IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20615

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AMBROSE ONYE ESOGBUE,
JAMES AARON MARTIN and
KELLY LYN BOOTHE,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-3027-1; 2; 4)

February 13, 1996

Before KING, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Ambrose Onye Esogbue, James Aaron Martin, and Kelly Lyn Boothe appeal their convictions and sentences for conspiracy, wire fraud and money laundering. Finding no error, we affirm.

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

I. BACKGROUND

A. FACTS

James Aaron Martin ("Martin"), Ambrose Onye Esogbue ("Esogbue") and Kelly Lyn Boothe ("Boothe") were participants in a scheme in which they attempted to profit from an investment mechanism known as a "self-liquidating loan." Esogbue testified as to the mechanics of self-liquidating loans. Brokers such as Esogbue would bring together a funding bank and a collateral bank. The funding bank would purchase instruments such as prime bank notes before their maturity dates at a price higher than the notes' current values but lower than their face values; the collateral banks would sell the unmatured notes to the funding banks at less than face value to gain capital. The difference between the funding bank's purchase price and the collateral bank's sales price--known as the "fall out"--would provide payments for the brokers and funds used to support the business ventures presented by investors. The mechanism is called a self-liquidating loan because when the banks purchase the notes, they also purchase the right to receive interest payments before the notes mature. Thus, the money expended to buy a note will be repaid by the interim interest payments and the final principal payment. The participants in the scheme collected fees from investors ostensibly to cover the expense of locating collateral and funding banks and setting up the transactions.

In 1990, Martin started his own loan business in which he found sources of capital for people who failed to receive loans

from traditional sources. Martin held himself out as an attorney, although he was not, and he met with investors to describe self-liquidating loans and collect fees from those who wished to invest. Also in 1990, Boothe formed a credit counseling company with Sam Harrison. When that business proved unsuccessful, Boothe began to procure clients for the self-liquidating loan investments with Martin and, later, on his own. Boothe had learned of the investment mechanism from Ferrell Kimmel ("Kimmel").[1]

Esogbue formed JARE Investment Corporation in 1988, through which he participated in the arbitrage business. In 1990, Esogbue became involved with self-liquidating loans as an agent for the Rothschild Financial House in Luxembourg. Martin would direct persons seeking business loans to Esogbue, who would then seek to put together self-liquidating loan transactions. Martin would send Esogbue fees which he collected from investors to cover the expenses of creating the transactions.

Several investors lost large sums of money that they had entrusted to Martin, Boothe, and Esogbue. Martin, Boothe, Esogbue and Kimmel promised investors large returns on their investments to induce them to provide a commitment fee to cover expenses of structuring the transaction. None of the investors received any return on their investments, nor did they receive a refund of their commitment fees. Bank records reveal that

[1] Kimmel was indicted for his participation in the scheme; however, he is currently a fugitive from justice reported to reside in Switzerland.

Martin, Boothe, Esogbue and Kimmel took the investors' commitment fees and spent them on personal expenses unrelated to the transactions they purported to put together. The following investors testified for the government, and the prosecution was based on their experiences: Steven Overstreet ("Overstreet"), Kevin Pillard ("Pillard"), Alton Liao ("Liao"), and Michael Casey ("Casey").

1. Overstreet

In 1985, Overstreet, an oil field equipment manufacturer turned born-again Christian, sold all of his assets and invested the proceeds in certificates of deposit. Overstreet met Boothe because their wives were related and they attended the same church. Overstreet trusted Boothe because of their family, social and religious association. In October 1990, Boothe interested Overstreet in investing in a business deal by promising that if Overstreet invested $100,000, he could make $110,000 in ten days, and an additional $500,000 in twenty-one weeks.

On October 17, 1990, Overstreet accompanied Boothe to a meeting in Dallas at which Boothe, Kimmel, Joe Johnston, and Martin were present. Martin identified himself as the attorney for Esogbue, who was identified as the mandate agent for Rothschild Bank. After the self-liquidating loan investment was explained, Overstreet agreed to invest $100,000, although he admitted that he did not understand the transaction. Boothe promised Overstreet a total refund if the deal fell through.

Subsequently, Overstreet invested an additional $260,000 with Boothe. Overstreet repeatedly asked Boothe and Martin about the return on his investment, but they explained that the deal was delayed.

The government traced Overstreet's funds through bank records and wire transfers. Martin transferred approximately $207,000 to Esogbue's account; the remainder was used by Martin, Kimmel, and Boothe to pay personal expenses and business expenses unrelated to Overstreet's transaction. Overstreet never saw any return on his investments. He lost a total of $360,000 in the investment scheme.

