UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60664
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE CASTELLANO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(94-CR-081-01)

June 19, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Jose Castellano appeals his conviction and sentence for use or attempted use of an unauthorized access device. We **AFFIRM.**

I.

A jury found Castellano guilty of access device fraud, in violation of 18 U.S.C. § 1029(a)(2), for his unauthorized use of a credit card account. The district court sentenced him to, *inter alia*, 37 months imprisonment, and ordered him to pay $2,287.20 in

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

restitution.

II.

Castellano challenges the sufficiency of the evidence and the district court's application of the Sentencing Guidelines.

A.

Section 1029(a)(2) criminalizes the conduct of one who "knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period". 18 U.S.C. § 1029(a)(2). Castellano challenges only one of the elements that the Government must prove for conviction; he contends that the evidence does not establish that he "used or attempted to use the access device in the amounts alleged".[2]

In reviewing a challenge to the sufficiency of the evidence, we view the evidence, and any inferences that may be drawn from it, in the light most favorable to the verdict, to determine whether a rational trier of fact could have found that it established guilt beyond a reasonable doubt. *E.g.*, ***United States v. Ivey***, 949 F.2d 759, 766 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S. Ct. 64 (1992). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except

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[2] Castellano concedes that the credit card account number was an access device, as defined in 18 U.S.C. § 1029(e)(1), that he was not authorized to use it, that its use affected interstate commerce, and that the value of services charged to the account exceeded $1,000 over a 12-month period. *See* ***United States v. Goodchild***, 25 F.3d 55, 57 (1st Cir. 1994) (stating elements of § 1029(a)(2) offense).

that of guilt, and we accept all credibility choices that tend to support the verdict. *E.g.*, ***United States v. Pofahl***, 990 F.2d 1456, 1467 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 266, 560 (1993).

The Government introduced the following evidence at trial. On January 17, 1994, Castellano checked into the Hampton Inn in McAllen, Texas. He told one of the desk clerks that he was moving from San Antonio, and paid cash for one night's stay.[3] However, the hotel's daily credit card status reports reflect that, from January 18, Castellano paid for his accommodations with an American Express credit card held by H. E. Butt Grocery Company (HEB). HEB earlier had sent a letter to the Hampton Inn authorizing two HEB employees who would be attending a training session in McAllen to charge their hotel room and tax expenses to that account. Castellano was not employed by HEB.

In late January, another Hampton Inn desk clerk contacted Castellano to secure an outstanding balance of approximately $17 on Castellano's cash "folio".[4] Castellano asked that the charges on the cash folio be placed on his credit card folio. Castellano made three separate requests for cash advances on the credit card, all of which were refused because hotel policy prohibited making cash advances.

On March 16, Annette Sullivan was having dinner at a

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[3] Castellano also made cash payments of $16.72, on January 24, and $160.90, on March 5.

[4] A "folio" is a complete record of the charges made to a particular guest during his stay at the hotel.

restaurant next to the Hampton Inn when a man, later identified as Castellano, approached her and asked her for a date. Castellano told Sullivan that he had been in McAllen about a month and was having a home built there. When Sullivan asked about the expense of staying at a hotel for that length of time, Castellano replied that money was no problem for him, and told her that he could get free rooms in the Hampton Inn.

Castellano did not know that Sullivan worked in the San Antonio office of the Federal Bureau of Investigation. She was suspicious of Castellano's remarks, and related the substance of her conversation with him to FBI agent Pruit. Pruit conducted an investigation which culminated in his obtaining an arrest warrant for Castellano.

On March 24, Pruit asked Hampton Inn assistant manager Salinas to call Castellano, and verify that Castellano was in his room. Salinas knew that the American Express account used to pay for Castellano's room actually belonged to HEB, and he attempted to find out whether Castellano was aware that his room was being paid for with that account. Salinas asked Castellano if he knew that his credit card was cleared routinely when the balance reached $800; Castellano answered, "yes, I was". Salinas told Castellano that his credit card number had been erased accidentally and asked him to come to the front desk with his card; Castellano replied that he would do so later that day.

Before Castellano went to the front desk, he was arrested by FBI agents. He waived his rights; and, after being told that he

was charged with a credit card violation, stated that he had never owned a credit card and that he had paid all his hotel bills with cash. Castellano also consented to a search of his room; among the items discovered were hotel statements reflecting credit card charges.

Castellano claims that evidence suggests that another hotel employee, who was fired three weeks before trial for misappropriating hotel funds, might have taken the cash from Castellano, kept the money, and posted the unauthorized room charges to HEB's credit card account.[5] According to Castellano, he "was not shown to have direct knowledge of the American Express account number and never directly used it, [but] was merely a beneficiary of the insider's illegal use".

The evidence reflects, however, that Castellano, when interrogated by FBI agents, expressly denied having made any cash payments to the hotel employee he now accuses. Moreover, for example, Castellano requested that charges on his cash folio be placed on his credit card folio, acknowledged to Salinas that he was aware that his credit card account was routinely cleared at $800, and on three occasions attempted to receive cash advances. In sum, it was reasonable for the jury to conclude that Castellano knowingly used the credit card number to obtain his accommodations from the Hampton Inn.

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[5] The Government acknowledged at trial that it suspected that a hotel employee was involved, and that the investigation was continuing.

B.

Castellano maintains that the district court misapplied the Sentencing Guidelines by increasing his offense level pursuant to the criminal livelihood provision, § 4B1.3. "In reviewing a challenge to a sentence under the Guidelines, we must accept the factual findings of the district court unless clearly erroneous, but we fully review its application of the Guideline for errors of law." ***United States v. Sellers***, 926 F.2d 410, 417 (5th Cir. 1991).

