APPEAL NO. 23-5766

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOUGLAS WILLIAM VANCE,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Kentucky
Original Crim. No. 5:20-cr-00063-DCR-MAS-1
Hon. Danny Reeves, Presiding in the District Court

REPLY BRIEF OF DEFENDANT-APPELLANT DOUGLAS WILLIAM VANCE

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ARGUMENT IN REPLY

I. Appellant's right to a fair trial was violated when the district court refused to permit the defense to introduce into evidence his codefendant's letter confessing to the fraudulent conduct and exonerating the Appellant.

Appellant sought the introduction of a letter written by codefendant McKinnon who took responsibility for the fraudulent conduct charged in the indictment and attributed to Appellant. Even if hearsay, the letter was plainly admissible under Fed. R. Evid. 804(b)(3) and the failure to allow Appellant to introduce McKinnon's letter of confession deprived Appellant of the ability to present a viable defense in violation of his right to due process and a fair trial. See United States v. Johnson, 581 F.3d 320, 325 (6th Cir. 2009).

A. Appellant did not waive an argument regarding the allegation that the letter was erroneously excluded under Fed. R. Crim. P. 16.

Rather than addressing the propriety of the district court's decision to exclude from evidence McKinnon's letter of confession, the government claims Appellant waived any argument regarding the allegation that the letter was erroneously excluded under Fed. R. Crim. P. 16 based on a failure to disclose it in reciprocal discovery. The government's argument is without merit.

Contrary to the government's assertion, Appellant did not ignore the alleged discovery violation in the opening brief. Indeed, it was pointed out that the

government knew about McKinnon's letter long before trial, eliminating the possibility of a discovery violation. Opening Brief, p 5, n 1. But regardless of why the district court excluded the letter, Appellant argued that the district court's decision to exclude the letter violated due process and the right to a fair trial because it deprived him of the ability to provide a viable defense. This argument encompasses any of the reasons the court provided for excluding the letter at trial. Thus, Appellant has not waived any argument. However, Appellant addresses the erroneous finding of a Rule 16 violation more fully herein.

The district court found the letter could be excluded under Fed. R. Crim. P. 16, based on an alleged failure of the defense to disclose the letter in reciprocal discovery. This finding is plainly erroneous and cannot be affirmed. Importantly, the government knew of the evidence contained in McKinnon's letter long before trial. Thus, any assertion that the government did not have knowledge of the evidence contained in the letter should be discounted. For example, it was the government who first brought up McKinnon's letter during the testimony of Agent Hubbuch. Trial Day 4; PageID#1489-1521. Agent Hubbuch was asked by the prosecutor about a recorded interview he conducted of the Appellant, entered as Government Exhibit 401. See Exhibit 401; PageID#1489-91. Although Agent Hubbuch did not take possession of the letter, Hubbach testified that he knew about the letter:

BY MR. ROSENBERG:
Q. Was there a back and forth about some letter?
A. Apparently so.
Q. What was this letter Mr. Vance kept referring you to?
A. It was my understanding that it was a letter that Molly had.
MR. ROSENBERG: If we could go to 13:17?
(Audio played.)
BY MR. ROSENBERG:
Q. Did you hear a reference from Mr. Vance of, my attorney has a letter from Molly?
A. Yes.
Q. At various points in your conversation, did Mr. Vance refer you to this letter for answers to your questions?
A. Yes.

Id; PageID#1521.

Accordingly, the government was aware of the letter and the claim the letter was inadmissible under Rule 16 because of unfair surprise was entirely disingenuous.

But most importantly, McKinnon's letter to the Appellant was not subject to reciprocal discovery under both Fed. R. Crim. P. 16(b)(1)(A)(ii) and (b)(2)(B). Appellant had no intention of using the letter in his case-in-chief and only sought introduction of the letter only after the court ruled on McKinnon's proffered testimony would not satisfy her defense of duress and necessity. Therefore, there was no obligation for the defense to provide the letter to the government under Fed. R. Crim. P. 16(b)(1)(A)(ii). Further, the letter was written by McKinnon, who was not only a codefendant, but also a prospective defense witness who testified at trial. Thus,

the letter was expressly not subject to disclosure under Fed. R. Crim. P. 16(b)(2)(B).

