reasonable inferences and credibility choices. Id. To support a conviction under § 2314, the government must prove beyond a reasonable doubt that a defendant (1) transferred or caused to be transferred across state lines (2) monies valued at $5,000 or more (3) with knowledge that such monies had been stolen, converted, or fraudulently obtained. United States v. Judd, 889 F.2d 1410, 1417 (5th Cir. 1989), cert. denied, 494 U.S. 1036 (1990); United States v. Vontsteen, 872 F.2d 626, 630 (5th Cir. 1989), cert. denied, 498 U.S. 1074 (1991).

Grable contends that the government failed to prove that the monies constituting the $26,000 wire transfer were stolen prior to the transfer from Texas to Montana and that the government failed to prove that Grable himself transported or transferred the money interstate. Both arguments fail.

To prove that Grable transferred the monies, the government must show only that Grable caused the money to be transferred, not that he transferred it personally. United States v. Poole, 557 F.2d 531, 534 (5th Cir. 1977).

Trial testimony indicates that Grable contacted the victim, James Sumrall, in August 1991 and told him that he (Grable) had a

model 640 pumping unit, serial number T-36F-144-4L-1896, that he would ship to Sumrall if Sumrall would wire $26,000 to his (Grable's) bank account in Montana. Sumrall wired the money but never received anything.

Sumrall testified that Grable did not return any of the $26,000. Additionally, a representative of American Manufacturing Company ("AMC"), the company that had manufactured the unit, testified that it did not manufacture any model 640 pumping units with the serial number 1896. It did manufacture a model 912 pumping unit with the serial number 1896, but that unit was shipped to Peru. The evidence shows that neither "plain error" nor a "manifest miscarriage of justice" occurred.

Grable's argument that there was insufficient evidence to conclude that the money was stolen prior to transfer also fails, as § 2314 contains no such requirement. The government need prove only fraudulent inducement, and the fraud is deemed completed when the monies cross state lines. See Poole, 557 F.2d at 534-35; United States v. Stouffer, 986 F.2d 916, 923 (5th Cir. 1993).

B.

Grable contends that the district erred in calculating the amount of loss used to determine his offense level for sentencing purposes. The application of the sentencing guidelines is a question of law subject to de novo review. United States v. Otero, 868 F.2d 1412, 1414 (5th Cir. 1989). A sentence must be reversed if it is imposed through a misapplication of the law. United

States v. Mourning, 914 F.2d 699, 704 (5th Cir. 1990). 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).

Grable's base offense level is six. U.S.S.G. § 2F1.1(a). The PSR recommended a six-level increase, asserting that the total loss was more than $70,000, based upon information relating to alleged losses from other transactions involving other individuals. The PSR also recommended an additional two-level increase, asserting that the scheme to defraud involved more than one victim, relying upon the same PSR information relating to alleged losses from other transactions involving other victims.

Grable objected to the calculation of his offense level and the calculation of the amount of loss. He reurged his objection at sentencing.

The district court specifically stated that it would not consider the information relating to alleged losses from other transactions involving other victims as detailed in paragraphs 6-8 of the PSR. The district court stated, however, that it believed "that the proper offense level [was] 14."

The district court clearly erred, given its explicit statement that it would not consider the allegations of other losses. The amount of the loss from the offense of conviction is the $26,000

Sumrall wired to Grable. Therefore, the proper offense level would be 10, i.e., a base offense level of six and a four-level increase because loss was more than $20,000 but less than $40,000. See U.S.S.G. § 2F.1(b)(1)(E), (F). Grable specifically did not object to his criminal history category of II. The sentencing table thus yields a guideline range of 8-14 months. As the district court's imposition of a 21-month sentence was an improper application of the guidelines, we vacate the sentence.

The judgment of conviction is AFFIRMED; the judgment of sentence is VACATED and REMANDED for resentencing.