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2017 MAY 19 PM 1:17

FILED

9 **IN THE SUPERIOR COURT**
10 **IN AND FOR THE COUNTY OF COCONINO, STATE OF ARIZONA**

11 STATE OF ARIZONA,
12
13 Plaintiff,

14 vs.

15 **STEVEN EDWARD JONES,**
16
17 Defendant.

Case No. CR2015-00862

**DEFENDANT'S MEMORANDUM
REGARDING PROSECUTORIAL
MISCONDUCT DURING CLOSING
ARGUMENTS**

(Hon. Dan Slayton - Div. 2)

18 The State's actions go well beyond ethical standards and cannot be taken
19 lightly.

20 As the Court is aware, the central issue for the jury to determine in this case is
21 whether Mr. Jones reasonably acted in self-defense when he fired his weapon on
22 August 9, 2015. The State sought - and obtained - this Court's order precluding
23 introduction of statements made to Chase Jones *prior* to police arrival wherein the
24 defendant stated "it was all in like self-defense" and "these guys, they beat me up and
25 it was in self-defense." While speaking with Chase Jones, the defendant pointed to
26 another individual (likely Delta Chi member Nick Pletke) and stated "this guy keeps
27 trying to get my gun." This statement was also precluded at the State's request. The
State also sought - and obtained - this Court's order precluding statements made by
Mr. Jones almost immediately after he was taken into police custody. These
statements included Mr. Jones hysterically asking "Why did they hit me?", "Why did
they hurt me?" and "Why did they chase me?". While still on scene and awaiting

1 transport to the police department, Mr. Jones also stated "Why were you trying to
2 hurt me?", "Why did they make me do that?" and "I thought I was gunna die."
3 Although somewhat muddled, the defendant can also be heard saying "Why did you
4 chase me, why did you say you we're gunna kill me? Why?"

5 Notwithstanding the prosecutor's undeniable knowledge of nearly all these
6 statements, he made the following representation to the jury during closing
7 arguments on April 25th in reference to the defendant's interaction with Deputy
8 Libarle:

9
10 **He's admitting right there that he did something wrong.**
11 **He's not discussing that he was justified. He's not saying that**
12 **what he did was correct or right. The defendant realized in that**
13 **moment that he was arrested for a reason, that what he did was**
14 **wrong.**

15 **Now, it wasn't until later, of course, when he had an**
16 **audience with the police in a police station on the record that he**
17 **started talking about well, these people were trying to kill me.**
18 **Right. But in that moment in introspection, he knew that what**
19 **he had done was wrong. Even the defendant doesn't believe he**
20 **was justified.**

21 The prosecutor's remarks simply cannot be characterized as anything other
22 than a misstatement fashioned to mislead the jury.

23 CURATIVE FACTUAL AND LEGAL INSTRUCTION

24 Defendant requests that the Court instruct the jury to disregard the offending
25 portions of the prosecutor's argument and permit the admission of previously
26 excluded evidence establishing the falsity of the prosecutor's statement. This remedy
27 essentially mirrors the process approved by the Ninth Circuit Court of Appeals in
United States v. Randall, 162 F.3d 557 (9th Cir. 1998).

The similarities between the instant case and Randall are unmistakable.

1 In Randall, the prosecutor told the jury during closing statements that the
2 defendant's former employer was closed down by the FBI. This statement was false
3 and operated to prejudice the defendant. The trial court denied the defendant's
4 request for a mistrial but gave a cautionary instruction on the following day, which
5 indicated that the prosecutor's statements were not supported by evidence. Id. at
6 559.:

7
8 Randall's challenge to his conviction is based on the district court's
9 refusal to grant a mistrial after the prosecution's closing argument. He
10 argues that the prosecution acted inappropriately by stating
11 that Randall's former employer, Tri Star Inc., was closed down by
12 the FBI. Specifically, the prosecutor said:

13
14 I want to talk to you about verification and customer
15 sales.... Folks, it's part of the scheme. It's part of the
16 scheme. TriStar, you learned, had a verification and
17 customer service department. In fact, Mr. Miller and Mr.
18 LeBlanc came to Marketing Unlimited from TriStar. *And
19 that was shut down. It was investigated by the FBI Agent
20 Hummel.* ... You had the same verification and customer
21 service department and the same people at TriStar which
22 was *shut down by the FBI*, and they knew it.