2. Pillard

In late 1990, Pillard, a general contractor in Hawaii, was seeking $3 million to finance a beach-front development known as the Hilo Project. Pillard met with Kimmel and Martin and agreed to pay a fee to cover expenses they would incur in putting together a $10 million loan transaction for him. Pillard wired $160,000 to Kimmel's bank account; Kimmel subsequently transferred $145,000 to Martin's account, part of which Martin further distributed to Esogbue. Kimmel repeatedly rescheduled closing on the loan, and after he received Pillard's $160,000, he was no longer available when Pillard called. In July 1991, Pillard asked Kimmel by fax to either fund the loan or return his $160,000. In October 1991, Kimmel advised Pillard that Esogbue had Pillard's fee. When Pillard later called Martin and Kimmel, he learned their phones had been disconnected. Pillard called

Esogbue, and Esogbue told Pillard that he was unfamiliar with his transaction. Pillard never received the loan or a refund of his $160,000 fee.

3. Liao

In 1990, Liao, a Plano, Texas businessman, sought funding to purchase a parcel of real estate in Memphis, Tennessee for $1.4 million and to develop a shopping center on the land at a cost of $4.5 million. Liao contacted Martin about a mortgage loan at the suggestion of his business associate, Robert Wilcox. Martin explained the self-liquidating loan to Liao, and promised to deliver either a $4.5 million loan or the refund of Liao's $150,000 commitment fee within thirty days. On November 2, 1990, Liao agreed to the proposal and delivered a $150,000 cashier's check to Martin, which he understood would be used to pay expenses related to the transaction. Martin transferred $82,000 to Esogbue and used the remainder to pay expenses unrelated to Liao's transaction.

Liao's loan had not been funded by December 1990, but Martin explained to Liao that it was merely delayed. Martin told Liao that Esogbue, a "prince" from Nigeria whose family had ties to the Rothschild Bank of France, was putting the deal together. Liao and Wilcox repeatedly contacted Martin about the loan, but Martin told them they were jeopardizing the deal. Martin also told Liao to communicate directly with Esogbue.

Subsequently Martin and Boothe convinced Liao to invest an additional $200,000 with them. Again, this money was to be used

to pay expenses of creating a self-liquidating loan transaction; however, bank records and wire transfers reveal that Martin transferred some of the money to Esogbue, Boothe transferred some of the money to Kimmel, and the remainder was used by Martin and Boothe to pay personal expenses. After Liao repeatedly asked about his investment, Kimmel agreed to repay Liao's money in July 1991; however, it was never refunded. Liao lost a total of $360,000.

4. Casey

In March 1990, Michael Casey, a Massachusetts businessman, contacted Delton Heath about obtaining a $5.5 million loan to buy a double-A baseball franchise and to build a stadium in Binghamton, New York. Heath introduced Casey to Kimmel. Kimmel explained self-liquidating loans, and required Casey to put up $150,000 to cover expenses, which would be returned in full if the transaction failed to close. Kimmel transferred $75,000 of Casey's money to Boothe and made other payments unrelated to Casey's transaction. Casey met Kimmel and Boothe in New York for the first time on January 6, 1992, intending to close the deal. They told him that the transaction had been delayed. Casey's loan transaction never materialized and his $150,000 was never refunded.

B. PROCEDURE

On January 31, 1994, a superseding indictment was entered in the Southern District of Texas, Houston Division, charging

Esogbue, Martin, and Boothe with conspiracy to commit wire fraud and money laundering in violation of 18 U.S.C. § 371 (count one), six counts of wire fraud in violation of 18 U.S.C. §§ 2 and 1343 (counts two through seven), and four counts of money laundering in violation of 18 U.S.C. §§ 2 and 1956(a)(1)(A)(i) (counts eight through eleven). Before trial, the court dismissed counts five and eight upon the government's motion. On April 20, 1994, the verdict was rendered. Esogbue was found guilty of conspiracy under count one, and wire fraud under counts two, three and seven. Boothe was found guilty of conspiracy under count one, wire fraud under counts three, four, and six, and money laundering under counts nine and ten. Martin was found guilty of conspiracy under count one, wire fraud under counts two, three and seven, and money laundering under counts nine and eleven. Boothe filed a motion for new trial on August 8, 1994, which apparently was never ruled on by the district court.

On August 11, 1994, the defendants were sentenced. Martin was sentenced to six concurrent terms of fifty-seven months imprisonment and three years of supervised release, ordered to pay $1,205,000 in restitution, and assessed $300. Esogbue was sentenced to four concurrent terms of thirty-seven months imprisonment and three years of supervised release, ordered to pay $980,000 in restitution, and assessed $200. Boothe was sentenced to six concurrent terms of fifty-seven months imprisonment and three years supervised release, ordered to pay $1,180,000 in restitution, and assessed $300. After judgment was

entered, Esogbue, Martin, and Boothe each filed a notice of appeal to this court.

