UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8906

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE WENDELL MAXEY, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(M-93-CR-42)

(March 1, 1995)

Before WISDOM, JONES, and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

George W. Maxey adopted an unconventional approach to robbing a bank. Instead of charging into the establishment with some type of weapon or breaking in secretly in the dead of the night, he attempted to take the vice-president responsible for opening the bank every morning hostage. The plot, however, was bungled when he and his accomplice learned that she could not open

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the vault by herself. Maxey was convicted by a jury and now primarily appeals the length of his sentence.

I.

At the urging of the government, the district court assessed a two-level offense increase for criminal activity involving a "vulnerable victim." See U.S.S.G. § 3A1.1. The district court enhanced the sentence because of the victim's position at the bank and further noted that the hostage was "mentally scarred." The district court eschewed reliance on her age (53 years old) or her prior physical or mental condition.

Although we are extremely hesitant to reverse a finding of vulnerability because of the district court's superior vantage point, see United States v. Mejia-Orosco, 868 F.2d 807, 809 (5th Cir. 1989), the analysis mandated by United States v. Moree, 897 F.2d 1329, 1335-1356 (5th Cir. 1990), convinces us that the district court did not properly apply the "vulnerable victim" adjustment. Pursuant to § 3A1.1 an increase is authorized "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct." Moree decided that a victim's vulnerability must be "unusual," which this court defined as present in only some of the victims of the type of crime involved.

No dispute exists that the victim here was selected because of her position of responsibility with the bank. This status coupled with the fact that she lived alone and was unlikely

to have been able to defend herself against armed terrorists explained her selection as a target. That an employee of a bank would become a victim in an attempted robbery, however, is not "unusual" within the meaning adopted by Moree. As this court noted, "neither a business-man nor a bank should be considered unusually vulnerable to armed robbery merely because the bank robber knows they have cash on hand or may have some breach in their security system." Id. at 1336; see also United States v. Morrill, 948 F.2d 1136, 1137 (11th Cir. 1993)(en banc)("bank tellers, as a class, are not vulnerable victims within the meaning of section 3A1.1").[1] In contrast, armed assault of a blind person, or a blind bank employee, would support the increase in base level. The victim here does not have unique disabling personal characteristics that sufficiently distinguish her from other likely victims of Maxey's type of offense.

Nonetheless, on remand the district court is free to depart upward from the guideline sentence for Maxey because of the "two-hour physical restraint of the victim and the post-offense psychological trauma the victim currently suffers from." See U.S.S.G. § 5K2.3 (victim suffered psychological injury); § 5K2.4(victim unlawfully restrained). Although the government suggests that this court affirm the sentence imposed on this "alternative ground," we are not convinced that the district court

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[1] That the government misunderstood the law is evident from its argument for enhancement to the district court: "[S]he is a vulnerable victim because she is a vice president of a bank, perhaps to a certain extent all bank employees in this day and age are particularly vulnerable[.]"

would have necessarily departed had it correctly calculated Maxey's offense level. On the one hand, the district court did state that "two points ought to be added" because the victim was "mentally scarred" but the court also expressly found that the victim was "vulnerable" and that this was "not taken into consideration anywhere else." Accordingly, we remand to the district court for resentencing to ensure that the erroneous conclusion of "vulnerability" did not impact Maxey's punishment. See United States v. Corley, 978 F.2d 185, 187 (5th Cir. 1992)(remand required where it cannot be determined that identical sentence would be imposed).

II.

Finally, Maxey argues that the district court abused its discretion by allowing evidence of his prior forgery during cross-examination. Because Maxey failed to object at the time this evidence was introduced, this court confines its review to plain error. See United States v. Graves, 5 F.3d 1546, 1551-52 (5th Cir. 1993). Although Maxey did move to exclude this evidence, an overruled motion in limine does not preserve a defendant's objection to evidence introduced at trial. United States v. Estes, 994 F.2d 147, 149 (5th Cir. 1993)(citation omitted).

It is impossible to find the requisite "miscarriage of justice"[2] in the admission of the prior forgery offense. Even if such a decision to admit by the district court could ever constitute plain error, such an assertion here borders on the

[2] See United States v. Fortenberry, 914 F.2d 671,673 (5th Cir. 1990).

frivolous. Although the fact that his prior offense was actually a "deferred adjudication" rather than a final conviction affects the propriety of admission under Fed. R. Evid. 609, Rule 608(b) would permit impeachment on the issue of his credibility via this previous forgery. See United State v. Leake, 642 F.2d 715, 718-19 (4th Cir. 1981)("Rule 608 authorizes inquiry only into instances of misconduct that are clearly probative of truthfulness or untruthfulness, such as perjury, fraud, swindling, forgery, bribery, and embezzlement.") Maxey testified at trial, placing this capacity for truthfulness in issue. See United States v. Williams, 822 F.2d 512, 516 (5th Cir. 1987). Thus the government was entitled to freely rebut his assertions through inquiry on cross-examination (albeit not by virtue of the introduction of extrinsic evidence) subject only to the limits of Rule 403.[3]

For the foregoing reasons, we **AFFIRM** Maxey's conviction, **VACATE** his sentence, and **REMAND** to the district court for resentencing consistent with this opinion.

[3] Maxey also himself alluded to his prior trouble with check forgery during his direct examination.