23
24 Randall moved for a mistrial the next morning, but the motion was
25 denied. **However, the district court did issue a curative instruction
26 which stated that there was no evidence that TriStar was closed by
27 the FBI, and no evidence from which this could be inferred. The
district court further stated that TriStar was not, in fact, closed by
the FBI.**

28
29 We review the district court's denial of a motion for mistrial for an
30 abuse of discretion. Ordinarily, cautionary instructions or other
31 prompt and effective actions by the trial court are sufficient to cure
32 the effects of improper comments, because juries are presumed to
33 follow such cautionary instructions. Moreover, "[d]eclaring
34 a mistrial is appropriate only where a cautionary instruction is unlikely
35 to cure the prejudicial effect of an error.' "

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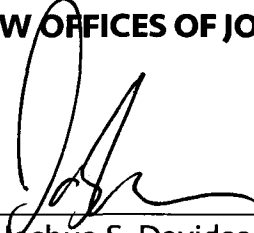
We conclude that the district court's cautionary instruction cured any prejudice resulting from the prosecutor's statements. The district court issued this instruction promptly, the day after the statements were made. Therefore, the district court did not abuse its discretion in denying the motion for mistrial.

Id at 559-60 (Emphasis added; internal citations omitted.)

Given the similarities between Mr. Jones' case and the Randall case, the Court should follow the same procedure here. Specifically, Defendant requests that the Court instruct the with the attached proposed language and permit the admission of evidence discussed herein that demonstrates the falsity of the prosecutor's statements.

DATED this 27th day of April, 2017.

LAW OFFICES OF JOSHUA S. DAVIDSON, PLC

By 
Joshua S. Davidson
Attorney for Defendant

MAILED

ORIGINAL ~~filed~~
this 27th day of April, 2017, to:

ZGT's
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COPY of the foregoing emailed
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Conduent Outsorts 5/5/2017

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By:  _____

2

INTERVIEW OF CHASE JONES

3

October 9, 2015

4 By Detective Knott:

5 Q Just go ahead and have a seat right there. Alright, Chase, my name is

6 Detective Knott, obviously with the Flagstaff Police Department, okay?

7 A Um-hum (yes).

8 Q You doing okay?

9 A Yeah.

10 Q Yeah? Okay. So basically I need you to tell me what happened?

11 A I know.

12 Q Okay? Start from the beginning.

13 A Okay.

14 Q You know, try and tell me the time frame of when you got there and so
15 forth, okay?

16 A So, I left my room on the 5th floor, left it to go fill up my water. Left it to
17 fill up my water, so I went down to the lobby. And I have a gallon jug of water so I was
18 filling that up and it takes a couple of minutes and went to go talk... my RA was on duty,
19 went to go and talk to him, two other RA's came up and said, you know, there were gun
20 shots and stuff.

21 I hadn't seen a couple of my fraternity brothers for a while so I walked over
22 towards the... there's a fireplace and there's a big viewing window that can see the lot.
23 And so I started calling one of them and then I saw, you know, Hollywood-style,

1 someone holding their side kind of like wobbling on the ground kind of thing. So I told
2 the RA, like dude, call the cops.

3 I ran out. When I ran out, I ran out from the 1st floor, it's like a little lobby facing
4 the whatchamacallit, the field, and ran across towards the lot. When I got over there,
5 there was a kid laying in the... laying on the rocks with two guys next to him. For lack of
6 better way to describe them... the officers down there were saying that he stopped
7 breathing and stuff, so he was right there, there were two guys with him. The girl that's
8 in there with the white pants was helping a kid in a parking spot. And when I got there,
9 there was a kid, there were two guys, one was more towards the east of the parking lot by
10 the stop light. All within like 10-15 feet of me kind of.

11 When I got there, there was a guy with his hand behind his back with the gun in
12 his hand. And so I ran over, started looking at, you know, the two people trying to
13 visually assess who would be better to help, and I saw him, and I was like, hey, what's
14 going on? He's like, you know, I didn't want... I didn't want, or whatever he said, I
15 didn't mean to do it, it was all in like self-defense. And then that's kind of when he, he
16 was kind of like this, kind of hesitant, kind of shaking, and I kind of saw out of the side
17 my eye when I first showed up that he put his hand behind his back.

