No. 02-10096

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.
AUSTIN J. "SONNY" SHELTON,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GUAM

BRIEF FOR THE UNITED STATES

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STATEMENT

A. Statement of the Case

A 15-count superseding indictment filed March 14, 2001 charged defendant Austin J. "Sonny" Shelton with two counts of wire fraud (18 U.S.C. 2, 1343, 1346); six counts of bribery (18 U.S.C. 666(a)(1)(B)); three counts of conspiracy to restrain trade (15 U.S.C. 3, 18 U.S.C. 2); one count of money laundering conspiracy (18 U.S.C. 1956(h)); two counts of money laundering (18 U.S.C. 2, 1957); and one false statement count (18 U.S.C. 1001). ER 1.[1] The offenses arose out of Shelton's procurement activities as Director of the Department of Parks and Recreation (DPR) for the Government of Guam following the devastation caused by Typhoon Paka in December 1997. The indictment charged that Shelton used his position corruptly to solicit, demand, and accept cash payments totaling over $100,000. ER 2.

One of the money laundering counts (Count 14) was dismissed during trial. At the end of trial, the jury acquitted Shelton on the remaining money laundering count (Count 13) and the false statement count (Count 15), while convicting Shelton on the two wire fraud, six bribery, three Sherman Act, and one money

[1] "ER" refers to Appellant Shelton's Excerpts of Record; "Supp.ER" refers to the government's "Supplemental Excerpts of Record."

laundering conspiracy counts.

On January 22, 2002, the court (Unpingco, C. J.) sentenced Shelton to 10 years in jail and ordered him to pay $112,000 in restitution to the Government of Guam. The court did not impose a fine noting Shelton's "inability to pay." ER 36-43. Shelton has been incarcerated since September 24, 2001.

B. Statement of Facts

Typhoon Paka struck the island of Guam on the night of December 16-17, 1997, causing hundreds of millions of dollars in damages. Supp.ER 468, 502. On December 17, 1997, the Governor declared a state of emergency and authorized $250,000 from the General Fund for emergency procurement of goods and services to repair and replace DPR facilities damaged by the storm. Supp.ER 498-500. On December 18, 1998, the Guam Legislature authorized the expenditure of funds for 180 days to restore government services and damaged infrastructure. Supp.ER 501-04. The legislature contemplated that most or all such funds would be refunded by the Federal Emergency Management Agency (FEMA). Supp.ER 503.

Guam law requires that at least three price quotations be secured for emergency procurements, and the contract must be awarded to the firm with the best offer, as determined by cost and delivery time. Supp.ER 498. Moreover, if time allows, the procurement agent must give notice to all contractors from the

qualified bid list. Id. Non-emergency contracts have additional requirements, including advertisement of the proposal and the submission of sealed bids. Supp.ER 407-08, 412, 456, 461. As Director of DPR, Shelton sought and obtained authority to procure the necessary repairs and services to recover from Typhoon Paka, Supp.ER 524-25, and as the procurement agent, he was subject to these procurement requirements. Supp.ER. 413-15.

Shelton, however, violated competitive bidding regulations and conspired with certain contractors to award the Paka-related projects through rigged bids. He allocated these projects in return for substantial bribes out of the contract proceeds and as a favor to a close friend.

1. Equipment Rentals and Debris Removal

Shelton's first responsibility following Typhoon Paka was to arrange for the removal of debris. Within a day or two of December 18, Shelton called Young Soo Yoon for help in obtaining a contractor to do debris removal and cleanup. Supp.ER 286-87.[2]

Shelton told Yoon that, in addition to the regular hourly rate for the

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[2] In 1995 Yoon and a partner had applied for a permit for a Jetski rental business. After waiting several months without receiving the permit, Yoon went to see Shelton. Supp.ER 346-59. He offered Shelton a $5,000 bribe, which Shelton accepted, and a permit was issued within the month. Supp.ER 274-75, 277-84, 360-67.

equipment rental, Shelton wanted a cash payoff for awarding Yoon's contractor the work -- the equivalent of one hour's rental per day for the duration of the rentals. Supp.ER 289. Yoon called a fellow church member, Chang Bok Son, who agreed to do the work. Supp.ER 177-79, 286-90. Yoon told Son to raise his rates for equipment rentals $10-$15 above the normal hourly rate. Supp.ER 180-81. Son understood that this additional money was to be paid to Shelton; and when he prepared the invoice to submit to DPR, he billed an extra backhoe ("EB") at 60 hours to cover the payoff of $15 per hour to Shelton. Supp.ER 505; 182-83, 201-02, 205-07.

In January 1998, Son brought an invoice to Shelton for work that had been performed between December 20-31, 1997. Shelton told him separate invoices for each job order were required, however, and offered to prepare them for Son on Son's company stationery. Supp.ER 184-86. When Son returned to sign the invoices Shelton had prepared, each had a different date in order to make it look like the invoices had been prepared at different times. And, although Shelton knew from Son's records where work had actually been performed, the invoices listed cleanup at locations where no work had been done. Supp.ER 187-95, 204, 526-28.

When the first progress payment was ready, Shelton notified Yoon, who told Son. Supp.ER 196-203. On Yoon's instruction, Son deposited the $30,045 check,

took out $9,000 in cash, added another $1,000 cash, and brought the $10,000 cash to Yoon. Supp.ER 529; 197-99. Shelton was at Yoon's office when Son arrived. Supp.ER 200, 368-69. Yoon told Son to put the money down and leave. Supp.ER 200. Yoon then turned the money over to Shelton. Supp.ER 291, 341.

2. Paseo Light Tower

Soon after debris removal and cleanup commenced, Shelton called Yoon to discuss the Paseo Stadium light tower project. Supp.ER 292. He told Yoon to submit a quote that could be as high as $150,000. Shelton also said that it was an "emergency" project, and that Yoon should bring him three quotations for the project quickly. Supp.ER 292-93. Yoon, who did not have a company of his own to do the work, had his secretary prepare a quote of $134,000 for the light tower project on the stationery of Deok Shin Corporation, which he obtained from Il Cho, the brother of Deok Shin's owner, Tommy Cho. Supp.ER 268, 271, 293-94, 313, 509. Yoon knew that the lights for the stadium project would have to be ordered from off-island, and he used this information in preparing the estimates. Supp.ER 300, 338-39. Yoon secured two other higher price quotations as well. Supp.ER 510-11. One was from Kenneth Lee, the owner of BW Corporation. Lee estimated he could do the work for $80,000 to $100,00 but, acting on Yoon's instructions, he prepared a bid for $148,350. Supp.ER 213-18. Lee also prepared a supporting bid

on stationery he had obtained from the Young Lae Corporation. Yoon brought the three quotes to Shelton, who subsequently notified Yoon that the project had been awarded to Deok Shin Corp. Supp.ER 215-16, 295-97.

The lights for the stadium were ordered by fax transmissions through Bunny Hardware in Guam from Oscar Trading Co. in Los Angeles. Supp.ER 519; 399-404. As the work progressed on the light tower, Yoon prepared a payment request, signed Tommy Cho's name to it, and brought it to Shelton for payment. Supp.ER 302. Shelton approved the request for "expedited payment," and eight days later called Yoon to tell him the check, made out to Deok Shin Corporation, was ready. Supp.ER 303, 512.[3] After Yoon picked up the check, Shelton called him to meet at Linda's, a coffee shop on Agana. Supp.ER 303-04. Shelton told Yoon he wanted "help," which Yoon understood to mean "money." Yoon asked Shelton how much he needed and Shelton told him that $15,000 would be appreciated -- in cash -- and Yoon agreed. Supp.ER 304-05.

The first time Tommy Cho, the owner of Deok Shin, knew anything about the project was when he was called to Yoon's office to pick up the $85,500

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[3] It normally took longer for checks to be issued after payment was requested. Supp.ER 303. But Shelton authorized all payments on the projects at issue in this case to be expedited, so that checks would be ready in days rather than weeks. Supp.ER 415-17, 419-27.