II. DISCUSSION

A. JURISDICTION OVER BOOTHE'S APPEAL

The first issue that we must address is whether this court has jurisdiction over Boothe's appeal. Federal Rule of Appellate Procedure 4(b) governs the timeliness of an appeal in a criminal case. Rule 4(b) states in pertinent part:

> If a defendant makes a timely motion [for a new trial], an appeal from a judgment of conviction must be taken within 10 days after the entry of the order disposing of the last such motion outstanding, or within 10 days after the entry of the judgment of conviction, whichever is later. . . . A notice of appeal filed after a court announces a decision, sentence, or order, but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later.

Fed. R. App. P. 4(b) (1995) (emphasis added).

On August 8, 1994, Boothe filed a motion for new trial under Federal Rule of Criminal Procedure 33. Boothe then filed a notice of appeal of his conviction and sentence on August 22, 1994. The district court entered judgment on September 12, 1994. However, the district court has not yet ruled on Boothe's motion for new trial. Under rule 4(b), Boothe's notice of appeal is ineffective until the date of the entry of the order disposing of his motion for new trial. See United States v. Garrison, 963 F.2d 1462, 1465-66 (11th Cir.) (holding that notice of appeal is effective despite the pendency of a motion for new trial, but

noting that the appeal should be held in abeyance until the disposition of all motions in the district court), cert. denied, 113 S. Ct. 393 (1992); United States v. Varah, 952 F.2d 1181, 1183 (10th Cir. 1991) (holding that "when a defendant files a motion that tolls the time for appeal, the motion holds the notice in abeyance and the notice becomes effective upon disposition of the motion"); see also United States v. Greenwood, 974 F.2d 1449, 1468 n.16 (5th Cir. 1992) (citing Garrison and Varah with approval). Because Boothe's notice of appeal is not effective until the district court disposes of his motion for new trial, consideration of Boothe's appeal would be premature.

Therefore, we remand Boothe's case to the district court for the limited purpose of allowing it to consider and rule upon Boothe's pending motion for new trial. At the conclusion of such proceedings, a supplemental record shall be filed in this court.

Accordingly, the remainder of this opinion shall address only issues raised in the appellate briefs of Martin and Esogbue.

B. VOIR DIRE

Martin argues that the district court abused its discretion by improperly restricting his attorney's voir dire of the jury panel. During voir dire, the district court interrupted Martin's counsel, asking her to rephrase her questions or disallowing questions. First, Martin's counsel asked the jurors: "is there any kind of case, because of some situation in your life, that you think you would not be a good juror on." The court required

Martin's counsel to rephrase the question and relate it to the facts of the present case. She did so, and one panel member raised her hand, but the court reserved further questioning of that panel member for later.[2] The court also refused to allow the jurors to share "an example of when [they] were accused of doing something they really didn't do," or "what the saying `innocent until proven guilty' means to them," in response to Martin's counsel's questions. Finally, the court disallowed the question, "if it were up to you, would you have the government prove defendants guilty or would you have the person prove that they are innocent." Martin contends that the court's interruptions and limitations on voir dire impaired his ability to intelligently exercise his challenges, and that such error is reversible without prejudice.

The district court has broad discretion in conducting voir dire, and we review the court's decisions regarding the conduct and scope of voir dire under an abuse of discretion standard. United States v. Shannon, 21 F.3d 77, 82 (5th Cir.), cert. denied, 115 S. Ct. 260 (1994); United States v. Rodriguez, 993 F.2d 1170, 1176 (5th Cir. 1993), cert. denied, 114 S. Ct. 1547 (1994). "An abuse of discretion will be found when there is insufficient questioning to produce some basis for defense counsel to exercise a reasonably knowledgeable right of challenge." Shannon, 21 F.3d at 82. The impairment of the right

[2] When the panel member was later questioned further at the bench, no challenge was made.

to exercise peremptory challenges is reversible without a showing of prejudice. Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991).

We conclude that the district court did not abuse its discretion in limiting Martin's counsel's voir dire. The district court questioned the jury panel as to whether they could be fair and impartial, described the nature of the crime charged, and explained the burden of proof and the presumption of innocence. Martin's counsel's questions about the burden of proof were therefore repetitive of the court's voir dire. Furthermore, the jury was examined by the attorneys on several issues pertinent to the case. The jurors were questioned concerning, among other things, their experiences with loans, risky investments, law enforcement, and lawsuits. Thus, Martin's counsel did obtain useful information with which to exercise peremptory challenges. The fact that Martin's counsel was prevented from asking three or four specific questions of the panel did not render the trial fundamentally unfair. See Williams v. Collins, 16 F.3d 626, 636 (5th Cir.), cert. denied, 115 S. Ct. 42 (1994) ("Defense counsel's failure to obtain two specific answers, moreover, given an otherwise thorough voir dire examination, was not such a critical deficiency in the trial as to deprive [the defendant] of fundamental fairness in the exercise of peremptory strikes.").