B. The finding that Appellant violated Fed. R. Crim. P. 16 cannot survive plain error review.

Waived claims are claims intentionally relinquished by a defendant and are generally not reviewable. While forfeited claims, those not raised at all, are reviewed for plain error. United States v. Babcock, 753 F.3d 587, 590 (6th Cir. 2014). If counsel for the Appellant is at fault for failing to adequately address the alleged Rule 16 discovery violation in the opening brief, then Appellant has forfeited it. See, Scott v. First Nat'l Bank, 936 F.3d 509 (6th Cir. 2019)("appellant forfeits an argument that he fails to raise in his opening brief"). This Court should not affirm the district court's plainly erroneous decision and a wrongful conviction because appellate counsel inadvertently forfeited the error by failing to specifically raise it in the opening brief.

Here the district court's Rule 16 finding was "(1) error, (2) that was obvious or clear, (3) that affected [Appellant's] substantial rights, and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." United States v. Prater, 766 F.3d 501, 518 (6th Cir. 2014) (alteration in original). The error that was obvious or clear because under a plain reading of Fed.R Crim.P. 16(b)(1)(A)(ii) and (b)(2)(B) there was no obligation for the defense to provide the letter to the government. The error affected Appellant's substantial rights because it deprived him

of the ability to present a viable defense. And the error affected the fairness, integrity, or public reputation of the judicial proceedings" because it permitted the jury to render a guilty verdict when evidence supporting a viable defense existed, but was wrongfully excluded by the trial court. Because the court committed plain error in excluding the letter as a perceived discovery violation under Fed. R. Crim. P. 16(b), then this Court cannot affirm the district court's finding.

Finally, if this court finds he has waived this claim because he did not address it in the opening brief, then the waiver rule should not be enforced because to do so would result in affirming the conviction of an innocent man and a manifest injustice. See, Fryman v. Fed. Crop Ins. Corp., 936 F.2d 244, 251 (6th Cir. 1991) ("Deviation from the rule of waiver is permissible when application of the rule would result in a manifest injustice." (internal citations omitted)).

C. McKinnon's letter was admissible as a codefendant's statement against interest under Fed. R. Evid. 804(b)(3).

The government argues that the letter was inadmissible hearsay and that the decision in Chambers is inapplicable because Appellant did not cite to the decision in the district court. Further it is claimed "the letter was neither sufficiently reliable nor crucial to Vance's defense." Govt. Brief p 5, 16, 20.

The government's claim is unavailing. "[T]he hearsay rule may not be applied

mechanistically to defeat the ends of justice." Chambers v. Missisippi, 410 U.S. 284, 302 (1973). But that is precisely what occurred in the instant case, where the court excluded a letter containing reliable self-inculpatory statements from McKinnon that also exonerated the Appellant. McKinnon's letter confessing to the illegal conduct was inherently reliable and admissible as a statement against interest under Fed. R. Evid. 804(b)(3)(A), Williamson v. United States, 512 U.S. 594, 599, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994)("Self-inculpatory statements have long been recognized as bearing strong indicia of reliability"). This is true regardless of whether the government believes McKinnon to be a liar.

McKinnon's confession in her letter was corroborated at trial when she testified that she created the fraudulent financial materials and used Appellant's email to transmit those materials to the victims without Appellant's knowledge. See Chambers, 410 U.S. at 300. ("corroboration of the contents of that statement with other evidence is a factor weighing in favor of its reliability"). McKinnon testified that Appellant was unaware of the fact she had altered bank statements or illegally transferred funds. Id; PageID#1840. She further testified that she had access to Appellant's email username and password and that she would send emails from that account purporting to be the Appellant. Id; PageID#1841-1842.