Government of Guam check payable to his company, Deok Shin. Supp.ER 273. Yoon then had Tommy Cho obtain a cashier's check payable to Yoon for $70,000, which Yoon deposited into his wife's business (WOW Jet Ski) account. Supp.ER 269-70, 306-08, 342, 515. Yoon had his secretary make a series of cash withdrawals from that account until Yoon had $15,000 in $100 bills. Supp.ER 310, Tr. 2102-04. Yoon then brought the cash to Shelton. Supp.ER 310-12, 384-91.

3. Wettengel Football Field

Shortly after Shelton contacted Yoon about the Paseo light tower project, he told Yoon about a project to repair the Wettengel football field. Shelton again told Yoon that the bid should not exceed the DPR budget of $150,000 and that Yoon should bring him three estimates for each of the two sub-projects involved, one to repair the fence and goal post, and the other to repair buildings at the stadium. Supp.ER 314-15.

Yoon asked a close friend, Il Young Cho, who owned Cho Iron Works, to do the work. Supp.ER 248-51, 315. Cho estimated the job at $77,000, but Yoon told him that was "too cheap." Supp.ER 251-52. Cho then added $19,000 to the quote, but Yoon told him to add $30,000 more, for a total of $126,000. Supp.ER 252-54. Yoon also had his secretary prepare two higher bids on the stationery of Deok

Shin Corporation, owned by Tommy Cho, and C.Y. Development Corp., owned by Yoon. Supp.ER 255, 266, 268, 272, 370-78. Yoon took the bids to DPR and left them with Shelton who told him to "wait for the phone call." Supp.ER 319.

Yoon told Cho that he would get the contract and Cho started work because he knew Yoon was close to the "Director." Supp.ER 256. Cho later saw in Yoon's office the DPR authorization for the work. Supp.ER 257. When the project was half completed, Yoon had an invoice prepared on Cho Iron Works stationery and took it to Shelton. Supp.ER 257-58, 321-22, 379-80.

The DPR check was ready within just a few days. Supp.ER 259-60. After Yoon picked it up to give it to Cho, Shelton again called Yoon to meet him at Linda's Cafe. Supp.ER 324-26. Shelton said he wanted $15,000 out of the proceeds of the Wettengel football field work. Supp.ER 327. Yoon told Cho to bring him $20,000 in cash from the check proceeds as soon as possible. Supp.ER 261, 328 (some of the money was for Yoon). Cho had some trouble getting that much cash immediately, and two days later, Yoon called to ask for the money, saying that the Director needed it quickly. Supp.ER 261-62, 267. A few days later, Cho got the cash and brought it to Yoon. Supp.ER 262-64. Yoon put $15,000 in cash in an envelope and gave it to Shelton behind closed doors in Shelton's DPR office. Supp.ER 330.

4. Ypao Pavilion

Shortly after Shelton contacted Yoon about the Paseo light tower and Wettengel stadium projects, he called Yoon about a third project. The Pavilion and Cabanas at Ypao Beach had to be repaired and painted. Shelton told Yoon that he would need more money for himself on this project, and asked for $45,000 in cash. Supp.ER 332-34. Again, Shelton said that he would need three quotations from Yoon. Supp.ER 335. Yoon called Kenneth Lee who had provided Yoon with a supporting bid for BW Corporation on the Paseo light tower project. Lee wanted a project of his own, and agreed to accept "any kind of condition" to get it. Id. Yoon told Lee he would get the job if he could do it for $100,000. When Lee agreed, and prepared a bid for that amount, Yoon told him to raise the bid to $145,000. Supp.ER 219-21, 243-47, 336, 506. At Yoon's request, Lee also provided Yoon with two "supporting," higher bids. Supp.ER 220-22, 240-43, 336, 507-08.

Before he had any official authorization from DPR, Lee began work on the project based solely on Yoon's assurances. Supp.ER 224-25. The shingles used for the project were not normally stocked on the island. Supp.ER 225-26, 392-98. They were ordered by fax through Allied Traders Co. in Guam from Tilling Timber Pty, Ltd. in Melbourne Australia. Supp.ER 521.

Yoon subsequently informed Lee that DPR had awarded him the Ypao Beach contract. When Lee prepared his first request for partial payment, he brought it to Yoon for processing and Yoon submitted it to DPR. Supp.ER 224-25, 228. Shortly thereafter, Yoon told Lee that he had the DPR check for $101,500. Supp.ER 229, 232. Yoon told Lee to bring him $58,000 in cash from the proceeds of the check. Because getting that amount in cash was difficult, they agreed Lee would give Yoon $18,000 in cash and the rest in checks. Supp.ER 230-31. Lee brought Yoon the cash, along with two checks for $26,951 and $12,746 made out to WOW Jetski and GKTV (companies owned by Yoon and his wife). Supp.ER 232-39, 381.

Yoon took the $18,000 cash and, after depositing the checks, had his secretary cash a check for an additional $7,000 in $100 bills from the GKTV account. Supp.ER 383-84, 516. He then gave the $25,000 in cash to Sonny Shelton at Shelton's DPR office. Supp.ER 332. He later gave Shelton the additional $20,000, by cashing a check for $18,000 on Mrs. Yoon's Oceanic Bank account (the Jetski account), Supp.ER 517-18, 386, and adding $2,000 cash from money he had obtained from Cho on the Paseo light tower project.

5. The Paseo Stadium and Agana Tennis Courts

Primitivo Carlos had worked with Shelton before Shelton became the

Director of DPR. Supp.ER 44. Shelton called him in December 1997 about two projects involving the repair of damage done by Typhoon Paka to the Agana tennis courts and Paseo Stadium. Supp.ER 45-46. Shelton told Primitivo that he would get the contracts if he added $25,000 to the bid price as a payoff to Shelton. Supp.ER 46-47. When Shelton discovered that Primitivo's company, JBL Pacific Construction Co., had been blacklisted by the government, he told Primitivo to find another company "that could be trusted" to bid the job. Primitivo called his cousin Jesse Carlos to find a contractor to supply the required bid, telling him of the agreement to pay Shelton $25,000 out of the contract. Supp.ER 48-53, 101-04. Jesse went to Joselito Lopez, who owned LL Pacific Co., and together they agreed to submit a bid of $175,000, although Lopez estimated that the true value of the work was only $100,000. Supp.ER 83, 104-05. Lopez agreed to prepare the bid and the subsequent invoices, while Jesse was to perform the work. Supp.ER 81-82, 86-88, 106. Jesse, Primitivo, and Lopez were then to split the profits. Supp.ER 89-93, 106-07.[4]

After Lopez prepared the bid for LL Pacific, Jesse gave it to Primitivo who submitted it to Shelton. Supp.ER 54-56. Shelton then told Primitivo that he would

[4] Lopez was unhappy about sharing the profits with Primitivo, but agreed because Jesse explained that Primitivo was "close to" Shelton, the DPR Director, and Primitivo had gotten them the contract. Supp.ER 89-91, 107.

have to get two additional, higher, bids for the projects. Supp.ER 56-57. Primitivo had a friend prepare two complementary high bids and brought them to Shelton. Supp.ER 58-63, 117-126. Shelton subsequently notified Primitivo that LL Pacific was awarded the contract. Supp.ER 61-62, 84-85.

When the first progress payment check was ready, Shelton called Primitivo Carlos to pick it up. Supp.ER 64. Normally, the check would have been mailed to LL Construction, which was the contractor of record and the payee on the check, or someone at LL Construction would have been notified that the check was ready to be picked up. Supp.ER 418. Shelton told Primitivo to bring him his payment in cash. Supp.ER 65-66. Primitivo gave the check to Jesse who gave it to Lopez. Lopez deposited it in LL Pacific's account and then made out two checks for $7,000 each to Jesse and "Jay D. Carlos," Jesse's son. Supp.ER 92-98, 522-23. After Jesse got the cash, he brought it to Primitivo at Primitivo's office. Supp.ER 66, 96-97, 110-11. Primitivo called Shelton to say he had the first installment for him and, after ascertaining that no one but "family" would be at Primitivo's offices, Shelton came to collect his cash. Supp.ER 67-68, 127-28.

