UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-10488

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,,

versus

DAVID L. LACKEY,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(3:93-CR-100-T)

(April 27, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

A federal grand jury found David Lackey guilty of two counts of bribery of a public official in violation of 18 U.S.C. § 201(b)(1) (1988); the district court sentenced him to thirty months in prison. Lackey appeals his conviction, and we affirm.

I

David Lackey, the owner of an accounting firm, Lackey & Associates, represented Nabeel Slaeih in an income tax audit

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conducted by Special Agent Mike McCall of the IRS. At Lackey and McCall's first meeting, Lackey offered to hire McCall to manage Lackey & Associates' offices in Dallas and Fort Worth, at a salary of $35,000 a year. McCall reported the offer to his superior at the IRS, who told McCall to record his future conversations with Lackey. Lackey revised Slaeih's tax return to show that Slaeih's tax liability was even less than that reported in the original return, and he gave a copy of the revised return to McCall. Lackey was unable to provide McCall with the documentation necessary to support the revisions, offered McCall $2900 to falsify his report on Slaeih's audit, and ultimately paid McCall $1900.[1] On this evidence, the jury found Lackey guilty of two counts of bribing a public official. Lackey has filed a pro se appeal, arguing that (1) the Government failed to prove that Lackey was predisposed to commit bribery, (2) the district court erred in admitting certain evidence against him, (3) the jury instructions were erroneous, (4) the district court erred in calculating his criminal history score, (5) the district court erred at sentencing in failing to credit Lackey for accepting responsibility for his offense, (6) the district court erred in determining the Government's amount of loss for the purposes of sentencing, and (7) he was denied effective assistance of counsel.[2]

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[1] Lackey contends that the job offer was unconnected to the audit, and that any cash payments thereafter were induced by McCall.

[2] We decline to review Lackey's ineffective assistance of counsel claim because the record is not sufficiently developed on this issue. *See United States v. Andrews*, 22 F.3d 1328, 1345 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 346, 130 L. Ed. 2d 302 (1994) (declining to address ineffective assistance

II

A

Lackey claims that the Government did not prove that he was predisposed to commit bribery. "When the government, by use of a sting operation or otherwise, has induced an individual to break the law, and the defense of entrapment is at issue, the prosecution must prove beyond a reasonable doubt that the defendant was inclined to commit the criminal act even before he was approached by the government agents." *United States v. Byrd*, 31 F.3d 1329, 1334-35 (5th Cir. 1994), *cert. denied*, No. 94-7588, 1995 WL 16586 (U.S. Apr. 3, 1995). "When a jury, which was fully charged on entrapment, rejects the defendant's entrapment defense, the applicable standard of review is the same as that which applies to sufficiency of the evidence." *United States v. Rodriguez*, 43 F.3d 117, 126 (5th Cir. 1995) (citing *United States v. Mora*, 994 F.2d 1129, 1137 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 417, 129 L. Ed. 2d 363 (1993)).

When considering a challenge to the sufficiency of the evidence, "[w]e must affirm if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt" after considering the evidence in the light most favorable to the jury's verdict. *See United States v. Bermea*, 30 F.3d 1539, 1551 (5th Cir. 1994). However, when a defendant fails to move for

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claim because of insufficiently developed record). "[W]e do so without prejudice to [his] right to raise the issue in a proper proceeding pursuant to 28 U.S.C. § 2255." *Andrews*, 22 F.3d at 1345 (quoting *United States v. Higdon*, 832 F.2d 312, 314 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1051, 98 L. Ed. 2d 1013 (1988)).

a judgment of acquittal in such cases, we restrict our review to whether the defendant's conviction "resulted in a manifest miscarriage of justice." *United States v. Thomas*, 12 F.3d 1350, 1358 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1861, 128 L. Ed. 2d 483 (1994). Thus, taking the evidence in the light most favorable to the jury's verdict, we review whether Lackey's conviction on the bribery counts resulted in a manifest miscarriage of justice.