18 And so when I... I started talking to him and I was like, you know, hey, I don't
19 care what's going on, it's just, can you put the gun down? And he was like, yeah. And
20 he pointed to the guy who was towards the east of the lot at the, by the light pole, and he
21 said, this guy keeps trying to get my gun. So I was like, I don't... I don't care, can you
22 just put it on the ground? And so he put it on the ground where the officers picked it up,
23 kind on the sidewalk there's a curb in between it.

1 Q Okay.

2 A He walked, I got distracted by whoever was trying to walk towards the
3 gun, just because I don't... I didn't know what was going on. I don't want anyone else
4 with the gun. I tried asking, I couldn't get the attention of the girl who was helping the
5 kid in the parking spot, but I was going to have her like kind of switch, like see if I could
6 talk to someone, like the guy who was going for the gun or whatever. That's when you
7 guys showed up. I want to say the guy who was holding the gun when I got to you guys
8 had walked, I don't know how to really describe it, but he continued along the pathway
9 towards like the courtyard, those... the courtyard houses.

10 Q Courtyard houses? So...

11 A I'm really bad with the street names, I'm sorry.

12 Q No, no, that's fine. Okay, so let's, let's go back, okay? Say you're in your
13 room on the 5th floor?

14 A Yes.

15 Q What dorm are you in?

16 A I'm on the Pi Cap Wing.

17 Q Okay.

18 A I don't remember the floor or the door number is. It's like 53. I'm the last
19 door on the right side of the hall.

20 Q Okay, so you know where Franklin is?

21 A The...

22 Q Franklin runs between San Francisco and Lone Tree.

23 A Yes.

1 Q Okay?

2 A On the opposite of my room you can see that street.

3 Q You can see that street?

4 A Yes.

5 Q So, you're, is that...

6 A I face the inside towards the dumpsters.

7 Q Okay, so at Mountain View?

8 A Yes.

9 Q Okay, so you're at Mountain View?

10 A Yes.

11 Q Okay. And you aren't sure what your room number is?

12 A No, I'm the last possible room on the 5th floor towards the back.

13 Q Okay. And then you go down to the lobby area to fill up your water

14 bottle?

15 A Yes.

16 Q And then someone... did you hear gun shots or someone told you?

17 A I did not hear any gun shots.

18 Q Okay.

19 A I had just finished filling it up when the two other... I've seen them behind

20 the desk, I'm assuming they're RA's. We were talking to my RA and they were like,

21 hey, we, you know whatever they said, we heard gun shots. Some girl came running

22 down the stairs and she's saying she heard gun shots.

23 Q Okay.

1 A I wanted to call because I know one of my brother's had parked there so I
2 started calling him, and that's when I went to look out the window to see if I could see
3 anything, and that's when I saw whoever was in the... the injured person who was in the
4 lot kind of start, like he was holding right...you know, moving.

5 Q What did he look like? Do you remember what he was wearing?

6 A No. Honestly it could have been the girl in the white, if she was trying to
7 move him, to try to help him.

8 Q Um-hum (yes).

9 A From where I was, it wasn't like a clear view of him. It was a clear view
10 of the lot and I could see, you know, the figures. It wasn't until he started moving that I
11 was like, those are people. So, then I ran out to go and...

12 Q Okay.

13 A ... see if I could help with anything.

14 Q Sure. So when you said "holding"? Was he holding his right side?

15 A You know, I don't know how any other way really to describe it, I have no
16 idea what side he was holding.

17 Q Okay.

18 A But that's, right handed, I just choose that side.

19 Q Sure.

20 A But he, the Hollywood-esk, you know, field position kind of rolling
21 around, so I could see from where I was.

22 Q And that's the same guy holding his side?

23 A He could have been holding his side however...

1 Q Well, the same guy you're talking about?

2 A Yes, yeah.

3 Q Okay, okay. So you run out there?

4 A Um-hum (yes).

5 Q And there's two people helping the one guy they said wasn't breathing?

6 A Yes, so the officers and the...

7 Q Okay, so officers were out there helping that guy?

8 A No, no, no.

9 Q No?

10 A Officers weren't out there yet.

11 Q Okay.

12 A The only way I know how to describe them, I don't remember what he

13 was wearing, when the officers came, when they were... right when I was put in

14 handcuffs, they said, he had stopped breathing.