Two days after LL Pacific submitted its second invoice, Shelton called Primitivo to tell him the second progress payment for LL Pacific was ready for pick up. Supp.ER 69-70. Primitivo had been working on renovations to Shelton's

home and had not been paid for the work. Supp.ER 70-71. Shelton told Primitivo to take $5,000 out of the proceeds and give Shelton the remaining $7,500 of the $12,500. Supp.ER 73-74. Primitivo gave the check to Jesse, who had Lopez deposit it and make out a check for cash. Supp.ER 99-100, 112-15.[5] Jesse then gave the check made out to cash to Primitivo who had his wife cash it. Supp.ER 513-14. Primitivo kept $5,000 in payment for his work on Shelton's home as agreed, put the balance of $7,500 in an envelope, and gave it to Shelton. Supp.ER 75-78.[6]

6. Paseo Flagpole, Light Tower, and Scoreboard

John Martinez was a close friend and business associate of Shelton. Supp.ER 133-35. In the spring of 1999, when Paka reconstruction was still in progress, Martinez went to see Shelton at his DPR office and told Shelton that he needed work. Supp.ER 140. Shelton told Martinez about three projects involving the replacement of the scoreboard, flagpole and billboards at the Paseo Stadium. SuppER 141. Shelton showed Martinez the project specifications, gave him the

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[5] Because it would have cost $100 to get a cashier's check for $10,000, the check was made out for $9,900. Supp.ER 115-16.

[6] Primitivo recalled that the $25,000 payment to Shelton was made in two payments of $12,500. Supp.ER 47, 50. Jesse testified that there were two payments of $10,000, and a third of $5,000. Supp.ER 108-09.

RFPs (requests for price) to submit bids, and an approximate valuation of the projects. Supp.ER 143-44, 175. He told Martinez that, in order to award him the projects, Martinez would have to bring him three bids for each project. Supp.ER 142-43, 172.[7]

Jaime Sioco agreed to put in high bids for his company, Adisco Construction, in return for a share of the profits. Supp.ER 144-46, 150, 171. Sioco then found a third contractor, Alfredo Javelosa, to put in a high bid on each project. Supp.ER 147-48, 153. Martinez understood from Shelton that, by supplying him with three bids for each of the three projects Martinez would be awarded the projects. Supp.ER 147.

Martinez's first bid for the scoreboard was rejected by the Department of Administration because it quoted a price for a 20-foot scoreboard rather than the 27-foot scoreboard required by the specifications. Supp.ER 154, 462-64. The bid was also unusual because it asked for a 50% advance payment from DPR before any work was undertaken. Although non-conforming bids normally would be disqualified outright, Shelton authorized Martinez to submit a second, conforming

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[7] More than a year after the typhoon, Shelton was still awarding the projects under the rules for "emergency" bidding, i.e., the informal bidding procedures rather than the formal bidding procedures which would have required projects to be advertised as sealed bids. Supp.ER 174.

bid, and he was then awarded the contract. Supp.ER 154, 173, 428-29. Shelton also authorized the 50% advance payment. Supp.ER 408-411. Martinez was awarded the flagpole contract, and Scioco was awarded the billboard project, as Scioco and Martinez had agreed. Supp.ER 166-71.

7. FEMA Reimbursement

Ninety percent of the funds paid by the Government of Guam for typhoon repair and recovery was reimbursable by the Federal Emergency Management Agency (FEMA). For projects costing under $47,000, Guam was able to "draw down" funds automatically from FEMA once a FEMA agent had examined the damage and authorized payment. But for projects over $47,000, FEMA reimbursement was available only after the project was actually completed and supporting documentation, including proof of expenses incurred, was provided. Supp.ER 430-31, 446-54, 457-59. Shelton never supplied the paperwork needed on these large projects to receive reimbursement from FEMA. Indeed, when Shelton's assistant, Frank Herrero, contacted Il Young Cho to get the underlying cost documentation to submit to the Guam Recovery Coordination Office (RCO) for reimbursement from FEMA, Shelton chastised Herrero, told him not to contact the contractors further, and that he would "take care of it." Supp.ER 432-33, 440-41. When Connie Jo Brennan of the RCO was concerned about reimbursement,

she pressed Shelton for the missing documentation. Supp.ER 459. Although he said he would "take care of it," id., he never provided any of the necessary documentation and no reimbursement from FEMA was ever made. Shelton also had Herrero supply misinformation as to the amount of work completed on the project to the RCO. He told Herrero to indicate that projects were not complete when in fact they were complete. Supp.ER 435-39, 458-60. Since completion was a sine qua non for applying for and receiving FEMA reimbursement, Shelton thereby averted FEMA scrutiny of those projects.

SUMMARY OF ARGUMENT

Many of the arguments raised on appeal were never made below. In the absence of proper objection which would have given the trial court the opportunity to cure any alleged error, Shelton cannot obtain reversal unless the Court finds "plain error," i.e., error that affects substantial rights, and whose correction is necessary to protect the fairness and integrity of the trial or to prevent manifest injustice. United States v. Olano, 507 U.S. 705, 731-737 (1993). This was not a close case. Shelton does not challenge the vast majority of evidence from numerous witnesses and documents which supports the jury's guilty verdict on twelve counts. There is no basis for finding plain error. Indeed, there was no error at all.

The court did not abuse its discretion in departing upward three levels in sentencing because Shelton's conduct deprived Guam of hundreds of thousands of dollars of reimbursement from FEMA on the projects at issue in this case and made it more difficult to receive FEMA reimbursement in the future. These were aggravating factors not adequately taken into consideration by the Sentencing Commission under USSG §5K2.0 and not adequately reflected in the specific offense characteristic for bribery. USSG §2C1.1, comment. (n.4).

The court properly grouped the bid rigging counts separately from the other counts because bid rigging involves a separate societal interest from the other counts and the offense levels for bid rigging are calculated on a different basis (volume of commerce) from the other counts (value gained or loss incurred).

The court did not abuse its discretion in admitting evidence under Fed. R. Evid. 404(b) because it explained the background to the conspiracy and was relevant to the issues of intent, knowledge, and absence of mistake.

The court did not prejudice defendant either in the conduct of the trial or in dismissing some of the jurors. The record shows that the court's dismissal of jurors was balanced and its occasional impatience at trial with defense counsel's failure to adhere to the court's rulings did not demonstrate hostility or bias.

The court followed the general rule in criminal cases which disfavors special

verdicts. Since it instructed the jury that it had to unanimously agree on one or more of the wire fraud schemes and one or more of the false statements in order to convict, there was no error.

There was no improper vouching or other misconduct by the prosecution and, in any event, Shelton's challenges were never raised below and he has not attempted to demonstrate plain error.

Shelton did not challenge the wire fraud instructions below and cannot claim plain error in the charge. The evidence also amply supports the jury verdict on the wire fraud convictions based on uncontroverted evidence at trial.

The court's bribery instruction was correct since it is supported by the language of the appropriate statutes, by the Ninth Circuit Manual of Model Jury Instructions, Criminal, and by established precedent.

The court properly refused to grant a continuance to allow Shelton to investigate charges that the court knew to be unfounded. Since the court did not preclude Shelton from investigating the charges and raising any improprieties he might discover on appeal, and since Shelton does not claim to have uncovered any improprieties, there can be no error or prejudice from the failure to obtain a continuance.

The claims of error relating to Count 15 (claimed failure of court to permit

Shelton to present witnesses or present cross-examination, and alleged improper admission of 404(b) evidence) are frivolous because Shelton was acquitted on that count.