Section 4B1.3 provides, in pertinent part, for an offense level of not less than 13 if the defendant "committed an offense as part of a pattern of criminal conduct engaged in as a livelihood". U.S.S.G. § 4B1.3. The commentary defines "[p]attern of criminal conduct" as "planned criminal acts occurring over a substantial period of time ... involv[ing] a single course of conduct or independent offenses". ***Id***., comment. (n.1). Criminal conduct is "engaged in as a livelihood" when:

> (1) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (2) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (*e.g.*, the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for his criminal conduct).

U.S.S.G. § 4B1.3, comment. (n.2). "The object of this section is to distinguish the professional from the amateur criminal and punish the former more heavily." ***United States v. Taylor***, 45 F.3d 1104, 1106 (7th Cir. 1995). As hereinafter shown, Castellano more

than fits the bill. He disputes application of § 4B1.3 on two bases.

1.

The district court found that Castellano's commission of access device fraud was related to his lengthy history of offenses involving "some species of theft", and thus constituted a pattern of criminal conduct. It found further that, between January 1 and December 31, 1986, Castellano's income derived from a check-kiting scheme which resulted in a federal conviction for bank fraud and a state conviction for theft by check met the $6,700 threshold (2,000 times $3.35, the minimum wage in 1986) for application of § 4B1.3.

Castellano contends that the court erred in finding that the instant offense was part of a pattern of criminal conduct, because that offense is not related to his 1986 theft-related criminal activities.

The district court neither clearly erred nor misapplied the Guidelines in determining that Castellano's access device fraud conviction was related to his 1986 convictions for bank fraud and theft by check, and thus part of a pattern of criminal conduct. As noted, a "pattern of criminal conduct" may consist of *either* a single course of conduct *or* independent offenses. U.S.S.G. § 4B1.3, comment. (n.1). The objective of both the instant offense and Castellano's 1986 offenses for bank fraud and theft by check was to obtain money or services by fraud and false pretenses. *See* ***United States v. Oliver***, 908 F.2d 260, 265-66 (8th Cir. 1990) (in determining whether instant offense is part of pattern of criminal

conduct, court should consider whether offenses had same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics). And, the record contains no evidence that Castellano derived any income from legitimate employment. *See* ***Taylor***, 45 F.3d at 1106-07 (evidence that defendant had no legitimate income for year prior to arrest and had held a job for only three months in prior 11 years is relevant to the application § 4B1.3).

2.

Castellano contends next that the district court improperly considered the proceeds from his unlawful activities in 1986 to enhance his sentence for the instant offense, committed in 1994. He asserts that the 12-month period under § 4B1.3 must encompass the conduct underlying the instant offense. Castellano failed to preserve this issue for review.[6] Accordingly, we review it under the plain error standard. *See* ***United States v. Calverley***, 37 F.3d 160 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1266 (1995). Under that standard, "unobjected-to errors [must] be

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[6] At the sentencing hearing, Castellano objected on the ground that

> the offense conduct that [the Government] is alleging is preguidelines conduct. It is the year 1986. And has to be some kind of equitable interest in here and latches it before it to can be counted [*sic*].

The district court stated that the Guidelines did not contain any limitation as to which one-year period should be considered, or any requirement that it had to be within a year or two of the instant offense; Castellano's counsel replied, "You are right, Judge".

`plain' and `affect substantial rights'". ***Id***. at 162. Even if those requirements are met, we have "the discretion to decline to correct errors which do not `seriously affect the fairness, integrity, or public reputation of judicial proceedings'". ***Id***.

Even assuming an error, it was by no means "plain". "Plain is synonymous with `clear' or `obvious,' and, `[a]t a minimum,' contemplates an error which was `clear under current law' at the time of trial." ***Id***. at 162-63 (quoting ***United States v. Olano***, ___ U.S. ___, 113 S. Ct. 1770, 1777 (1993)). As the district court correctly noted, neither § 4B1.3 nor its commentary contain any limitation as to which 12-month period should be considered; indeed, the commentary refers to "*any* twelve-month period". U.S.S.G. § 4B1.3, comment. (n.2).[7] Castellano has not cited, nor have we found, any case interpreting that section or the commentary as requiring that the 12-month period under § 4B1.3 must encompass the conduct underlying the instant offense.[8] Accordingly, the

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[7] The Government points out that 1986 was the only 12-month period immediately preceding the instant offense during which Castellano was not either incarcerated or facing pending charges.

[8] Our research found no cases expressly addressing the precise issue raised by Castellano, and only a few which dealt with it even peripherally. *See* ***United States v. Reed***, 951 F.2d 97, 101 (6th Cir. 1991) (commentary's recognition that independent offenses may constitute a pattern of criminal conduct "implies that the pattern may contain gaps or periods of lull during which no offenses are committed"), *cert. denied*, 503 U.S. 996 (1992); ***United States v. Cianscewski***, 894 F.2d 74, 77 n.7 (3d Cir. 1990) (because Government did not seek to aggregate defendant's present offenses with his various and sundry past criminal activity, court did not consider whether illegal activity engaged in by defendant during most of his adult life constituted a single pattern of criminal conduct); ***United States v. Luster***, 889 F.2d 1523, 1530-31 (6th Cir. 1989) (district court did not clearly err in holding that 1988 credit card fraud was part of pattern of

district court did not commit plain error by enhancing Castellano's sentence because of his 1986 conduct.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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criminal conduct which included 1970 conviction for attempted armed robbery, 1977 conviction for possession of heroin, 1979 conviction for selling heroin, and 1987 conviction for larceny).