IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 94-50237
Summary Calendar

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

RAY MENN, Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(A-93-CR-168)

(May 29, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM*:

Ray Menn ("Menn") was convicted after a jury trial of two counts of wire fraud, one count of conspiracy to misapply savings association funds and six counts of misapplication of savings association funds. At sentencing, he received nine concurrent sixty-month terms of incarceration, a five-year term of supervised release, a $450 special assessment and was ordered to pay $40,000 in restitution. He appeals his conviction and sentence. We affirm.

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Menn contends that the district court misapplied the Sentencing Guidelines because it "double counted" when it added two points to his criminal history category pursuant to U.S.S.G. § 4A1.1(d), which authorizes the addition of two points if a defendant committed the underlying offense while on probation or parole, and also departed upwardly based, at least in part, on Menn's prior criminal record.

The Sentencing Guidelines do not prohibit all double counting. *United States v. Godfrey*, 25 F.3d 263, 264 (5th Cir.), *cert. denied*, ___U.S.___, 115 S.Ct. 429, 130 L.Ed.2d 342 (1994). Double counting is prohibited only if the particular guideline at issue specifically forbids it. *Id.*; *United States v. Box*, 50 F.3d 345, ___, No. 93-1674, slip op. at 3384 (5th Cir. 1995). Assuming the complained of action constitutes double counting, Menn fails to identify anything in the Guidelines that would prohibit double counting. Moreover, we have not found any language in the applicable Guidelines prohibiting the district court's consideration of both the time in which Menn committed the instant offense (*i.e.*, during his probation) and the offense itself for which he was sentenced to probation.[2] No impermissible double counting has been shown.

Aside from the "double counting" argument, Menn appears to

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[2] *See also United States v. Starr*, 971 F.2d 357, 361 (9th Cir. 1992); *United States v. Stephenson*, 924 F.2d 753, 759 (8th Cir.), *cert. denied*, ___U.S.___, 112 S.Ct. 63, 116 L.Ed.2d 39 and ___U.S.___, 112 S.Ct. 321, 116 L.Ed.2d 262 (1991).

argue that the district court's upward departure resulted from a blanket misapplication of the Guidelines. A departure under § 4A1.3 is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. *See* U.S.S.G § 4A1.3, p.s. Repeated acts of similar criminal activity are an acceptable basis for departure because they may indicate the defendant's lack of recognition of the gravity of the original wrong. *United States v. Medina-Gutierrez*, 980 F.2d 980, 984 (5th Cir. 1992). The inadequacy of a defendant's criminal history category is an acceptable basis for departure.

The district court specifically stated that Menn had "no remorse" about the crimes he committed, that it did not appear that there was "any likelihood of [Menn] stopping the kind of con-artistry that [he is] capable of," and that there was "absolutely nothing to show any likelihood that [Menn was] going to stop [his] activities." The district court did not misapply the Guidelines.

II.

Menn next contends that he did not receive a *Burns*[3] notice that the district court intended to depart upwardly and thus "was not given an opportunity to prepare legal and equitable arguments." He failed so to object in the district court.

When a defendant forfeits an error by failing to object, we may remedy the error only in the most exceptional case. *United*

[3] *United States v. Burns*, 501 U.S. 129, 138, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991).

States v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994) (*en banc*), *cert. denied*, ___U.S.___, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995). The Supreme Court has directed the courts of appeals to determine whether a case is exceptional by using a two-part analysis. *United States v. Olano*, ___U.S.___, 113 S.Ct. 1770, 1777-79, 123 L.Ed.2d 508 (1993). First, an appellant must show that there is actually an error, that it is plain, and that it affects substantial rights. *Id.* at 1777-78; *United States v. Rodriguez*, 15 F.3d 408, 414-15 (5th Cir. 1994); FED. R. CRIM. P. 52(b). Plain error is one that is "clear or obvious, and, at a minimum, contemplates an error which was clear under current law at the time of trial." *Calverley*, 37 F.3d at 162-63 (internal quotation and citation omitted).

Second, even when the appellant carries his burden, "Rule 52(b) is permissive, not mandatory. If the forfeited error is `plain' and `affect[s] substantial rights,' the Court of Appeals has authority to order correction, but is not required to do so." *Olano*, 113 S.Ct. at 1778 (quoting FED. R. CRIM. P. 52(b)).

The Presentence Investigation Report ("PSR") specifically noted that an upward departure might be warranted under § 4A1.3 because Menn's criminal history category did not adequately reflect the seriousness of his past criminal conduct nor the likelihood that he would engage in future crimes. Menn did not object to that portion of the PSR. The grounds were clearly identified in the PSR as factors the district court "may consider" in determining whether an upward departure was warranted. Therefore, we find that Menn received adequate notice in the PSR of the district court's intent

to depart upward. *See United States v. Bachynsky*, 949 F.2d 722, 733 (5th Cir. 1991) (appeal following remand from *en banc* Court), *cert. denied*, ___U.S.___, 113 S.Ct. 150, 121 L.Ed.2d 101 (1992).