ARGUMENT

I. THE COURT DID NOT ABUSE ITS DISCRETION IN DEPARTING UPWARD FROM THE GUIDELINES

USSG §5K2.0 provides generally that the sentencing court may impose a sentence outside the guideline range if it finds "'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission,'" quoting 18 U.S.C. 3553(b). A district court's decision to depart from the Sentencing Guidelines is due substantial deference and is reviewed for abuse of discretion. Koon v United States, 518 U.S. 81, 98-100 (1996). The abuse of discretion "standard includes review to determine that the discretion was not guided by erroneous legal conclusions." Id. at 100. The district court's underlying factual findings are reviewed for clear error. United States v. Jordan, 256 F.3d 922, 926 (9th Cir. 2001).

In this case, after grouping (see pages 27-28, infra), the court imposed sentence using the bribery guideline, USSG §2C1.1.[8] After various adjustments

[8] After calculating the offense levels for wire fraud, money laundering, bid rigging, and bribery, the court used the highest resulting offense level, which was

not at issue on appeal, the court determined that the adjusted offense level was 27. Supp.ER 606-10. The court then departed upward 3 offense levels because it believed that an offense level of 27 did not reflect the seriousness of the offense. On appeal, Shelton challenges this upward departure.

In calculating the offense level for bribery, the Sentencing Guidelines required the court to apply the greater of two applicable alternatives: (A) "the loss to the government from the offense" using the table in 2B1.1, or (B) an 8-level enhancement for the payment of bribes to a high-level decision-making official. 2C1.1(b)(2)(A),(B). In this case, the court found that a preponderance of the evidence showed that the failure of Guam to obtain FEMA reimbursement had caused a loss of between $522,000 and $744,000. Under the bribery guidelines and table 2B1.1, this would have resulted in a 14-level increase over the base offense level. 2C1.1(b)(2)(A). Supp.ER 598-99. Because the court found that it could not ascertain the loss with sufficient precision to satisfy a "clear and convincing" evidentiary standard,[9] however, it applied the 8-level enhancement

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for bribery. Supp.ER 606-09.

[9] The district court believed that this Court's decision in United States v. Jordan, 256 F.3d 922, 928-29 (9th Cir. 2001), required the amount of the loss to be proved by clear and convincing evidence. In our view, the district court misinterpreted Jordan and should have applied the preponderance of the evidence standard. However, since Shelton benefitted from this error -- his offense level

under 2C1.2 (B), recognizing nonetheless that the loss was far greater than that accounted for under subsection (B). Supp.ER 596, 603. Because 2C1.2(B) did not fully account for the intended loss in this case, the court relied on Application Note 4 to the Bribery Guidelines. Supp.ER 599-600.[10] In that note, the Sentencing Commission observed that "the monetary value of the unlawful payment might not be known or may not adequately reflect the seriousness of the offense." USSG §2C1.1, comment. (n. 4). In those situations, "an upward departure is warranted." Id. Accordingly, the court in this case departed upward three offense levels.

The court fully explained why it believed that the amount of the bribes that Shelton received did not adequately reflect the seriousness of the offense and justified an upward departure. First, in addition to demanding bribes for granting DPR projects, Shelton had deprived the Government of Guam of reimbursement of hundreds of thousands of dollars by failing to provide, and indeed preventing others from providing, the underlying documentation required as a condition of

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even after the district court's departure (30) was lower than it would have been (33) if the court had applied a preponderance standard -- and the government did not appeal the sentence, there is no reason for this Court to address the burden of proof issue.

[10] If the court had been able to calculate the loss under subsection 2(A), there would have been no need for departure because the severity of the offense would be accounted for under the bribery guideline. Supp.ER 595.

FEMA reimbursement on these projects. Supp.ER 600-01. See pages 16-17, supra. The court found nothing in the Sentencing Guidelines indicating that the Sentencing Commission ever took the concept of FEMA reimbursement into account in considering appropriate offense levels. Supp.ER 600-01. Thus, depriving the Government of Guam of FEMA reimbursement was a significant additional harm that fully justified the court's reliance on Application Note 4 to Section 2C1.1 to make sure that the sentence adequately reflected the seriousness of the offense. Supp.ER 601-04.

Another reason why the bribes Shelton received did not adequately reflect the seriousness of the offense is that Shelton's conduct could affect Guam's receipt of FEMA assistance in the future. The court reasoned that Guam is periodically subject to tropical storms, typhoons, and earthquakes for which timely "FEMA assistance is absolutely essential." Supp.ER 605. Shelton's conduct may jeopardize Guam's ability to receive FEMA help, may result in a lessening of FEMA help, or may make it harder for the Government of Guam to get help as expeditiously as possible because, as a result of the bribery and fraud in this case, FEMA imposed new safeguards to more closely monitor and scrutinize disaster recovery in Guam. Supp.ER 605-06.

Shelton's challenges to the upward departure should be rejected because

they mistake the grounds for departure, misapply the sentencing guidelines, and challenge factual findings that are supported by the record.[11] Specifically, Shelton is mistaken in claiming that there was improper double-counting of the bribery offense. As noted above, the court correctly found that Shelton's "conduct involved more than taking bribes" and "[n]either Section 2C1.1(b)(2)(A) nor (B) adequately reflects the seriousness" of the offenses. Supp.ER 603. Accordingly, because the amount of the bribes Shelton received did not adequately reflect the seriousness of the offense, the court's reliance on USSG §2C1.1, comment. (n.4) was correct and did not constitute double-counting.

Nor has Shelton established that any of the district court's factual findings are clearly erroneous. He claims, for example, that the court's finding that "Shelton 'has thus far and may permanently prevent the Government from receiving reimbursement' is not supported by the record." Deft. Br. 12. But at the time of sentencing -- which was close to the end of or past the four-year limit for submitting the paperwork for FEMA reimbursement, at which point the "the grant

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[11] The court rejected several other grounds for upward departure suggested by the government, including a request made under USSG §5K2.7. Supp.ER 585-89, 611. Since the court expressly refused to base an upward departure on this provision, Shelton's claims that his conduct did not meet the 5K2.7 standards for finding a "significant disruption of a governmental function"(Deft. Br. 15-17), are irrelevant. Moreover, these arguments were never made to the court below.

is deobligated and you lose the funds" (Supp.ER 603[12]) -- DPR had not submitted any documentation for, and thus had not received, any reimbursement on the three large Paka projects.[13] Supp.ER 568-69 (FEMA agent stated "there won't be no moneys associated with reimbursement for that, it's too late"). Shelton ignores this evidence and claims that the record "overwhelming[ly] established the availability of reimbursement opportunity." Deft. Br. 12. In fact, however, the FEMA witness cited stated only that "I know they can ask for it, and what FEMA's position will be, I have no idea." And he added that "if the money [for a particular project] has been deobligated, then it's -- it's no longer up for obligation." Supp.ER 578-80. Indeed, Shelton cites no evidence to suggest that anything is being done even at this late date to secure FEMA consideration or obtain FEMA reimbursement. Shelton's speculation that some day, long past the FEMA deadline, documentation might be submitted to FEMA which FEMA might consider and might decide to

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[12] The Director of Guam's Recovery Coordination Office testified that FEMA required projects over $47,100 to be completed within 18 months and required underlying documentation to be supplied within four years. Supp.ER 458.

[13] The "significant draw downs" to which Shelton refers (Deft. Br. 13) were for projects under $47,100 that automatically receive FEMA reimbursement without documentation. Supp.ER 565, 576-77. There were no draw downs and no reimbursement for the large projects -- Paseo Stadium, Wettengel Football Field, and Ypao Beach. Supp.ER 567-68, 590.

reimburse, is just that -- speculation without any evidentiary support. Such speculation cannot undermine the district court's determination that Shelton intentionally subverted the FEMA reimbursement process, seriously jeopardizing Guam's ability to obtain timely reimbursement in the future, and thus that Shelton "has thus far and may permanently prevent the Government of Guam from receiving reimbursement for its expenditures." Supp.ER 600.