C. DISTRICT COURT'S QUESTIONING OF WITNESSES

Martin next argues that the district court abused its discretion by improperly questioning witnesses, and that, by doing so, the court acted as an advocate for the government. Esogbue adopts his co-appellant's argument. Martin contends that the district judge's questions indicated to the jury that the judge believed that Martin was guilty, citing excerpts from the record in which the court did the following: (1) questioned Overstreet regarding his knowledge of whether Martin invested his own money in self-liquidating loans; (2) questioned Esogbue and Liao about Martin's attendance at law school; (3) asked Liao about Martin's association with Kimmel; (4) asked Sam Harrison, "Did you think there was anything fishy going on at that time?"; and (5) asked Liao if in dealing with Martin he "smelled a rat."

This circuit has described the role of a trial judge as follows:

> [T]he trial judge has a duty to conduct the trial carefully, patiently, and impartially. He must be above even the appearance of being partial to the prosecution. On the other hand, a federal judge is not a mere moderator of proceedings. He is a common law judge . . . . He may comment on the evidence, may question witnesses and elicit facts not yet adduced or clarify those previously presented, and may maintain the pace of trial by interrupting or cutting off counsel as a matter of discretion. Only when the judge's conduct strays from neutrality is the defendant thereby denied a constitutionally fair trial.

United States v. Carpenter, 776 F.2d 1291, 1294 (5th Cir. 1985) (quoting Moore v. United States, 598 F.2d 439, 442 (5th Cir. 1979)). In determining whether the trial court maintained a neutral position in its conduct before the jury, we must examine

the record as a whole. Carpenter, 776 F.2d at 1294. Furthermore, because no objection was made to the court's comments by any defense counsel, we review this claim for plain error. United States v. Puig-Infante, 19 F.3d 929, 950 (5th Cir.), cert. denied, 115 S. Ct. 180 (1994). "Plain error occurs when the error is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings and would result in manifest injustice." Id.

After reviewing the entire record, we conclude that the district judge's questioning of witnesses was not improper. The record as a whole demonstrates that the district judge maintained a neutral position throughout the trial. His questions to witnesses were merely intended to assist the jury in understanding a complex factual scenario. In asking these questions, the district judge did not act as an advocate for the government. He elicited answers from witnesses on many occasions other than those referenced in Martin's brief. Some of the judge's questions could be construed as helpful to the defendants; others as helpful to the prosecution.

In the alternative, we hold that any impropriety in the district court's questioning did not rise to the level of plain error. The district judge's questions were interspersed throughout the testimony of several witnesses. The district judge's questions generally did not veer from the line of questioning started by the attorney questioning that witness at

the time. Taken in context, it would have been obvious to the jury that the district court's purpose in asking questions was to clarify the witness's answer to the attorney's previous question or line of questioning. Moreover, the effect of any improper questioning was lessened by the court's instructions to the jury to disregard anything it may have said other than instructions on the law, and that the jury was not to assume by the court's comments that it had any opinion on any issue in this case. See Puig-Infante, 19 F.3d at 950; Carpenter, 776 F.2d at 1295; United States v. Gonzales, 700 F.2d 196, 204 (5th Cir. 1983). In sum, the district judge's questioning did not deny Martin or Esogbue a fundamentally fair trial.

D. EXCLUSION OF WITNESS'S PRIOR CRIMINAL RECORD

Martin and Esogbue also allege that the district court erred in excluding from evidence Overstreet's prior criminal conviction. They argue that the court abused its discretion by not applying the exception to the overage conviction rule for convictions whose probative value substantially outweighs any prejudice. Additionally, they contend that the exclusion of Overstreet's conviction violated their Sixth Amendment Confrontation Clause rights.

Overstreet, one of the victims of the scheme, testified on behalf of the government as its first witness. On direct examination, the government questioned Overstreet about his 1985 religious conversion and strong relationship to his church,

attempting to demonstrate that Overstreet had strong personal reasons for trusting Boothe, a minister in Overstreet's church. The defendants sought to impeach his testimony on cross-examination by questioning Overstreet about a 1966 burglary conviction. The defendants argue that they needed the prior conviction to "show a different side of Overstreet than the religious devotion portrayed by the government." Because the conviction was over ten years old, the district court ruled that it was inadmissible under Federal Rule of Evidence 609.