"It is the jury's `unique role' to judge the credibility and evaluate the demeanor of witnesses and to decide how much weight should be given to their testimony." *United States v. Layne*, 43 F.3d 127, 130 (5th Cir. 1995). McCall's testimony at trial revealed that Lackey displayed the necessary predisposition to commit bribery before receiving any encouragement from the Government. Lackey's offer of employment to McCall, his proposal to falsify Slaeih's tax returns, and his tendering of $1900 of $2900 in bribes all support the jury's finding that Lackey was predisposed to commit bribery. Based on this, we cannot conclude that Lackey's conviction on the bribery counts resulted in a manifest miscarriage of justice.[3]

[3] Lackey further asserts that separate from the question of predisposition, governmental activity in an undercover operation may be "so outrageous or fundamentally unfair as to deprive the defendant of due process of law." *United States v. Smith*, 7 F.3d 1164, 1168 (5th Cir. 1993). "In order to establish such a claim, defendants must prove not only government overinvolvement in the charged crime, but also that they were not active participants in the criminal activity." *Mora*, 994 F.2d at 1138 n.9 (quoting *United States v. Arditti*, 955 F.2d 331, 342 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 597, 121 L. Ed. 2d 534 (1992). Agent McCall's testimony established that the Government did not act outrageously and that Lackey was an active participant in the crime. Thus, Lackey's claim of outrageous conduct is meritless.

B

Lackey next asserts that the district court committed two evidentiary errors, neither of which he objected to at trial. "One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result in its forfeiture." *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir. 1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1266, ___ L. Ed. 2d ___. However, in rare cases, an appellate court has the discretion to correct an error not objected to in the lower court if the error is plain and involves substantial rights. Fed. R. Crim. P. 52(b); *United States v. Olano*, ___U.S. ___, ___, 113 S. Ct. 1770, 1776, 123 L. Ed. 2d 508 (1993); *Calverley*, 37 F.3d at 162 (emphasizing that even if error is plain, "appellate courts possess the discretion to decline to correct errors which do not `seriously affect the fairness, integrity, or public reputation of judicial proceedings'"). To establish plain error, a litigant must establish that (1) there is an error, (2) the error is plain, and (3) the error infringes upon the defendant's substantial rights. *Calverley*, 37 F.3d at 162-64.

First, Lackey claims that the district court erred in admitting the testimony of IRS agent Iris Martin because it contained inadmissible hearsay. Martin testified that Lackey made sexually suggestive comments and threats to her during an audit. However, the Federal Rules of Evidence provide that a statement does not constitute hearsay if "[t]he statement is offered against

a party and is . . . the party's own statement in either an individual or a representative capacity." Fed. R. Evid. 801(d)(2)(A). Thus, because the comments and threats were made by Lackey and offered against Lackey, Martin's statements did not constitute hearsay and the trial court committed no error in admitting Martin's testimony.

Next, Lackey claims that the trial court should not have admitted any of the Government's evidence of his sexual assault conviction. He argues that any probative value the evidence might have had was substantially outweighed by the unfair prejudice he suffered as a result of its admission. *See* Fed. R. Evid. 403 (providing that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"); *United States v. Tomblin*, 46 F.3d 1369, 1387 (5th Cir. 1995) (requiring that probative value of evidence not be substantially outweighed by undue prejudice pursuant to Rule 403). However, Lackey himself first mentioned the sexual assault conviction in front of the jury, and the prosecution may always refer to a defendant's prior conviction if the defendant mentions the conviction first during direct examination, *see United States v. Galvan-Garcia*, 872 F.2d 638, 640 (5th Cir.) (holding that defendant "cannot now [on appeal] complain of the introduction of the prior conviction into evidence when he himself initially presented the evidence to the jury"), *cert. denied*, 493 U.S. 857, 110 S. Ct. 164, 107 L. Ed. 2d 122 (1989). Therefore, the district court's

admission of the Government's evidence of Lackey's conviction was not plainly erroneous. *See Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993) (holding that evidence of underlying murder conviction did not endanger defendant's substantial rights because defendant opened door for prosecution).

C

Lackey argues that the district court erred in not providing the jury with additional instructions on predisposition and entrapment,[4] although he did not object to the court's instructions at trial. "When no party objects at trial to a jury instruction, [we] will uphold the charge absent plain error. Plain error occurs only when the instruction, considered as a whole, was so clearly erroneous as to result in the likelihood of a grave miscarriage of justice." *United States v. Davis*, 19 F.3d 166, 169 (5th Cir. 1994). The court instructed the jury on predisposition and entrapment pursuant to the Fifth Circuit Pattern Jury Instructions, which are presumptively sufficient when we review for plain error. *See United States v. Foy*, 28 F.3d 464 (5th Cir.), *cert. denied*, _ U.S. ___, 115 S. Ct. 610, 130 L. Ed. 2d 520 (1994) (holding that the district court's jury charge was not erroneous because "[a]ll