Similarly unavailing is Shelton's challenge to some findings as too "speculative," "merely reflect[ing] an anticipated disruption of government function." Deft. Br. 15, emphasis added. The court was entitled to consider the effect that Shelton's conduct might have on FEMA reimbursement in the future, especially when viewed in conjunction with clear evidence (l) that Shelton failed to seek and impeded FEMA reimbursement; (2) that Guam has not to this date been reimbursed;[14] and (3) that FEMA has in fact put in place more stringent policies affecting Guam's disaster recovery.[15]

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[14] Shelton's claim that the government was required to prove the precise amount of the lost FEMA reimbursement, and that "reimbursement eligibility was permanently lost" (Deft. Br. 12, 13) is unsupported by any authority requiring this precise quantum of proof.

[15] Shelton's claim that FEMA's decision to change its audit procedures was not "solely . . . attributable to Shelton" (Deft. Br. 16) is, again, directed at 5K2.7 and is thus irrelevant. See note 11, supra. It is also wrong. Shelton's corrupt mishandling of the projects at issue in this case was the reason DPR did not apply

Therefore, the district court did not abuse its discretion by departing upward three offense levels.

II. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE BID RIGGING OFFENSES SHOULD NOT BE GROUPED WITH THE OTHER OFFENSES

"A district court's application and interpretation of the Sentencing Guidelines is reviewed de novo." United States v. Johnson, 297 F.3d 845, 867 (9th Cir. 2002).

The district court properly grouped the bid rigging counts separately from the bribery, wire fraud, and money laundering conspiracy counts. USSG §3D1.2 provides that "counts involving substantially the same harm shall be grouped" in four circumstances. None of those circumstances exists in this case.

Subdivision (a) provides that counts should be grouped when they "involve the same victim and the same act or transaction." 3D1.2(a). The counts in this case clearly do not arise out of the same act or transaction, and the counts cannot be grouped under this subdivision. Because Shelton does not and could not claim

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for or receive FEMA reimbursement. It was, moreover, a significant factor, and perhaps the only factor, in FEMA's decision to put in place more costly audit procedures for the future. Despite the "ten other investigations" that Shelton cites (Deft. Br. 16), the record shows that Mr. Lou Botta, who had instituted the new FEMA policies, did not even know about these additional investigations into wrongdoing, and so could not have relied on them in deciding to implement the more stringent procedures. Supp.ER 570-75.

that subdivision (a) applies in this case, his reliance on Application Note 3 to claim that bid rigging and mail fraud should grouped together (Deft. Br. 18) is plainly wrong. Application Note 3 by its express terms applies only to 3D1.2(a) -- counts involving a single transaction.

Shelton also does not suggest that grouping would be warranted by subdivision (c) -- which requires grouping when "one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts."

Subdivision (d) is also clearly inapplicable because it provides for grouping "[w]hen the offense level is determined largely on the basis of the total amount of harm or loss, . . . or some other measure of aggregate harm. . . " The offense level for bid rigging is based on the volume of commerce affected by the antitrust violation while the offense level for the remaining offenses is based on the value of benefit gained or loss incurred. The fact that the offense levels are computed differently precludes application of USSG §3D1.2(d); United States v. Taylor, 984 F.2d 298, 303 (9th Cir. 1993); Supp.ER 581-84.

The only remaining basis for grouping is if the "counts involve the same victim and two or more acts or transactions connected by a common criminal objective or . . . a common scheme." 3D1.2(b). Shelton's claim that the counts

should have been grouped under this provision ignores the Guideline commentary and established precedent.

The offenses at issue do not involve the "same victim." The victim of Shelton's bid rigging is, concretely, the government of Guam. The bribery statute, on the other hand, protects the public's abstract right to honest officials, and a violation of that statute does not necessarily have an identifiable victim. Even assuming that the bid rigging and other offenses had as their victim "society at large," (see Deft. Br. 18), the commentary to 3D1.2 expressly states that "[f]or offenses in which there are no identifiable victims . . . where society at large is the victim," then the "victim" "is the societal interest that is harmed." Comment. (n.2). Thus, when the government is the victim of multiple crimes charged in separate counts, the courts must examine the "societal interest that is harmed" by each of the separate counts, and counts are to be grouped only "when the societal interests that are harmed are closely related." Id. (emphasis added).

In this case, the societal interests that are harmed are different, and thus they must be grouped separately. Id.; United States v. Egson, 897 F.2d 353, 354 (8th Cir. 1990). The societal interest at stake in offenses involving public officials -- the bribery and related wire fraud counts -- is the public's right to honest services from government officials; the societal interest involved in bid rigging is the

interest in free and open competition to ensure the best quality at the lowest price. Supp.ER 585-84. Thus, the bid rigging counts were properly grouped separately. See United States v. Bordinaro, 777 F. Supp. 1229, 1233-34 & nn.3, 5 (E.D. Pa. 1991) (fraud offenses and antitrust offenses grouped separately), aff'd, 970 F.2d 900 (3d Cir. 1992).

III. THE COURT PROPERLY ADMITTED EVIDENCE UNDER Fed. R. EVID. 404(b)

The trial court's decision to admit 404(b) evidence is reviewed for abuse of discretion. United States v. Chase, 301 F.3d 1019, 1023 (9th Cir. 2002). Rule 404(b) is a rule of inclusion, and "[t]he only time such evidence may be excluded . . . is if the evidence 'tends to prove *only* criminal disposition.'" United States v. Hinostroza, 297 F.3d 924, 928 (9th Cir. 2002) (emphasis in original, citation omitted).

The district court properly applied the four-part test for admitting 404(b) evidence, and engaged in the appropriate balancing under Fed. R. Evid. 403. ER 19-27. At trial, Shelton's only objection to the 404(b) evidence was that it was not sufficiently "similar" to the conduct charged in the indictment. But the district court properly found that the Flores Park evidence concerned the same conduct -- bid rigging and bribery -- between the same participants -- Yoon and Shelton -- and the same modus operandi, as the bid rigging and bribery schemes in this case.

ER 21-24.

The court also properly found that the evidence that Shelton took a bribe from Yoon in exchange for Yoon's obtaining a DPR permit to operate a Jet Ski business (see note 2, supra) was probative of Shelton's intent to defraud the Government of Guam and to abuse the power of his public office. United States v. Johnson, 132 F.3d 1279, 1283 (9th Cir. 1997) (conduct need not be identical to conduct charged, but only probative of intent).

The Jet Ski evidence was also properly admitted as background evidence. It showed how the relationship between Shelton and Yoon developed, and why Shelton could approach Yoon in 1997 anticipating that Yoon would accede to his bid rigging and bribery solicitations. ER 25-26; see United States v. Smith, 282 F.3d 758, 768 (9th Cir. 2002) (prior criminal endeavors help provide background and explain why co-conspirator trusted defendant to be included in risky scheme).[16]

Shelton makes several claims that were never raised below and, in any event, lack any merit and do not establish plain error. First, Shelton claims that, when 404(b) evidence was admitted, the court was required to identify for the jury the count(s) to which that evidence related. But Shelton cites no authority for

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[16] Shelton also challenges 404(b) evidence relating to Count 15 (Deft. Br. 19-20, 24-25). But he was acquitted on that count, and could not have been prejudiced by that 404(b) evidence. See also note 18, infra.

requiring such an instruction, never proffered an instruction at trial, and has not explained how he was prejudiced by the failure to give such an instruction. The court instructed the jury that the evidence could only be used to determine "the question of the defendant's intent, plan, knowledge, absence of mistake, and for no other purpose." E.g., Supp.ER 276-77. That was sufficient and appropriate.

Second, Shelton now claims the Flores Project evidence was improper because it related to incidents occurring after the conduct in this case. But, "404(b) does not distinguish between 'prior' and 'subsequent' acts," and this Court "has squarely resolved in the government's favor the issue that subsequent Rule 404(b) evidence may be relevant and admissible." United States v. Hinostroza, 297 F.3d at 928 (subsequent evidence admissible for intent and knowledge).

