UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20957

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CRAIG JONATHAN BERRY,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-94-0119-2)

October 31, 1995

Before HIGGINBOTHAM, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant Craig Jonathan Berry appeals his conviction for conspiracy, mail fraud, and wire fraud, in violation of 18 U.S.C. §§ 371, 1341 and 1343. Finding no reversible error, we affirm.

I

Berry operated a telemarketing loan scheme which was designed to induce individuals with poor credit to submit application fees for "preaccepted" loans. The telemarketing scheme operated out of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

several different "loan rooms" set up to solicit customers. Berry attempted to conceal his involvement by instructing associates to deny all knowledge of him and by not allowing his name to be used in connection with any of the loan rooms. The telemarketers were instructed to tell the callers that they had been "accepted" by the lender and would have to send in an application fee of up to $295 by a certain deadline. No loans were ever provided.

Berry had also previously been involved with two other advance-fee loan operations that were investigated by the Consumer Protection Division of the Texas Attorney General's Office because of numerous complaints. The Attorney General's Office eventually obtained an injunction against these two loan operations, and Berry signed an agreement precluding him from participating in the further operation of any advance-fee loan businesses.

A jury convicted Berry on all counts of conspiracy, mail fraud and wire fraud. He was sentenced to forty-six months in prison and a three-year term of supervised release, and ordered to pay over $176,000 in restitution to the victims of the fraud. Berry now appeals, alleging that the district court erred in admitting evidence of his prior involvement with the two loan operations that were shut down by the injunction.

II

Berry contends that evidence of the Texas Attorney General's Office investigation and the resulting injunction was inadmissible

under FED. R. EVID. 404(b).[1] Rule 404(b) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

FED. R. EVID. 404(b). We have held that evidence is admissible under Rule 404(b) if "(1) it is relevant to an issue other than the defendant's character, and (2) the probative value of the evidence substantially outweighs the undue prejudice." *United States v. White*, 972 F.2d 590, 599 (5th Cir. 1992), *cert. denied*,___ U.S. ___, 113 S. Ct. 1652, 123 L. Ed. 2d 272 (1993); *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S. Ct. 1244, 59 L. Ed. 2d 472 (1979).

Because Berry failed to properly object at trial under Rule 404(b) to the admission of this evidence,[2] we review only for plain error. FED. R. CRIM. P. 52(b). We correct forfeited errors only where they are "clear" or "obvious" and "affect substantial rights." *United States v. Olano*, ___ U.S. ___, ___, 113 S. Ct. 1770, 1776-79, 131 L. Ed. 2d 508 (1993); *United States v. Caverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), *cert. denied*, ___

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[1] Although Berry's "Statement of Issue" asserts that the evidence was admitted in violation of FED. R. EVID. 401 and 403, he fails to present any argument regarding these two rules in the body of his brief. Because issues must be briefed in order to be preserved, we decline to address the alleged Rule 401 and 403 violations. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993).

[2] Prior to trial, Berry moved for a general preclusion order under Rule 404(b) in a motion in limine which was denied for untimeliness. We have held that a motion in limine is not alone sufficient to preserve an issue for review. *See Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988) ("A party whose motion in limine is overruled must renew his objection when the evidence is about to be introduced at trial.").

U.S. ___, 115 S. Ct. 1266, 131 L. Ed. 2d 145 (1995). Even where these factors are established, we will not exercise our discretion to correct the forfeited error unless it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Olano*, ___ U.S. at ___, 113 S. Ct. at 1776; *Caverley*, 37 F.3d at 162.

Berry argues that the evidence of the investigation and injunction was not relevant to prove intent because his defense was based on the assertion that he did not commit the acts alleged in the indictment. Berry did not, however, remove the issue of intent by enforceable stipulation. *See United States v. Scott*, 48 F.3d 1389, 1396 (5th Cir. 1995) (holding there was no abuse of discretion where the defendant did not offer to stipulate intent until after both parties had rested), *cert. denied*, 1995 WL 509143 (Oct. 2, 1995); *United States v. Gordon*, 780 F.2d 1165, 1174 (5th Cir. 1986) ("Only when the defendant affirmatively takes the issue of intent out of the case is he entitled to an exclusion of the evidence."). In this case, the evidence was relevant to prove Berry's intent and to explain why he went to extra lengths to avoid having his name used in connection with any of the telemarketing businesses. Further, the district court gave a limiting instruction in the general jury charge, thereby diminishing the likelihood of undue prejudice. *See Scott*, 48 F.3d at 1396-97. Because the evidence was relevant to Berry's intent and because its probative value substantially outweighed any undue prejudice, we find that admitting the evidence under Rule 404(b) was not error.

III

For the foregoing reasons, we AFFIRM.