III.

Menn next argues that the upward departure must be set aside because the district court utilized information contained in the presentence report that was not introduced at trial, and relied on a baseless conclusion by the probation officer contained in the PSR. A district court may consider any evidence that has "sufficient indicia of reliability to support its probable accuracy," including evidence not admissible at trial, *e.g.*, hearsay. U.S.S.G. § 6A1.3, comment; *United States v. Manthei*, 913 F.2d 1130, 1138 (5th Cir. 1990). A defendant who objects to consideration of information by the sentencing court bears the burden of proving that it is "materially untrue, inaccurate or unreliable." *United States v. Angulo*, 927 F.2d 202, 205 (5th Cir. 1991).

The district court, at sentencing, stated "that the sentence imposed in this case is going to be based on the evidence [the judge] heard during the trial." Even if the district court relied on the PSR as a basis for the upward departure, Menn has failed to shoulder his burden of proving the unreliability or inaccuracy of the PSR. Thus, we find his contention is conclusional at best.

IV.

Menn also contends that the prosecutor (a) improperly vouched for a witness during closing argument and (b) failed to correct

perjured and unreliable trial testimony.

(a) Because Menn's improper vouching argument is raised for the first time on appeal, it should be reviewed for plain error. *See Calverley*, 37 F.3d at 162; *see also United States v. Tomblin*, 46 F.3d 1369, 1386 (5th Cir. 1995) (plain-error review of prosecutorial misconduct).[4] Assuming, *arguendo*, that the prosecutor's remarks constituted error and that the error was obvious, we find that the remarks were not so harmful that they affected Menn's substantial rights. *See Tomblin*, 46 F.3d at 1386.

(b) Menn moved for a new trial based on the alleged discovery of new evidence. Specifically, he alleged that several witnesses offered false testimony at trial.[5] The district court denied the motion, holding that: 1) Menn had presented no newly discovered evidence; 2) the evidence presented at the hearing was not material to Menn's guilt or innocence; and 3) in light of the overwhelming evidence of guilt, there was little probability, if any, that the evidence would have changed the outcome of the trial.

Motions for a new trial based on newly discovered evidence are generally disfavored by the court and are viewed with caution. *United States v. Pena*, 949 F.2d 751, 758 (5th Cir. 1991). We will reverse the denial of a motion for new trial only when there is a

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[4] Menn's objection was not that the prosecutor was vouching for the witness but that the facts in argument were *dehors* the record. *See United States v. Maldonado*, 42 F.3d 906, 912 (5th Cir. 1995) (issue must be raised with specificity in the district court to preserve it for appellate review).

[5] He did not allege before the district court that the Government knowingly used perjured testimony.

clear abuse of discretion. *Id.* To prevail on the motion for a new trial based on newly discovered evidence, Menn must have shown to the district court: 1) that the evidence was in fact newly discovered and was unknown to him at trial; 2) that the evidence is material and not merely cumulative or impeaching; 3) that the evidence would probably produce an acquittal; and 4) that the failure to discover the evidence was not due to his lack of diligence. *United States v. Munoz*, 957 F.2d 171, 173 (5th Cir.), *cert. denied*, ___U.S.___, 113 S.Ct. 332, 121 L.Ed.2d 250 (1992). Failure to satisfy one part of this test requires the denial of the motion for new trial. *Pena*, 949 F.2d at 758.

Menn offers no explanation why he could not have discovered the alleged new evidence prior to trial, save to allege that he "did not have the resources to determine the actual facts prior to trial." For that reason alone, we may find that the district court's denial of the motion for a new trial was proper *See Munoz*, 957 F.2d at 173. Simply because testimony is discredited by other witnesses or may be inconsistent with prior statements, the testimony is not necessarily false or tantamount to perjury. *See United States v. Brown*, 634 F.2d 819, 827 (5th Cir. 1981). Menn has not met the standard of showing that the newly discovered evidence was not merely cumulative or impeaching or that it "would probably produce an acquittal." *Munoz*, 957 F.2d at 173. Therefore, we find that the district court did not abuse its

discretion in denying the motion for new trial.[6]

V.

For the reasons articulated above, Menn's conviction and sentence is AFFIRMED.

[6] For the first time on appeal, Menn hints at, but does not develop, an argument that he is entitled to a new trial because the prosecution knowingly utilized perjured testimony. It is therefore not properly before us for review. Even assuming that the argument is adequately briefed, we review for plain error only. *See Calverley*, 37 F.3d at 162; *see also Tomblin*, 46 F.3d at 1386. Menn offers no basis from which one could reasonably infer that the prosecution had any knowledge regarding actual perjury. Menn has not shown error, let alone plain error which affected his substantial rights.