Third, Shelton claims that 404(b) evidence cannot be admitted to prove intent, knowledge, or lack of mistake where a defendant categorically denies commission of the crime. Deft. Br. 22. But the only case cited for that claim is United States v. Mayans, 17 F.3d 1174 (9th Cir. 1994) which holds to the contrary. Mayans points out that, even if the defendant denies participation in the charged schemes, knowledge and intent are still material issues that the government must prove and thus 404(b) evidence can be admitted with respect to those issues. Id. at 1182.

Shelton's final complaint is that the court erroneously referred to the 404(b) evidence as other "crimes" in its cautionary instructions to the jury about the limits on the use of such evidence. Deft. Br. 25. But Shelton never objected to the instruction at trial and, indeed, defense counsel himself referred to the 404(b) evidence as "other crimes" in his closing. Supp.ER 481 (complaining that "other crimes" evidence was introduced "despite the fact that he's not even charged with those crimes . . . [p]erhaps because they can't prove it beyond a reasonable doubt"). Thus, he can hardly claim that he was "unduly prejudiced" by the court's use of the term.[17]

Even if any 404(b) evidence had been improperly admitted, there would be no basis for reversal because any error would be harmless. United States v. Derington, 229 F.3d 1243, 1247 (9th Cir. 2000) (error is harmless if "it is not probable that it affected the jury's guilty verdict"). The jury's guilty verdict on the counts of conviction is supported by overwhelming evidence of Shelton's guilt. Moreover, the court gave limiting instructions each time the 404(b) evidence was

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[17] The 404(b) evidence did relate to other "crimes," i.e., bribery of a public official, and bid rigging on the Flores Park project. In any event, in addition to using the term other "crimes," Rule 404(b) authorizes the admission of evidence concerning other "wrongs" or "acts" which may involve conduct that was not charged as a crime. Nor do 404(b) crimes, wrongs or acts have to be proved beyond a reasonable doubt.

introduced, and again in the closing charge, and those instructions are ordinarily presumed to have cured any possible prejudice. United States v. Matthews, 240 F.3d 806, 817 (9th Cir. 2001), aff'd in pertinent part, rev'd other grounds, 278 F.3d 880 (9th Cir. 2002) (en banc); United States v. Romero, 282 F.3d 683, 688-89 n.1 (9th Cir. 2002).[18]

IV. THE COURT'S DISMISSAL OF SOME JURORS DID NOT DEMONSTRATE BIAS

The trial court's decision to excuse or replace a juror is reviewed for abuse of discretion. United States v. Gay, 967 F.2d 322, 324 (9th Cir. 1992). In the absence of objection, the plain error rule applies.

Shelton's claims of judicial bias in excusing four jurors has no merit. The court retained jurors who were friends of Shelton, e.g., Supp.ER 2-5, 36-40, even when they were not entirely certain they could put that friendship aside, Supp.ER 10-20. The court also retained jurors who demonstrated sympathy for Shelton and suspicion of the government. See, e.g., Supp.ER 4-9, 27-33.

The court did not abuse its discretion in excusing the few jurors cited in

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[18] The 404(b) evidence relating to Count 15, as well as the government's reliance on that evidence in closing (see Deft. Br. 24-25) can hardly be deemed prejudicial because Shelton was acquitted on that count. See also Matthews, 240 F.3d at 817 (since defendant was acquitted on the count where the evidence would have had the most prejudicial impact the evidence must have had only minimal impact).

Shelton's brief. A juror's claim that he or she can be fair and impartial does not preclude the court from determining otherwise. Murphy v. Florida, 421 U.S. 794, 800 (1975). The court excused Mr. Dumanal because the witness "was avoiding eye contact on a number of the questions," had a "drinking problem," which might return given this "high pressure case" and a sequestered jury, and had gone through the criminal justice system and served time. Supp.ER 41-42. The court was concerned whether the witness could "handle" the pressure and whether he could be fair and impartial. Supp.ER 42-43.

The court excused Juror Amy Cruz because she described herself as "related closely" to defense counsel and admitted she had "strong feelings, attachment" "towards [her] cousin," "her family." Supp.ER 21. The court found that her "non-verbal behavior" showed "she was struggling and she was stiffening up when she said yes, I will, like she was forcing herself to do that. Also her eyes were teary-eyes and red, which means there's a struggle going on some place in her." Supp.ER 26. Dismissal on this basis does not evidence bias, especially when the court retained another juror who was closely related to defense counsel, Supp.ER 23-25, and a juror who was a friend of defense counsel. Supp.ER 1.

Nor did the court abuse its discretion in dismissing Juror Gangob whose $650 monthly rent -- a significant part of her budget -- was paid by defense

counsel's family in exchange for her husband's maintenance services. Supp.ER 209. When the court asked the juror if "you felt that you have to give a verdict against Mr. Arriola's side, would the thought of any repercussions or the thought that something might happen to your husband or your arrangement affect your consideration of that verdict," the juror admitted that "[t]he thought has crossed my mind," adding "but I'm pretty confident." Supp.ER 210. Thus, the court wondered "whether she'll have a struggle, or how much of a struggle that would pose." Supp.ER 211. Moreover, the court was concerned that the husband might report to the juror during trial things about his job -- whether good or bad -- that might also affect her deliberations. Id.[19] Juror Gangob was replaced by an alternate juror who was agreed on by both sides. Supp.ER 212.

"The district court has the responsibility 'affirmatively to detect potentially contaminating influences on juror deliberations . . .'" Gay , 967 F.2d at 324, quoting United States v. Perez, 658 F.2d 654, 663 (9th Cir. 1981). The court took that responsibility seriously in this case and exercised its discretion appropriately.

In addition, the court was well within its discretion in excusing an alternate juror during the trial who needed to visit the dentist to repair a broken tooth. The

[19] The juror realized the connection to defense counsel when her husband wrote her a note during the trial. Supp.ER 208.

court did not know how long the treatment would take, or if the juror would be on painkillers, and the court needed "somebody that's fully healthy and fully alert." Supp.ER 285. In this case, where the jury was sequestered during the trial, the court had a particularly strong interest in avoiding any unnecessary delays. See Gay, 967 F.2d at 325, citing with approval United States v. Peters, 617 F.2d 503, 505 (7th Cir. 1980) (no abuse in excusing a juror who arrived to court 10 minutes late because the court had legitimate concerns in maintaining a trial schedule).

Although Shelton complains about the trial court's decision not to dismiss military reservist Juror Andrade, he does not cite any legal basis on which the court should have dismissed Mr. Andrade simply because he asked to be dismissed. Nor did the court make any "outrageous" remarks to this juror. Rather, the court merely impressed on Mr. Andrade the importance of jury service. Deft. Br. 26-27. Shelton could not have been prejudiced by those statements.

Indeed, Shelton has not claimed that he had any particular attachment or interest in retaining any of the excused jurors or any objection to the substitute jurors. See Gay, 967 F.2d at 324 n.2. With the exception of excusing Amy Cruz, moreover, Shelton did not even object to the court's conduct. The record shows that the court was even-handed and impartial in its jury selection. Shelton's claims that the court's "unwarranted" treatment of jurors "presented a very clear signal of

its bias against Shelton" (Deft. Br. 30, 29) are thus groundless.

V. THE GOVERNMENT DID NOT ENGAGE IN IMPROPER VOUCHING

This Court reviews claims of improper vouching to determine whether the prosecution in fact engaged in improper tactics. Failure to object is reviewed for plain error. United States v. Young, 470 U.S. 1, 15 (1985); United States v. Matthews, 240 F.3d at 818.