We review the district court's rulings on the admissibility of evidence for abuse of discretion. United States v. McAfee, 8 F.3d 1010, 1017 (5th Cir. 1993); United States v. Jardina, 747 F.2d 945, 950 (5th Cir. 1984), cert. denied, 470 U.S. 1058 (1985). "Federal Rule of Evidence 609(a) allows a witness's credibility to be impeached by evidence of prior convictions punishable by death or imprisonment in excess of one year, provided the court determines that the probative value of the evidence outweighs its prejudicial effect." Fed. R. Evid. 609; United States v. Estes, 994 F.2d 147, 148 (5th Cir. 1993); United States v. Turner, 960 F.2d 461, 465 (5th Cir. 1992). In determining whether an erroneous admission of evidence is harmless error, we must decide whether the inadmissible evidence actually contributed to the jury's verdict; we will not reverse unless the evidence had a substantial impact on the verdict. United States v. Gadison, 8 F.3d 186, 192 (5th Cir. 1993).

"Federal Rule of Evidence 609(b) provides that evidence of such convictions is not admissible if the conviction is more than ten years old, unless the court determines that the probative value of the conviction substantially outweighs the prejudicial effect." Estes, 994 F.2d at 148; United States v. Cathey, 591 F.2d 268, 274-75 (5th Cir. 1979). We have interpreted Rule 609(b) to mean that "the probative value of a conviction over ten years old is outweighed by its prejudicial effect. Estes, 994 F.2d at 149. Overstreet's burglary conviction, entered in 1966, was well over ten years old at the time of trial; therefore, it was presumptively inadmissible.

The defendants additionally argue that, even if the district court properly applied the Federal Rules of Evidence, the exclusion of Overstreet's burglary conviction violated their Sixth Amendment rights to confront the witnesses against them. "The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to cross-examine the witnesses arrayed against him." United States v. Pace, 10 F.3d 1106, 1113 (5th Cir. 1993). However, the Sixth Amendment does not guarantee that defendants may cross-examine adverse witnesses "in whatever way and to whatever extent the defense may wish." United States v. Wallace, 32 F.3d 921, 926 (5th Cir. 1994). Alleged violations of the Confrontation Clause are subject to harmless error analysis. United States v. McCormick, 54 F.3d 214, 219 (5th Cir. 1995).

We need not decide whether the district court abused its discretion by finding that the probative value of this almost 28-year-old conviction did not substantially outweighed its prejudicial effect. Nor need we decide whether the exclusion of the conviction violated the defendants Confrontation Clause rights. Rather, we conclude that any such error was harmless. Even if Overstreet's 1966 conviction had been admitted, and the jury had entirely discredited Overstreet's testimony, other evidence was presented corroborating Overstreet's testimony which the jury could have believed, including documentary evidence and the testimony of Sam Harrison. Furthermore, the defendants were able to thoroughly challenge Overstreet on cross-examination regarding every aspect of his direct testimony, including his relationship with his church and his reasons for trusting Boothe. Accordingly, we hold that if the district court abused its discretion or violated Martin's and Esogbue's Confrontation Clause rights by excluding Overstreet's 1966 burglary conviction, such error was harmless.

E. SUFFICIENCY OF THE EVIDENCE

Martin and Esogbue additionally contend that there was insufficient evidence to support their convictions. The scope of our review of the sufficiency of the evidence after conviction by a jury is narrow. We must affirm if a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. United States v. Mergerson, 4 F.3d 337, 341

(5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994). We must consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 500 U.S. 936 (1991). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. Id. at 254. On the other hand, if the evidence, viewed in the light most favorable to the prosecution, gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, we must reverse the conviction. United States v. Sanchez, 961 F.2d 1169, 1173 (5th Cir.), cert. denied, 113 S. Ct. 330 (1992).

1. Conspiracy

Esogbue and Martin were both convicted, under count one, of conspiracy to commit wire fraud and money laundering in violation of 18 U.S.C. § 371.[3] To prove a conspiracy, the government must demonstrate: (1) an agreement between two or more persons to violate the law; (2) that the defendant had knowledge of the

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[3] Section 371 provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. . . .

18 U.S.C. § 371 (Supp. 1995).

agreement; and (3) that the defendant voluntarily participated in the conspiracy. United States v. Casilla, 20 F.3d 600, 603 (5th Cir.), cert. denied, 115 S. Ct. 240 (1994). The jury may infer an agreement from circumstantial evidence. United States v. Chavez, 947 F.2d 742, 745 (5th Cir. 1991). Both Martin and Esogbue contend that the government failed to prove that they entered an agreement with the intent to defraud.