15 Q Okay.

16 A So they started doing CPR then. At the time I ran out there, I had no idea,

17 there were two guys kind of hovering over him, talking to him. My focus changed once I

18 saw the guy, you know, kind of put his hand behind his back.

19 Q Okay. Now let's talk about him?

20 A Okay.

21 Q Okay? Do you remember what he looked like? Best you can recall?

22 A Yeah.

1 Q I mean, I know you just went through a traumatic experience, okay? And
2 things are probably going to start coming back to your memory a little bit better as we go
3 on.

4 A Yeah.

5 Q Okay, but, just for what you can remember right now? Okay?

6 A For right now, he was bleeding from his nose. That was the first thing I
7 noticed because I didn't know what was going on. But he was bleeding from his face,
8 nose, on his face.

9 Q Okay.

10 A That's really all that I can immediately picture because I saw his face, saw
11 the blood on his face, like coming from his nose, and then I saw his hands move and I
12 could see the, the mag well for the gun that he had.

13 Q Okay.

14 A And that's when I was like, okay, this is... he's holding a gun, like I'm not
15 sure.

16 Q What did the magazine well look like? Do you remember color?

17 A Black, with the way the light was shining on it, it kind of looked like a 19-
18 11-esk. And I came up and I never really saw the full gun until it was set down. I
19 believe it was that.

20 Q Are you a gun guy? Do you know pistols?

21 A Kind of... not...

22 Q So you know the difference between a 19-11 and a Glock?

23 A Yes.

1 Q Okay. Okay. Do you remember what this guy was wearing clothing-wise?

2 A He was wearing pants and I don't really know, what he was kind of
3 wearing up top.

4 Q Okay. Yeah? You said he was bleeding from his nose?

5 A Yes.

6 Q Did you notice any other injuries on him?

7 A Not that I could really tell.

8 Q Okay.

9 A I was kind of looking at him to see if there were anything? Like if he had
10 been shot somehow with the gun. None of that looked like the case. He said, you know,
11 these guys, they beat me up and it was in self-defense. So I just assume, you know, he
12 got punched in the nose and started bleeding. And then everything kind of goes out and
13 the gun is like...

14 Q Right.

15 A Yeah, so.

16 Q And that's when you start talking to him, huh?

17 A Yeah, it was, you know, he didn't seem very hostile...

18 Q Okay.

19 A ... because I was able to touch him on the shoulder and say, like look man,
20 I don't care, just put the gun down, the sirens are already, you know, they weren't off the
21 street but you could hear them. And he set it down after telling me that the other guy was
22 trying to get, you know, his gun.

23 Q Did he point somebody out that was trying to get the gun?

1 A Yeah, he pointed out the guy who was to the east by the street light.

2 Q Do you remember what he looked like at all?

3 A He had on a longer sleeved ... longer sleeved shirt. I don't know if it was

4 pulled up or if it was like, you know, like the baseball style t's?

5 Q Um-hum (yes).

6 A Kind of thing. It could have been something like that. But he was right

7 there and he walked a little bit closer after the gun was set down. I told him to back off,

8 you know, whatever, I don't... don't care. Just, you know, go away from this... from the

9 gun. And that's when officers showed up. I believe the guy who had it was walking

10 towards, Franklin is the street that you were saying goes...

11 Q Right, that's that long one that runs to Lone Tree. To Lone Tree and then

12 if you go...

13 A Towards the Grove?

14 Q Right, if you go straight across you go in the Grove.

15 A Okay, yeah. Started walking towards the exit of the parking lot towards

16 Franklin.

17 Q Okay. Now this parking lot is the one that's...

18 A We call it the Gamma Phi lot.

19 Q Right there by that track?

20 A Yes.

21 Q You said, Gamma Phi lot?

22 A Yeah, that's...

23 Q Okay.

1 A That's the only thing I know it as.

2 Q No, that's fine.

3 A Yeah. And he walked towards that. The officers showed up, I want to say
4 he was the first ones that they put into cuffs.