"[W]hen a hearsay statement bears persuasive assurances of trustworthiness

and is critical to the defense, the exclusion of that statement may rise to the level of a due process violation." Chambers, 410 U.S. at 302. Such is the case here. McKinnon's letter was critical evidence because it corroborated Appellant's testimony at trial that he did not know about the falsehoods sent to victims in this case or why the false financial materials had been sent from his email. Accordingly, crucial and reliable evidence demonstrating that Appellant is innocent of the crimes charged was kept from the jury. The refusal to allow the introduction of the letter violated Appellant's right to a fair trial and to present evidence supporting his defense. Therefore, Appellant's right to due process and a fair trial was violated and his conviction should be vacated. Chambers, 410 U.S. at 302.

II. Appellant's convictions must be vacated because the prosecution engaged in misconduct by repeatedly telling the jury that Appellant was a liar and that his testimony could not be believed and vouching for the credibility of its witnesses.

Prosecutorial misconduct occurred throughout trial when the government sponsored testimony of its witnesses and improperly asked witnesses if they believed other witnesses had lied. The misconduct became egregious and glaringly evident during closing argument where the government repeatedly called the Appellant a liar and argued that Appellant's body language demonstrated that he had lied. These comments were not tied to evidence and were designed to improperly influence the

jury. The improper comments were highly prejudicial in this case because McKinnon had testified she was responsible for the fraud occurring in this case and that Appellant was unaware of her fraudulent activities.

"[E]xceptionally flagrant" prosecutorial misconduct is grounds for reversal, even under a plain-error standard. United States v. Carter, 236 F.3d 777, 783 (6th Cir. 2001). Here, the misconduct by the prosecution was consistent and reoccurring such that it permeated the entire trial. While counsel failed to object to some of the instances, the accumulation of repeated instances of misconduct amounts to "exceptionally flagrant" misconduct warranting reversal. Accordingly, Appellant's convictions must be overturned.

In response, the government claims

> "No prosecutorial misconduct occurred. The prosecutor properly argued that Vance was not a credible witness based on the trial evidence and Vance's demeanor while testifying, and the prosecutor did not improperly vouch for a witness. Even if the Court determines the statements were improper, they were not flagrant. Even if they were, they were not so exceptionally flagrant to require reversal under plain error review."

The government's argument ignores reality. Numerous instances of misconduct and improper statements were made by the prosecution throughout this case. See Trial Day 5 Page ID#1716, 1726; RE 179 Trial Day 6; PageID#1853-56, 1868-1870. The prosecution engaged in misconduct by repeatedly telling the jury that the Appellant

had lied to them, vouching for the credibility of its witnesses, and implying the prosecution knew Appellant was lying and guilty of the crimes charged. For instance, the jury was told:

> "You saw [Vance] shifting in his seat. He was shifting eye contact, he wasn't looking directly at his attorney or to you all, the jury. He would look around, he would mumble his answers. Ask yourself, is that how a truthful witness testifies? *I submit to you that it is not*."

Id; PageID#1869. This statement was particularly flagrant because the prosecutor told the jury that he knew or personally believed that Appellant had lied. See, United States v. Carroll, 26 F.3d 1380, 1387 (6th Cir. 1994)(prosecutor's use of phrase "I submit" in speaking to the jury was "inexcusable" misconduct).

Additionally, during cross examination, the prosecution asked Vance if he thought other witnesses were lying. Trial Day 5 Page ID#1716("Mike Miller lying?); Page ID#1726 ("Allan Deware lying?"). It is well settled that parties are prohibited from asking witnesses whether other witnesses lied because credibility determinations are the responsibility of the jury to make. See Arnold v. Wilder, 657 F.3d 353, 367-68 (6th Cir. 2011); United States v. Harris, 471 F.3d 507, 511 (3d Cir. 2006); United States v. Thomas, 453 F.3d 838, 846 (7th Cir. 2006); United States v. Williams, 343 F.3d 423, 437 (5th Cir. 2003). The prosecutor's questions were thus clearly improper under the Arnold rule.