The jury could have reasonably inferred from the evidence that Martin and Esogbue were knowing participants in a scheme to defraud investors and borrowers. The evidence demonstrates that Martin, Boothe and Kimmel met with prospective investors and borrowers such as Overstreet, Pillard and Liao and promised either great returns on their investment or large loans for projects presented by the borrowers. Overstreet, Pillard, and Liao testified that they were persuaded by these representations to pay commitment fees to Martin, Kimmel and Boothe ranging from $100,000 to $150,000 per transaction. Martin and the others falsely represented that the commitment fees would be used only to pay expenses directly related to the transaction and would be refunded if the deals fell through. However, the evidence showed that Martin, Esogbue and the others used the commitment fees to pay personal expenses unrelated to the loan transactions, and spent these funds almost immediately upon receipt. The evidence also demonstrated that Martin, Esogbue, Kimmel and Boothe, by facsimile, telephone conversation, and personal meeting, repeatedly assured the investors and borrowers that their money

would be forthcoming, explained the absence of funding as mere delays, and convinced the investors and borrowers to hold out for additional time. No investor ever received a profit from his investment, no loan promised was ever funded and no investor or borrower was reimbursed his commitment fee. The fact that none of the investments or loan deals advanced by the defendants ever resulted in financial benefit to the victims is evidence of Martin's and Esogbue's intent to defraud the victims. See United States v. Aggarwal, 17 F.3d 737, 741 (5th Cir. 1994) (specific intent to defraud can be inferred from evidence that none of the victims ever received the promised return). From this evidence, the jury could have inferred that Martin entered an agreement with the other defendants to defraud the investors.

Although Esogbue never met personally with investors, Martin represented Esogbue to the investors as the mandate agent responsible for structuring the transactions. The evidence also showed that a portion of each commitment fee was transferred to Esogbue, and that Esogbue used this money immediately to pay expenses unrelated to the transaction at hand. From the evidence that Esogbue was represented as working on these transactions, and that he received and spent the money provided by the investors, the jury could also have inferred that Esogbue knowingly participated in the scheme to defraud.

Therefore, the evidence is sufficient to support Martin's and Esogbue's convictions for conspiracy.

2. Wire Fraud

Martin and Esogbue were convicted of three counts of aiding and abetting wire fraud in violation of 18 U.S.C. §§ 2[4] and 1343[5]--count two (a wire transfer of $160,000 from Pillard's account to Kimmel's Champion Financial Corporation ("CFC") account at Ameriway Bank on April 12, 1991), count three (a wire transfer of $190,000 from Alton Liao to CFC on May 24, 1991), and count seven (a facsimile communication from Pillard to Kimmel on July 26, 1991, confirming a telephone conversation which indicated that Esogbue would reveal his identity to ensure Pillard that the loan would go through).

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[4] Section 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (1969).

[5] Section 1343 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 (Supp. 1995).

A person who aids or abets the commission of a crime is punishable as a principal. 18 U.S.C. § 2. To prove aiding and abetting, the government must show that the defendant: (1) associated with the criminal venture; (2) participated in the venture; and (3) sought by action to make the venture succeed. United States v. Laury, 49 F.3d 145, 151 (5th Cir.), cert. denied, 116 S. Ct. 162 (1995); Chavez, 947 F.2d at 746. "[T]he same evidence will [usually] support both a conspiracy and an aiding and abetting conviction." Chavez, 947 F.2d at 746.

To establish that a defendant committed wire fraud in violation of 18 U.S.C. § 1343, the government must prove that the defendant (1) used or caused the use of wire communications (2) in furtherance of a scheme to defraud. United States v. Ragan, 24 F.3d 657, 659 (5th Cir. 1994); United States v. Dula, 989 F.2d 772, 778 (5th Cir. 1992), cert. denied, 114 S. Ct. 172 (1993).

Esogbue again contends that the government failed to prove that he had the intent to defraud. Martin argues that he did not participate in the wire transfers in counts two, three, or the facsimile communication in count seven; rather, that Pillard communicated primarily with Kimmel, and that Liao communicated primarily with Boothe. However, "[o]nce membership in a scheme to defraud is established, a knowing participant is liable for any wire communication which subsequently takes place or which previously took place in connection with the scheme." Dula, 989 F.2d at 774. The government need not show that Martin or Esogbue personally caused the wire transfers or facsimile communication

to support the wire fraud convictions; rather, the government must show that wire communications were used in furtherance of a scheme to defraud and that Martin and Esogbue participated in the scheme to defraud.

Martin's and Esogbue's involvement in the overall scheme to defraud investors was established by the evidence discussed in reference to count one. In addition, with respect to counts two and seven, the evidence clearly demonstrates that wire communications were used in a scheme to defraud Pillard--he was induced to transfer by wire $160,000 to Kimmel. When Pillard expressed concern that the deal was not legitimate or would not go through, he was persuaded not to give up by Kimmel's promise over the telephone that Esogbue would reveal his identity to renew Pillard's confidence; Pillard confirmed this promise by facsimile communication. The evidence further demonstrates that Martin and Kimmel used deception to induce Pillard to provide funds. Part of the deception involved the explanation that the funding for the loan was coming from JARE Investments, a company owned by Esogbue, and a commitment letter that Pillard received by fax which stated that Martin would be handling the closing. Esogbue's involvement in defrauding Pillard is further established by bank records which show that he received a portion of the funds wired by Pillard to Kimmel. Martin spoke with Pillard by phone and encouraged him to send the money to cover the expenses of setting up the loan. Part of the money received by Kimmel from Pillard was transferred to Martin and Esogbue, who

used the money for expenses unrelated to procuring a loan for Pillard.