5 Q Okay.

6 A Because he was right there at the area where officers pulled up to.

7 Q Okay.

8 A And then ...

9 Q Did you know any of these people?

10 A No, I'd never seen...

11 Q Never seen them before?

12 A And I saw one kid because I remember him wearing, you know, like the
13 work boots that he has on.

14 Q Have you been drinking tonight?

15 A No, I have not.

16 Q No? Okay. So the guy you saw with the gun behind his back?

17 A Yes?

18 Q Did it appear like he had been drinking? Could you tell if he was drunk?

19 A You know, I couldn't tell if he was drunk.

20 Q Okay.

21 A He was shaken, I mean, very obviously shaken but that, that's the only
22 thing really kind of about him that seemed off was that...

23 Q He was shaking?

1 A ... he was shaking. And it seemed kind of off how easily he just listened to
2 me and put the gun down.

3 Q Okay.

4 A Too. Like you know there was no hostility about it, it was, you know, this
5 guy is trying to get my gun, and then he just set it down and that was it.

6 Q So when you first walk out and you see him out there with the gun?

7 A Yeah?

8 Q What's he doing? Is he, you know?

9 A He, I didn't actually see him holding the gun until I got closer and the light
10 kind of shined down on him.

11 Q Okay.

12 A At first I thought he was just someone like, kind of like grieving over, you
13 know, what's just happened, like he knew him and stuff. Kind of like he was taking a
14 step back, I guess, kind of letting it fully hit him. But then he, when I get there, he kind
15 of turned towards me as I came running up and, you know, kind of looked at everything,
16 and then I looked at him and that's when I saw, you know, the gun...

17 Q Right.

18 A ... go behind his back and him...

19 Q Which hand was he holding it in?

20 A So I'm looking at him and it was in this hand, so I want to say it would be
21 his left hand.

22 Q Left hand?

23 A Yeah. Left hand behind his...

1 Q Okay.

2 A Yeah, left hand behind his back.

3 Q Okay. Okay. Is there anything else that you can think of that I haven't

4 asked you? Anything that sticks out that you know, that you remember that I didn't bring

5 up?

6 A No. After, after officers secured the gun, I was put in handcuffs and I was

7 going... they were beginning to start ... officer, the female officer who is outside in the

8 hall right now...

9 Q Um-hum (yes).

10 A She handcuffed me and she was walking me towards the car to see if I

11 could identify the guy and I never got the opportunity to, that's the only thing I can think

12 of.

13 Q Okay.

14 A But...

15 Q So if you were shown, say we showed you a line up? Would you be able

16 to pick him out?

17 A I don't know.

18 Q Okay. Would you be willing to try it?

19 A I would absolutely be willing to try it.

20 Q Okay. So, that's all that we can ask.

21 A Yeah.

22 Q Is try.

23 A The major identifier was, you know, he had blood on his nose.

1 Q Okay.

2 A From his nose.

3 Q Any facial hair?

4 A He could have had facial hair, yeah.

5 Q Okay. It will all come back to you.

6 A Yeah.

7 Q Okay? We do have a Victim Witness Service here.

8 A Um-hum (yes).

9 Q Okay? Basically counselors that will help, you know...

10 A Okay.

11 Q ... witnesses and victims of crime and stuff like that. So, we'll link you up

12 with them here in a little bit, okay?

13 A Okay.

14 Q I'm going to have you sit back out in the hallway.

15 A Alright.

16 Q You need water or anything like that?

17 A Yeah, I was just going grab some from the drinking fountain when we go

18 back out.

19 Q We'll get you a bottle of water. I think we might have some.

20 A I think they said, yes, right now. It's fine.

21 Q Okay. But... do you want a soda?

22 A No.

23 Q Coffee?

1 A No, just water.)

2 Q Just water? Okay.

3 (end of recording).

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CERTIFICATION

I, Elaine Kaufman, do hereby certify that the foregoing transcript consisting of 1-15 pages, including this page, is a full, true, and accurate transcript of the recording in this matter, all done to the best of my skill and ability.

Dated: March 28, 2016.

Top Notch Transcribers

Elaine Kaufman

Elaine Kaufman, Transcriptionist

Conduent Outsorts 5/5/2017

162 F.3d 557
United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Jeffrey D. RANDALL, Defendant-Appellant.

No. 97-10108.

Argued and Submitted Oct. 8, 1998.

Decided Dec. 11, 1998.