Thus, the prosecutorial misconduct was consistent and recurring throughout trial and culminating during closing argument. United States v. Acosta, 924 f.3d 288 (6th Cir. 2019)("effect of [improper] comments must be considered in the context of the prosecutor's other statements, the defense arguments, and the evidence presented at trial"). The misconduct was exceptionally flagrant, especially given the disputed and inconsistent evidence of Appellant's guilt. Id. Accordingly, Appellant's convictions must be vacated. Carter, 236 F.3d at 783.

III. Appellant's 174-month sentence is procedurally and substantively unreasonable.

Appellant's sentence is both procedurally and substantively unreasonable and must be vacated.

A. The district court erroneously determined the amount of loss was between $1,500,000 and $3,500,000 and imposing a 16-level enhancement under U.S.S.G. §2B1.1(b)(1).

The district court incorrectly applied Guidelines' enhancements for the amount of loss based on conduct of others that was not attributable to Appellant as relevant conduct under the Guidelines. The court erroneously increased the amount of loss to Faybik to $500,000 despite the fact the government agreed the amount of loss was $42,500. This finding lacked evidentiary support and is an abuse of discretion. A correct application of relevant conduct standards results in amount of loss under $1.5

million and an offense level increase of 14, under U.S.S.G. §2B1.1(b)(1)(H). Thus, Appellant's offense level was erroneously increased to a level-16, under U.S.S.G. §2B1.1(b)(1)(I).

The government makes a claim plain error review applies. Govt. Brief, p 34. The claim is simply ridiculous. The amount of loss calculation was hotly contested at sentencing. RE 210 PSR (Sealed), p 23-29; RE 219 Hearing; PageID#2120-2224. And Appellant's claim that he should be held accountable for the amount of loss only from the time he learned of the investigation is based entirely on the district court record at sentencing. For example, the district court counted the loss as occurring from April 2017, the date upon which the Appellant allegedly became aware of the investigation at issue. RE 219, Sentencing; PageID #2209. However, the pre-sentence investigation stated that the investigation did not commence until February 2018. RE 210 PSR ¶9. This is not pulled from thin air. It is part of the record. Appellant points to that record in the opening brief to show that he cannot be held accountable under relevant conduct standards for conduct of McKinnon because such conduct was concealed from Appellant by McKinnon and Appellant only became aware of her fraudulent conduct when he became aware of the investigation. Accordingly, the government's argument must fail.

Based on the above and on the arguments presented in the opening brief, the

correct amount of loss was under $1.5 million and Appellant's offense level was improperly calculated. Therefore, his sentence should be vacated.

B. The district court erroneously found the offense resulted in financial hardship and assessing a two-level enhancement under U.S.S.G. §2B1.1(b)(2)(A)(I) and (iii).

Appellant relies on the argument in his opening brief that the evidence presented at sentencing did not support this enhancement. For instance, the government claims Faybik suffered a huge loss of her investment and a substantial financial hardship. However, Ms. Faybik claimed she was not a victim in several of her impact statements and letters. And Agent Hubbuch confirmed Ms. Faybik does not consider herself to be a victim. PageID#2167-2168. Her insistence that she is not a victim makes sense. After all, Agent Hubbuch testified that bank records show a total infusion of $42,500 and a return of $59,600 to Faybik. PageID#2151-52. And while the government also claims Ms. Faybik was ceding control over her affairs to the Appellant, Agent Hubbuch testified that Ms. Faybik was an authorized user on Appellant's bank account and had withdrew funds from the account in December of 2016. Trial Day 5; PageID#1539-40.

Because the court's determination that Faybik was a victim who suffered a significant financial hardship lacks evidentiary support and is contrary to Faybik's statements that she is not a victim, the district court abused its discretion in applying

an enhancement under §2B1.1(b)(2)(A)(iii).

C. The court abused its discretion by applying a use of a sophisticated means enhancement under U.S.S.G. §2B1.1(b)(10)(c), when any conduct requiring a special skill was committed by McKinnon and McKinnon admitted to concealing her fraudulent conduct from the Appellant.