With respect to count three, the bank records introduced into evidence clearly establish that Liao wire transferred $190,000 to Kimmel's CFC account after being persuaded by Martin that if he provided this money for expenses, Martin could find funding for a $4.5 million loan. Martin falsely represented to Liao that he was an attorney, and stated that he was paid by the funding party--which he represented to be Esogbue. Martin estimated in a written agreement that the expenses needed to set up the transaction, and to be taken out of the "retainer" provided by Liao, would approximate $20,000. Martin sent a copy of this agreement to Esogbue. Later on, Martin, Boothe and Kimmel persuaded Liao to invest more money with them, including the $190,000 that was wire transferred to Kimmel's CFC account. These funds were distributed to Martin and Esogbue. Because of the earlier letter, Esogbue knew that these funds were only to be spent on expenses necessary to Liao's transaction. However, Esogbue, like Martin, used these funds to cover personal and unrelated expenses.

The evidence demonstrates that the wire communications in counts two, three and seven were made in furtherance of a scheme to defraud and that Martin and Esogbue participated in the scheme to defraud. Therefore, the evidence is sufficient to support Martin's and Esogbue's convictions for wire fraud under counts two, three, and seven.

3. Money Laundering

Martin was also convicted for two counts of aiding and abetting money laundering in violation of 18 U.S.C. §§ 2 and 1956(a)(1)(A)(i)[6]--count nine (a wire transfer of $10,000 from Kimmel's CFC account to Jerry Layne on May 30, 1991) and count eleven (a transfer of $1000 from the CFC account to Ben Doyle on April 15, 1991).

To convict a defendant of money laundering, the government must prove that the defendant: "(1) knew that the property involved in a financial transaction represented the proceeds of unlawful activity; (2) conducted or attempted to conduct a financial transaction which in fact involved the proceeds of specified unlawful activity; and (3) did so with the intent to promote the carrying on of the unlawful activity." United States v. Restive, 8 F.3d 274, 280 (5th Cir. 1993) (citing 18 U.S.C. § 1956(a)(1)(A)(i)), cert. denied, 115 S. Ct. 54 (1994). Again, to prove aiding and abetting, the government must show that the defendant: (1) associated with the criminal venture; (2)

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[6] Section 1956 provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity;
>
> . . . shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(1)(A)(i) (Supp. 1995).

participated in the venture; and (3) sought by action to make the venture succeed. Laury, 49 F.3d at 151; Chavez, 947 F.2d at 746. "[T]he same evidence will [usually] support both a conspiracy and an aiding and abetting conviction." Chavez, 947 F.2d at 746.

Martin's conviction for money laundering under count nine involved a wire transfer of $10,000 from Kimmel's CFC account to Jerry Layne on May 30, 1991. Bank records demonstrated that on May 24, 1991, Liao wired $190,000 to Kimmel's CFC account--the basis of Martin's and Esogbue's convictions for wire fraud under count three. After this money was deposited, Kimmel transferred $10,000 of it from the CFC account to Jerry Layne on May 30, 1991. Thus, the money transferred to Jerry Layne constituted proceeds of the scheme to defraud Liao. Jerry Layne had met with Liao, while Kimmel purportedly was in New York to complete the transaction. Layne was supposed to help Liao keep in touch with Boothe and Kimmel. A jury could reasonably infer that the $10,000 payment to Layne was in return for his services in keeping Liao interested in the deal--thus, the payment was made in furtherance of the scheme to defraud. Thus, the evidence was sufficient to support Martin's conviction for money laundering under count nine.

Martin's conviction for money laundering under count eleven involved a wire transfer of $1,000 to Ben Doyle ("Doyle") from Kimmel's CFC account on April 15, 1991. Ben Doyle had faxed a letter of reference for Kimmel to Pillard, falsely representing that he had secured a loan through Kimmel. Doyle also told

Pillard over the telephone that he had received a $1.3 million loan through Kimmel for his employee leasing business. After Pillard received these assurances, he met with Kimmel at Martin's office to discuss a possible transaction. Kimmel represented to Pillard that Martin was the attorney who would handle the transaction. On April 12, 1991, Pillard deposited $160,000 into Kimmel's CFC account. Soon after, Kimmel transferred $1,000 from this account to Doyle. The money used to make the payment to Doyle constituted proceeds of the scheme to defraud Pillard, in which Martin had participated. Because Doyle had falsely represented to Pillard that he had successfully completed a loan transaction with Kimmel, the jury could reasonably infer that the $1,000 payment to Doyle was in return for Doyle's assistance in inducing Pillard to invest--therefore the payment was in furtherance of the scheme to defraud. Therefore, the evidence was sufficient to support Martin's conviction for money laundering under count eleven.