Defendant was convicted in the United States District Court for the Eastern District of California, William B. Shubb, J., of mail fraud, wire fraud, and conspiracy to commit mail and wire fraud. Defendant appealed. The Court of Appeals, Hug, Chief Judge, held that: (1) any prejudice resulting from prosecutor's closing statements was cured by cautionary instruction; (2) defendant was subject to vulnerable victim sentence enhancement; and (3) sentencing court's alleged failure to state specifically its reasons for imposing sentence it did was not plain error.

Affirmed.

West Headnotes (11)

[1] Criminal Law

⚡ Matters not sustained by evidence

Any prejudice resulting from prosecutor's closing statements indicating that defendant's former employer was closed down by the Federal Bureau of Investigation (FBI) was cured by cautionary instruction, given on following day, which indicated that statements were not supported by evidence, and therefore denial of defendant's mistrial motion was not abuse of discretion.

4 Cases that cite this headnote

[2] Criminal Law

⚡ Issues related to jury trial

Court of Appeals reviews the district court's denial of a motion for mistrial for an abuse of discretion.

2 Cases that cite this headnote

[3] Criminal Law

⚡ Action of Court in Response to Comments or Conduct

Ordinarily, cautionary instructions or other prompt and effective actions by the trial court are sufficient to cure the effects of improper comments, inasmuch as juries are presumed to follow such cautionary instructions.

7 Cases that cite this headnote

[4] Criminal Law

⚡ Otherwise irreparable error or prejudice in general

Declaring a mistrial is appropriate only when a cautionary instruction is unlikely to cure the prejudicial effect of an error.

4 Cases that cite this headnote

[5] Sentencing and Punishment

⚡ Vulnerability of victim

Defendant who participated in "reloading" aspect of fraudulent telemarketing scheme, under which past victims were contacted for additional "sales," was subject to two-level "vulnerable victim" enhancement under Sentencing Guidelines, inasmuch as "reloaded" victims were particularly susceptible to scheme and defendant knew or should have known that "reloaded" persons had previously fallen for scheme. U.S.S.G. § 3A1.1(b) (1997).

18 Cases that cite this headnote

[6] Criminal Law

⚡ Review De Novo

Court of Appeals reviews a district court's construction, interpretation, and application of the Sentencing Guidelines de novo. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

Conduent Outsorts 5/5/2017

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5 Cases that cite this headnote

[7] Criminal Law

↳ Sentencing

Sentencing court's factual findings, such as findings that the victims were vulnerable, are reviewed for clear error.

6 Cases that cite this headnote

[8] Sentencing and Punishment

↳ Vulnerability of victim

For Sentencing Guidelines enhancement based on existence of unusually vulnerable victim to apply, all that is required is that the defendant "knew or should have known" that the victim was unusually vulnerable. U.S.S.G. § 3A1.1(b) (1997).

9 Cases that cite this headnote

[9] Sentencing and Punishment

↳ Vulnerability of victim

Enhancement under Sentencing Guidelines' unusually vulnerable victim provision is appropriate when a defendant's activities are directed towards those in need of greater societal protection, thus rendering the defendant's conduct more criminally depraved. U.S.S.G. § 3A1.1(b) (1997).

7 Cases that cite this headnote

[10] Criminal Law

↳ Sentencing proceedings in general

Sentencing court's alleged failure to state specifically its reasons for imposing sentence of 41 months was not plain error; defendant was convicted of conspiracy for his role in fraudulent telemarketing scheme that took in almost \$1.3 million in less than one year, defendant was "reloader" who knew or should have known that those he was calling had previously fallen for scheme, and testimony indicated that all of scheme's salespeople made misrepresentations and knew pitch was illegitimate.

8 Cases that cite this headnote

[11] Criminal Law

↳ Sentencing and Punishment

Alleged sentencing errors are reviewed for plain error where the defendant has failed to object before the district court and therefore forfeited his right to appeal.

24 Cases that cite this headnote

Attorneys and Law Firms

*558 Michael B. Bigelow, Sacramento, California, for the appellant.

Richard Pachter, Special Assistant United States Attorney, Sacramento, California, for the appellee.

Appeal from the United States District Court for the Eastern District of California; William B. Shubb, District Judge, Presiding. D.C. No. CR-95-00525-WBS.

Before: HUG, Chief Judge, FLETCHER and TROTT, Circuit Judges.