McKinnon provided a letter confessing that she was responsible for the creation of falsified financial statements and sending emails containing falsified financial statements and other misrepresentations. She also testified at trial that Appellant was unaware she had created false financial information or that she used Appellant's email credentials to send falsified financial statements and other misrepresentations to the victims in this case. McKinnon's hidden activities cannot be attributed to Appellant as relevant conduct under the Guidelines because they were hidden from the Appellant and not within the scope of Appellant's agreement in the offense. Thus, use of a sophisticated means enhancement was inapplicable**.**

In response, the government argues that Appellant emailed fake documents and a customer list to Koch. Govt. Brief p 48. However, the customer lists and the information emailed came from McKinnon. Trial Day 4; PageID#1448. The government also asserts Appellant was involved in fraudulent wire transfers. However, Appellant was not a party to the wire transfers. Trial Day 2; Page ID#954, 955.

Appellant reasserts the argument in his opening brief. The enhancement was based on McKinnon's conduct and attributed to the Appellant by the court at sentencing. To attribute McKinnon's conduct to the Appellant was error because McKinnon testified and provided a letter admitting to her role in the offense. She stated that she, without the Appellant's knowledge, fabricated false bank statements that were sent to investors and partners and that she emailed these statements using the Appellant's email account and password. RE 153 Sentencing Memorandum; PageID#603. Because McKinnon actively hid her illegal conduct from the Appellant, such conduct could not be within the "scope of the criminal activity [Appellant] agreed to jointly undertake" and thus, cannot be relevant conduct under U.S.S.G. § 1B1.13.

Accordingly, Appellant's offense level should not have been increased pursuant to §2B1.1(b)(10)(c). His sentence is procedurally unreasonable and must be vacated.

D. The district court erred in assessing a two-level enhancement for abuse of position of trust under U.S.S.G. §3B1.3.

The government is incorrect. Appellant did not hold a position of trust as defined by the Guidelines. Nothing in the government's brief demonstrates that Appellant had the ability to administer the property of the purported victims. Instead,

McKinnon was the Chief Financial Officer of the business. RE 151, PageID #585. McKinnon had control over the company's bank accounts. Id. And McKinnon admits she fabricated false bank statements and financial information sent to investors. She admitted that she emailed these statements using the Appellant's e-mail account and password. And McKinnon, not the Appellant, had the ability to administer the victims' property. Therefore, Appellant could not have been in a position of trust.

Faybik was not called as a witness in this case and no effort was made by the court to determine if Appellant had communicated with Faybik or influenced her in some way to write the victim impact statements. There is nothing to suggest that Faybik was continuing to communicate with the Appellant about her victim status. Accordingly, the court's finding that Appellant continued to communicate with Faybik and wrongfully influence her lacks evidentiary support, was made based on the court's bald speculation, and the application of the enhancement is an abuse of discretion. RE 219 Hearing; PageID#2206. Appellant's sentence is procedurally unreasonable and must be vacated.

In sum, the district court improperly calculated the offense level when it sentenced the Appellant. He was sentence based on an offense level 33 and a Criminal History Category II yielding an imprisonment range of 151 to 188 months. Had Appellant's objections been sustained at sentencing, Appellant's offense level

would be no higher than 25 and his guideline range would be 63 to 78 months' imprisonment. Accordingly, Appellant's sentence of 174 months' imprisonment is greater than necessary to achieve the goals of sentencing and substantively unreasonable.

CONCLUSION

Based on the above, and the arguments presented in Appellant's Opening Brief, Appellant's convictions and sentence must be vacated.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief complies with Sixth Circuit limitations with respect to font and type size. The brief is prepared using Times New Roman in type-size 14. The brief exceeds 15 pages, but contains a total of 3,525 words.

/s/ Matthew M. Robinson
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CERTIFICATE OF SERVICE

The undersigned certifies that a on May 30, 2024, a true and accurate copy of the foregoing reply brief was entered in this Court's ECF/CM filing system, constituting delivery upon the Assistant United States Attorneys for the Eastern District of Kentucky.

/s/ Matthew M. Robinson
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Entry No.	Description of Document	PageID#
RE 1	Indictment	1-11
RE 202	Notice of Appeal	1985-86
RE 776	Judgment	1971-1977