Shelton first claims that the government engaged in impermissible vouching by saying on two occasions "I understand that" in response to statements by a witness that "I am telling the truth." Deft. Br. 30-31. This does not constitute "vouching." The prosecutor did not express his personal belief in the veracity of the witness, or indicate that information not presented to the jury supported the witness's testimony. The government was not saying "I know you are telling the truth," but, rather, "I understand what you are saying." It was made to get a witness who did not understand English well and was speaking through an interpreter to "listen closely to the question," and answer more responsively. ER 63, 65. This is evidenced by the fact that the only defense objection to this exchange was not to the prosecution's statement, but to the witness's answer as

"non responsive." Tr. 1065 (printed at Deft. Br. 31).[20]

Nor did the government engage in misconduct in its closing. The statements Shelton challenges were proper and, in two cases, were an invited response to remarks that defense counsel had made in its closing. Asking the jury "didn't [Mr. Jiang's] testimony have the ring of truth?" is not vouching. See, e.g., United States v. Atcheson, 94 F.3d 1237, 1245 (9th Cir.1996) (statement that witnesses were "good witnesses" is not vouching and does not imply that the Government was assuring the veracity of those witnesses); United States v. Necoechea, 986 F.2d 1273, 1279 (9th Cir. 1993) (not vouching to say "I submit to you . . . that she's not lying"). The prosecutor has a right to review the testimony of witnesses and argue credibility based on "inference[s] from evidence in the record." Id.[21]

Second, the prosecution did not engage in improper vouching in stating that "it might be that we could have got [Yoon] extradited, but . . . he came back." This comment was based on evidence in the record showing that Yoon returned

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[20] The line of questioning by the prosecution occurred on redirect, after the defense had attacked the witness's credibility. Once a witness for the prosecution has been attacked on cross-examination, the prosecution can elicit statements from the witness regarding his or her truthfulness. United States v. Wallace, 848 F.2d 1464, 1473-74 (9th Cir. 1988).

[21] Compare defense counsel closing: "Witnesses lie in court all the time. And certain witnesses in particular did it in this trial" (Supp.ER. 475); "Primo Carlos was such a bad liar, such a bad liar." Supp.ER 479.

voluntarily from Korea after being told by his wife that he was being sought by the government for questioning. Supp.ER 467 (FBI told Lee Yoon that there was a treaty with Korea that could require her husband to be brought back but she asked him to come back voluntarily).[22] The government's rebuttal closing statement was in response to remarks made by defense in its closing that government witnesses, and Mr. Yoon in particular, were lying "to avoid jail . . . . And they are willing to implicate Sonny Shelton, in some way, shape or form" Supp.ER 478. The government's response that Mr. Yoon returned to Guam voluntarily was meant to show that he would not "do anything" to avoid jail.

Similarly, the statement that "Lee Yoon doesn't have a plea agreement. She's not an accomplice," was not vouching (see Deft. Br. 32), since it did not refer to evidence outside the record. Supp.ER 482. Again, the remarks were invited by defense counsel's attacks in closing on the credibility of "accomplices . . . [l]ike Jesse Carlos" (Supp.ER 476), and other named government witnesses who had pled guilty. Supp.ER 477. Defense counsel had not claimed that Mrs. Yoon was either an accomplice or a witness who had pled guilty, but he later attacked her

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[22] Shelton cannot show how the reference to extradition could possibly have prejudiced him, even if it were deemed improper. The statement was not made to bolster the government's case, but rather was an acknowledgment by the prosecution that the existence of an extradition treaty could weaken its argument that Yoon's decision to come back was purely "voluntarily."

credibility on other grounds. Supp.ER 480 (suggesting she would lie to keep her husband out of jail). The government's response that Mrs. Yoon was not an accomplice and did not plead guilty is supported by the evidence and by defense counsel's own closing comments.

Finally, Shelton has not attempted to show how he was prejudiced by the challenged remarks to which he made no objection and for which no curative instructions were sought. In the absence of such objection, error would be reversible only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings, or if failure to reverse would amount to a miscarriage of justice. United States v. Tavakkoly, 238 F.3d 1062, 1065 (9th Cir. 2001). This was not a close case. Indeed, on appeal, Shelton generally ignores rather than challenges the overwhelming evidence of his guilt that the government presented at trial. See pages 3-17, supra. There is no basis for finding plain error.

VI. SHELTON WAS PROPERLY CONVICTED OF WIRE FRAUD

Where there is no objection to a jury instruction at trial, reversal is warranted only "if it is 'highly probable that the error materially affected the verdict.' 'Improper jury instructions will rarely justify a finding of plain error.'" United States v. Tavakkoly, 238 F.3d 1062, 1066 (9th Cir. 2001) (citations omitted).

Contrary to Shelton's contentions (Deft. Br. 33-34 and 38-39), the court's

instructions on wire fraud were correct and the jury verdict is supported by the evidence.

A. The Jury Instructions

Shelton claims that the instructions on wire fraud were incorrect because the court told the jury that the wires had to be used "to carry out or attempt to carry out an essential part of the scheme" with respect to a scheme to obtain money or property by false promises, but failed to use that phrase in instructing on the elements of a scheme to deprive the Government of Guam and its citizens of their right to honest services. Deft. Br. 33-34; see 18 U.S.C. 1343, 1346.[23]

But Shelton never objected to the instructions at trial when the court would have had the opportunity to cure any claimed defect. Supp.ER 469 (only objection to instruction was that it mentioned "telephone, wire, radio, or television communication" and "in this particular case, we're only dealing with a wire

[23] The Ninth Circuit Manual of Model Jury Instructions provides separate instructions for mail fraud based on a scheme to obtain money by false promises (8.101) and mail fraud based on a scheme to deprive the government and citizens of their right to honest services (8.102). The former instruction provides that "the defendant used, or cause to be used, the mails to carry out or attempt to carry out an essential part of the scheme," while the latter provides only that "the defendant used, or caused someone to use, the mails to carry out or to attempt to carry out the scheme or plan." Although the court's instruction omitted the "carry out" language from the latter charge, neither party noticed or objected to it.

transmission"). The failure to give the instruction was not plain error.[24]

To support a conviction for wire fraud, the government must prove: (1) defendant's participation in a scheme with intent to defraud; and (2) the scheme used or caused the use of wire in furtherance of the scheme. United States v. Johnson, 297 F.3d 845, 870 (9th Cir. 2002). It is not necessary that the wire be used "to carry out. . . . an essential part of the scheme," but only that the wire transmission be "incident to an essential part of the scheme" or a "step in [the] plot." Schmuck v. United States, 489 U.S. 705, 711 (1989) (quotations omitted). Thus, this Court held in United States v. Garner, 663 F.2d 834, 838 (9th Cir. 1981), that a telephone call to see whether someone would be coming to execute a gambling scheme, although not an essential part of the scheme, was sufficient to support the jury verdict that it was in furtherance of the scheme.

In this case, Shelton could not have been prejudiced by the omission of the "carry out" phrase. Immediately following the jury instructions cited in Shelton's brief, which reviewed the elements of wire fraud for the two alternative schemes

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[24] Shelton had proposed one general wire fraud instruction which stated in part: "*Third*, the defendant used, or caused someone to use, a wire in interstate commerce to carry out or to attempt to carry out the scheme or plan." Supp.ER 531. Shelton did not and does not now challenge the court's decision to give two separate instructions, however, because the elements of each scheme are not entirely the same. And, as noted above, Shelton did not object to the omission of the "carry out" language from the "right to honest services" portion of the charge.

alleged (deprivation of honest services, and deprivation of money or property), the court went on to explain the third element -- use of the wires -- in more detail. The court properly told the jury, pursuant to Schmuck, supra, that "[t]he communication itself need not be a essential part of the scheme. It is sufficient for the communication to be incident to an essential part of the scheme or a step in the plot." Supp.ER 494. The court also properly explained that "[a] wiring is caused when one knows that the wires . . will be used in the ordinary course of business or when one can reasonably foresee such use. . . . It does not matter whether the material wired was itself false or deceptive, so long [as] the use of the wires was incident to an essential part of the scheme. . ." Supp.ER 494-95; see United States v. Hubbard, 96 F.3d 1223, 1227-28 (9th Cir. 1996); United States v. Serang, 156 F.3d 910, 914 (9th Cir. 1998).