Opinion

*559 HUG, Chief Judge:

Appellant Jeffrey Randall ("Randall") appeals his conviction and sentence for nine counts of mail fraud, nine counts of wire fraud, and one count of conspiracy to commit mail fraud and wire fraud arising from a telemarketing scheme. Randall challenges his conviction based on the argument that the district court should have granted a mistrial because there was government misconduct during the summation. Randall challenges his sentence on two grounds. First, he argues that the district court should not have applied a two level "vulnerable victim" enhancement under the Sentencing Guidelines. Second, he argues that the district court erred in sentencing him to the middle of the guideline range, because the court did not specify the reasons for doing so. We have jurisdiction under 28 U.S.C. § 1291 and we affirm the conviction and sentence.

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I.

Randall's conviction stems from his participation in a telemarketing scheme whereby "fronters," working for a company called Marketing Unlimited, "cold called" people from customer lists, which typically consisted of names of people who had filled out contest or sweepstake entry forms at shopping centers. The "fronters" induced these people to purchase pens and other products with promises of significant awards that greatly exceeded in value the purchase price of the products. In exchange for the money, the customer was sent a product and an award. The company spent between ten and twelve percent of the money that customers sent in on the products and awards. The record indicates that no customer ever received more in value than they sent to Marketing Unlimited. At some point after a customer sent in money, a "reloader" received a copy of the initial sales order form (also called "reload paper"), and called the customer again to attempt to "reload" the customer into making another order. This scheme resulted in the collection of approximately \$1.3 million by Marketing Unlimited in less than one year.

On December 3, 1997, Randall was convicted for his role as a "reloader" in this telemarketing scheme and was sentenced to forty one months in prison. He then filed a timely appeal.

II.

[1] Randall's challenge to his conviction is based on the district court's refusal to grant a mistrial after the prosecution's closing argument. He argues that the prosecution acted inappropriately by stating that Randall's former employer, Tri Star Inc., was closed down by the FBI. Specifically, the prosecutor said:

I want to talk to you about verification and customer sales.... Folks, it's part of the scheme. It's part of the scheme. TriStar, you learned, had a verification and customer service department. In fact, Mr. Miller and Mr. LeBlanc came to Marketing Unlimited from TriStar. And that was shut down. It was investigated by the FBI Agent

Hummel. ... You had the same verification and customer service department and the same people at TriStar which was shut down by the FBI, and they knew it.

Randall moved for a mistrial the next morning, but the motion was denied. However, the district court did issue a curative instruction which stated that there was no evidence that TriStar was closed by the FBI, and no evidence from which this could be inferred. The district court further stated that TriStar was not, in fact, closed by the FBI.

[2] [3] [4] We review the district court's denial of a motion for mistrial for an abuse of discretion. See *United States v. English*, 92 F.3d 909, 912 (9th Cir.1996). Ordinarily, cautionary instructions or other prompt and effective actions by the trial court are sufficient to cure the effects of improper comments, because juries are presumed to follow such cautionary instructions. *Id.* Moreover, "[d]eclaring a mistrial is appropriate only where a cautionary instruction is unlikely to cure the prejudicial effect of an error." *United States v. Valdez-Soto*, 31 F.3d 1467, 1473 (9th Cir.1994) (quoting *United States v. Charmley*, 764 F.2d 675, 677 (9th Cir.1985)).

We conclude that the district court's cautionary instruction cured any prejudice resulting *560 from the prosecutor's statements. The district court issued this instruction promptly, the day after the statements were made. Therefore, the district court did not abuse its discretion in denying the motion for mistrial.

III.

[5] [6] [7] Randall also challenges the district court's two-level "vulnerable victim" sentence enhancement under section 3A1.1(b) of the United States Sentencing Guidelines.¹ We review a district court's construction, interpretation, and application of the Sentencing Guidelines de novo. See *United States v. Castellanos*, 81 F.3d 108, 109 (9th Cir.1996). Factual findings, such as findings that the victims were vulnerable, are reviewed for clear error. See *United States v. Caterino*, 957 F.2d 681, 683 (9th Cir.1992). We have explained the application of the relevant section of the Sentencing Guidelines as follows: "[S]ection 3A1.1 will apply to increase the offense

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level where (1) a victim was either (a) unusually vulnerable due to age, physical or mental condition, or (b) otherwise particularly susceptible to the criminal conduct, and (2) the defendant knew or should have known of such vulnerability or susceptibility.” *Castellanos*, 81 F.3d at 110. The district court found that Randall was subject to this enhancement because the victims of the “reloading” scheme were “particularly susceptible,” and that Randall knew or should have known of this susceptibility.