[4] Lackey claims that the court's instructions were improper because the indictment alleged two counts of bribery, whereas he engaged in a single, continuing bribery scheme. However, Lackey also admits that "each payment of a single bribe constitutes a separate offense within the statute." *See United States v. Colacurcio*, 659 F.2d 684, 688 n.4 (5th Cir. Unit A Oct. 1981) (concluding that each of numerous bribes given to officers as part of single scheme to "protect" illegal gambling operation should be counted as separate offenses), *cert. denied*, 455 U.S. 1002, 102 S. Ct. 1635, 71 L. Ed. 2d 869 (1982); *see also United States v. Bernstein*, 533 F.2d 775, 800 (2d Cir.) (holding that payment to appraiser of $350 for seven "top dollar" appraisals at $50 each constituted seven separate acts of bribery), *cert. denied*, 429 U.S. 998, 97 S. Ct. 523, 50 L. Ed. 2d 608 (1976).

of the jury instructions corresponded with the *Fifth Circuit Patterned* [sic] *Jury Instructions*"). Thus, the district court did not commit plain error in failing to provide the jury with additional predisposition and entrapment instructions.

D

Lastly, Lackey claims that the district court erred in its sentencing determinations. We review the factual findings made by the district court at the sentencing hearing for clear error. *United States v. Mimms*, 43 F.3d 217, 220 (5th Cir. 1995). We review the district court's application of the sentencing guidelines *de novo*. *United States v. Palmer*, 31 F.3d 259, 261 (5th Cir. 1994).

Lackey contends that the district court erred in considering an earlier conviction, which ultimately was set aside, in its computation of his criminal history score. Again, however, Lackey failed to raise this issue before the district court. Thus, we review his claim for plain error. *Calverley*, 37 F.3d at 162. Under the version of the United States Sentencing Guidelines in effect at the time of Lackey's sentencing, set-aside convictions were properly included in determining a defendant's sentencing range. *See* United States Sentencing Commission, *Guidelines Manual*, § 4A1.2 cmt. 10 (1987). Thus, the district court did not err in considering Lackey's prior conviction in calculating his criminal history score.

Lackey also claims that the court should have reduced his sentencing range because he accepted responsibility for his

offense. Even when a defendant pleads entrapment, the district court may consider a reduction for acceptance of responsibility under U.S.S.G. § 3E1.1. *United States v. Allibhai*, 939 F.2d 244, 253 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072, 112 S. Ct. 967, 117 L. Ed. 2d 133 (1992). "Because the sentencing judge is in the best position to gauge genuine contrition, `the standard of review under this provision is even more deferential than under the clear error standard.'" *Id.* at 253 (quoting *United States v. Roberson*, 872 F.2d 597, 610 (5th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 175, 107 L. Ed. 2d 131 (1989)). Under the Sentencing Guidelines, a district court should consider a reduction for acceptance of responsibility only if the defendant "clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). Lackey testified at trial that, in his opinion, he never committed bribery. Thus, we conclude that the district court did not err in denying Lackey's request for a sentence reduction based on his acceptance of responsibility.

Lackey further argues that the district court erred in increasing his base offense level by six points because of the amount of loss the IRS incurred as a result of the bribe. The Sentencing Guidelines in effect at the time of Lackey's conviction provided for a six-level increase in a defendant's base offense level if the amount of loss was between $101,000 and $200,000. U.S.S.G. § 2F1.1. The court's determination of the amount of loss for the purposes of sentencing is a question of fact, *Palmer*, 31 F.3d at 261, which the district court answered using the

presentence report, *see United States v. Alfaro*, 919 F.2d 962, 966 (5th Cir. 1990) (holding that presentence report "generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines"). Lackey's client owed the government $142,303 in taxes, penalties, and interest. The falsified report, for which Lackey offered McCall $2900, would have reduced Slaeih's liability to $1,710. Thus, the overall loss to the Government would have been over $100,000.

Lackey claims that the actual amount of loss to the IRS was not over $100,000. However, the commentary to the relevant Sentencing Guidelines provision provides that "if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it was larger than the actual loss." U.S.S.G. § 2F1.1 cmt. 7; *accord United States v. Henderson*, 19 F.3d 917, 927 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 207, 130 L. Ed. 2d 137 (1994). Therefore, we cannot conclude that the district court's finding was clearly erroneous.

III

For the foregoing reasons, we AFFIRM Lackey's conviction for bribery.