F. SENTENCING

1. Esogbue's Relevant Conduct

Esogbue argues that the district court erred in determining that he was responsible for losses totalling $980,000.

A sentencing court's factual findings must be supported by a preponderance of the evidence, and we review such findings under the clearly erroneous standard. United States v. McCaskey, 9 F.3d 368, 372 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565

(1994). The sentencing court's interpretations of the guidelines, being conclusions of law, are reviewed de novo. McCaskey, 9 F.3d at 372.

The district court's determination of what constitutes relevant conduct for sentencing purposes is subject to the "clearly erroneous" standard of review. United States v. Lokey, 945 F.2d 825, 839 (5th Cir. 1991). Relevant conduct for conspiratorial activity includes all reasonably foreseeable acts of others in furtherance of jointly undertaken criminal activity. U.S.S.G. § 1B1.3(a)(1)(B); United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994). "The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level . . . ." U.S.S.G. § 2F1.1, commentary, n.6. "[T]he loss need not be determined with precision. The court need only make a reasonable estimate of the loss . . . for example, [such estimate] may be based on the approximate number of victims and an estimate of the average loss to each victim." Id. n.8; see United States v. Hill, 42 F.3d 914, 919 (5th Cir. 1995).

The district court, adopting the findings of the Presentence Report ("PSR"), found that the total loss attributable to Esogbue was $980,000, resulting in a sentence of thirty-seven months pursuant to U.S.S.G. § 2F1.1(J). The PSR determined the following individual losses for each of the victims: Overstreet ($360,000), Liao ($375,000), Pate ($160,000), Pillard ($160,000), and Casey ($150,000), totalling $1,205,000. The PSR held Esogbue

responsible only for $980,000, as the amount of loss with which Esogbue was directly involved. In answer to objections, the probation officer revealed that he did not include in his calculation of Esogbue's relevant conduct the following losses: (1) Overstreet's $50,000 payment to Boothe on March 1, 1991; (2) $25,000 of Liao's $375,000 loss, because Martin paid this amount to the IRS; and (3) Casey's $150,000 loss. The $980,000 figure comes from the exclusion of these three items from the total cumulative loss of all the victims.

In adopting the PSR, the district court made a reasonable estimate of the total loss attributable to Esogbue as relevant conduct for purposes of determining his sentence. Under count one of the indictment, Esogbue was convicted of conspiring with Martin, Boothe and Kimmel to commit wire fraud and money laundering by inducing individuals, including but not limited to Overstreet and Liao, to invest funds with them and falsely representing that these investments would provide quick and large returns. The evidence at trial demonstrated Esogbue's involvement with Overstreet, Pillard and Liao. Even if Esogbue was only held responsible for these individuals' losses, their combined losses total $895,000. Therefore, $980,000 is a reasonable estimate of the total losses which can be attributed to Esogbue, based on his conspiracy conviction and the evidence related specifically to Esogbue.

2. Restitution

Esogbue additionally argues that the district court erred in ordering him to pay restitution on losses resulting from conduct that was beyond the specific offenses for which he was convicted.

A district court can order restitution only for the loss caused by the specific conduct that is the basis of the offense of conviction. Hughey v. United States, 495 U.S. 411, 413 (1990). The district court's inclusion of all losses caused by a scheme to defraud satisfies the Hughey requirement when the scheme is specifically defined in the indictment. United States v. Stouffer, 986 F.2d 916, 927 (5th Cir.), cert. denied, 114 S. Ct. 115 (1993); see also United States v. Pepper, 51 F.3d 469, 473 (5th Cir. 1995) (where the scheme to defraud is specifically described in the indictment, the district court can award restitution to victims not named in the indictment). Because Esogbue was convicted of conspiracy to commit wire fraud and money laundering, and because the scope and duration of the conspiracy were sufficiently delineated in the indictment, the district court did not err in holding Esogbue responsible for restitution of $980,000, to be divided among all the victims of the conspiracy and representing their cumulative losses. The district court's restitution order was not clearly erroneous because it was based on the total losses caused by the entire scheme as defined in the indictment--a conspiracy to commit wire fraud and money laundering occurring from on or about October 1, 1990, until on or about August 30, 1992, and during which several victims, including but not limited to Overstreet and Liao, were

defrauded. The $980,000 is a reasonable estimate of the cumulative losses of all of the victims of the scheme to defraud. As Esogbue was convicted on the conspiracy account, the district court's restitution order was not erroneous.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the convictions and sentences of Martin and Esogbue. We REMAND Boothe's case to the district court with instructions to rule on Boothe's motion for new trial within thirty days after the issuance of our mandate. AFFIRMED in part, REMANDED in part.