1 This section provides that: “If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.” U.S.S.G. § 3A1.1(b) (1997).

[8] [9] The Seventh Circuit in *United States v. Jackson*, 95 F.3d 500, 506-08 (7th Cir.1996), analyzed the same type of “reloading” scheme found here, and affirmed the district court’s finding that the “reloading” exemplified the targeting of unusually vulnerable victims.² While recognizing that a person involved in a scheme to defraud will usually direct his activities toward those persons most likely to fall victim to the scheme and that not all such defendants will deserve the vulnerable victim sentence enhancement, *see Castellanos*, 81 F.3d at 110-11, we agree with the Seventh Circuit’s conclusion in *Jackson*. The enhancement is appropriate when a defendant’s activities are directed towards those in need of greater societal protection, thus rendering the defendant’s conduct more criminally depraved. *See Castellanos*, 81 F.3d at 111. The “reloading” scheme at issue here seeks out people who have a track record of falling for fraudulent schemes. As the Seventh Circuit stated, “[w]hether these persons are described as gullible, overly trusting, or just naive ... their readiness to fall for the telemarketing rip-off, not once but twice ... demonstrated that their personalities made them vulnerable in a way and to a degree not typical of the general population.” *Jackson*, 95 F.3d at 508 (emphasis in original).³

2 Unlike several other circuits, including the Seventh Circuit, *see Jackson*, 95 F.3d at 507, the Ninth Circuit does not read § 3A1.1(b) to require the defendant to “target” an unusually vulnerable victim before it may be applied. All that is required is that the defendant “knew or should have known” that the victim was

unusually vulnerable. *United States v. O’Brien*, 50 F.3d 751, 755 & n. 3 (9th Cir.1995).

3 Randall argues that countless legitimate vendors maintain lists of previous purchasers, and that the mere willingness to make repeat purchases does not make a consumer a “vulnerable victim.” The difference between repeat purchasers in general and the “reloaded” victims here, however, is the latter’s vulnerability to *fraudulent* sales schemes. This is what makes them “victims,” rather than mere consumers.

Because the victims of this scheme were particularly susceptible, and it is uncontested that Randall knew or should have known that the persons “reloaded” had previously fallen for the scheme, we find that the district court did not clearly err in applying the vulnerable victim enhancement in this case.

IV.

[10] Randall’s final argument is that, other than overruling his objection to the vulnerable victim enhancement, the district court failed to specifically state its reasons for imposing this sentence. Therefore, he *561 requests that the matter be remanded for a particularized finding of the scope of the agreement to participate in the fraudulent scheme and for resentencing.

In sentencing Randall, the district court adopted the recommendations contained in the Presentence Report (“PSR”) and determined his applicable offense level under the Guidelines to be twenty one. The district court then sentenced Randall to forty one months, a sentence within the range set by the Guidelines. Randall was asked at the sentencing hearing if he had read the PSR and discussed it fully with counsel. He responded affirmatively, and failed to raise objections to anything contained in the PSR beyond the vulnerable victim enhancement.

[11] Alleged sentencing errors are reviewed for plain error where the defendant has failed to object before the district court and therefore forfeited his right to appeal. *See United States v. Hernandez-Rodriguez*, 975 F.2d 622, 628 (9th Cir.1992); *United States v. Visman*, 919 F.2d 1390, 1393-94 (9th Cir.1990). Randall was convicted of conspiracy for his role at Marketing Unlimited, which took in almost \$1.3 million in less than one year. Furthermore, Randall was a “reloader,” who knew or should have known that the people he was calling had

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previously fallen for the scheme. In addition, there was trial testimony that all of the salespeople at Marketing Unlimited made misrepresentations and knew the pitch was illegitimate. Randall failed to produce evidence which places any of these issues in controversy. Therefore, we cannot conclude that there was (1) error, (2) that was clear or obvious, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *United States v.*

Olano, 507 U.S. 725, 732-36, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

For the forgoing reasons, the conviction and sentence are **AFFIRMED**.

All Citations

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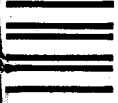
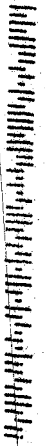
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