When the instructions are viewed in their entirety therefore, as they must be (United States v. Beltran-Garcia, 179 F.3d 1200, 1204 (9th Cir. 1999)), the jury was required to find all of the necessary elements of wire fraud. There was neither error nor plain error.[25]

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[25] The fact that the jury convicted Shelton of bid rigging as well as bribery suggests that the jury believed Shelton was guilty of wire fraud based on a scheme to deprive Guam of money or property as well as a scheme to deprive Guam of the right to honest services. Shelton concedes that the court's instructions with respect to the "money or property" scheme were correct. Thus, the convictions could be

Finally, Shelton is mistaken in claiming that the court omitted an instruction on materiality. Deft. Br. 34-35. The court instructed the jury that, in determining whether there was a scheme for obtaining money or property by making false promises or statements, the jury must find that "the promises or statements were material." Supp.ER 494. The instruction, which is taken from this Court's Manual of Model Jury Instructions 8.101, was submitted by the government. Shelton never even asked for a "materiality" instruction. Nor did he object to any deficiency in the materiality instruction that was given.[26] There was no error, and certainly no plain error, in the charge.[27]

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sustained on that basis alone.

[26] The government proffered a materiality instruction for the false statement scheme based Neder v. United States, 527 U.S. 1, 25 (1999), which held that "materiality of a falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes" (emphasis added). The trial court here agreed to give the materiality instruction, but also agreed with the government that Neder has no application to wire fraud based on the right to "honest services" because such a scheme does not require pinpointing particular promises or statements. Supp.ER 470-72, 474. Shelton never contested this interpretation of Neder. If Shelton is now belatedly asserting that a scheme to deprive citizens of their right to honest services requires some element of materiality, Shelton has not cited a legal basis for such a requirement or explained how such an instruction might be framed to fit a "right to honest services" mold.

[27] Shelton suggests some unspecified error in the fact that the indictment listed three duties of honest services owed by Shelton as Director of the DPR. Indictment ¶ 8(a),(b),(c). Deft. Br. 35. Since Shelton does not define the error, he has waived the issue. United States v. Tracy, 989 F.3d 1279, 1286 (1st Cir. 1993).

B. The Evidence

Shelton claims that he could not have been convicted of wire fraud because the wire transmissions could not as a matter of law either (l) have assisted in a scheme to deprive the citizens of Guam of their right to honest services, or (2) reasonably be foreseen by him to be necessary to carry out the schemes. Deft. Br. 38-39.

These issues are questions of fact for the jury, however, not issues of law, and the evidence, when viewed in the light most favorable to the government (United States v. Alvarez-Valenzuela, 231 F.3d 1198, 1203 (9th Cir. 2000)), supports the jury verdict.

The wire transmissions that were the basis for Counts 1 and 2 of the indictment were (l) a fax accepting an offer to ship lighting equipment to repair the Paseo Light Tower, sent on February 5, 1998, from the offices of D.S. Corporation, doing business as Bunny Hardware in Maite, Guam, to the offices of OSCAR Trading Co. in Compton California (Supp.ER 519-20); and (2) a fax accepting terms for the shipment of shingles to repair the roofs at Ypao Pavilion, sent on February 12, 1998, from ATCO in Tamuning, Guam, to Tilling Timer PTY, LTD in Australia. Supp.ER 521.

Shelton's claim that these fax transmissions could not have "assisted in

carrying out [a] scheme" that deprived Guam of his honest services (Deft. Br. 38-39) ignores the record. Indeed, the Supreme Court has upheld mail fraud convictions under similar circumstances. In Schmuck v. United States, supra, title registrations were mailed after dealers sold cars whose odometers had been tampered with pursuant to Schmuck's fraudulent scheme. The Court reasoned that these mailings were "incidental to an essential part of the scheme," because passage of title of the automobiles was essential to the perpetuation of Schmuck's scheme. If dealers were not able to resell Schmuck's cars then they would have ceased dealings with him and his scheme would have come to an abrupt halt. 489 U.S. at 712-13. Similarly, if the shingles and lighting necessary to perform the DPR projects in this case had not been ordered and shipped, the work could not have been performed, the contractors would not have been paid, and Shelton would not have received his bribes out of those payments.

Shelton's claim that the wire transmissions could not reasonably be foreseen also ignores the evidence. At the risk of stating the obvious, Guam is an island heavily dependent on imports ordered by wire or mail. Moreover, contrary to his claim (Deft. Br. 39), the purchased items were not "readily available within

Guam."[28] The shingles ordered for the Ypao Pavilion were not available at any store in Guam because they were not of a type generally used on Guam which used mostly roof tiles. Supp.ER 224, 394-95. The evidence established that a person knowledgeable about construction materials would know that these red cedar shingles would have to be ordered from off-island and that ordering by fax is the way business was done. Supp.ER 226, 395-98. Shelton, who had been involved in the sale and design of homes, was knowledgeable about the availability of construction materials on the island of Guam, and would know if they would have to be shipped from off-island. Supp.ER 136-39. Similarly, the lights for the Paseo Light Tower were not regular stock items and were not available on the island. Supp.ER 403, 339-40 (if lights had been available on Guam, Yoon would have ordered them, but they were not available from any of the light suppliers on Guam and had to be special-ordered). Indeed, Yoon knew this at the time the bids were submitted and this information was figured into the bid estimate and later requests for payment to DPR. Supp.ER 300-02. A person knowledgeable about

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[28] Shelton's cites to the record for this claim at Deft. Br. 39 are misleading. They show that there were other suppliers of light fixtures and shingles on the island, but there is no testimony that these other suppliers had the items in stock and could have supplied them from their inventory instead of ordering them from off-island. See Supp.ER 339-40 (although there were other suppliers of light fixtures aside from Bunny Hardware, the lights needed for Paseo Stadium were special and would have to be special-ordered).

construction would also know that these would be special order items that would commonly be ordered by fax. Supp.ER 402.

Thus, the evidence supports the jury determination that it was reasonably foreseeable by Shelton and anyone else knowledgeable about construction on the island that lighting for the Paseo Stadium project and shingles for the Ypao Beach cabanas would have to be ordered from sources off the island of Guam, and that such orders would be placed by wire as the most expedient method to obtain the supplies, particularly given the emergency nature of these repairs. See also United States v. Johnson, 297 F.3d at 871 ("Much like co-conspirators, knowing participants in a mail or wire fraud scheme are liable for their co-schemers' use of the mails or wires." Once defendant's participation in the scheme was shown, "it was sufficient for the government to show that . . . some co-participant used or caused to be used mail or wire in furtherance of the scheme").

VII. THE BRIBERY INSTRUCTIONS WERE CORRECT

Shelton claims that the bribery instruction was incorrect because it did not require the jury to find that "the federal funds for the Typhoon Paka Project were affected by the alleged bribery." Deft. Br. 35-36. In fact, however, the Supreme Court and this Court have expressly rejected such a requirement.

The six bribery convictions under 18 U.S.C. 666(a)(1)(B) were based on

Shelton's acceptance of six bribes, each in excess of $5,000, on the Paseo Light Tower, Wettengel Football Field, Ypao Beach Pavilion, Agana Tennis Court/Paseo de Susanna, and debris removal projects. 18 U.S.C. 666(a)(1)(B) makes it illegal for any agent of a State (or territorial[29]) government, or any agency thereof, to "corruptly . . . accept[] or agree to accept[], anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such . . . government, or agency involving any thing of value of $5,000 or more."

This provision applies to agents of an "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program . . ." 18 U.S.C. 666(b). As long as an agency receives the statutory amount, the statute forbids acceptance of a bribe by a covered official in connection with "any" business transaction. "The prohibition is not confined to a business or transaction which affects federal funds." Salinas v. United States, 522 U.S. 52, 57 (1997)." Thus, it does not require proof " that the federal funds for the Typhoon Paka Project were affected by the alleged bribery." See Deft. Br. 36. Indeed, there is no requirement that *any* federal funds be affected by the bribe. Salinas at 56-57; accord, e.g., United States v. Wyncoop, 11 F.3d 119, 122 (9th

[29] 18 U.S.C. 666(d)(2).

Cir. 1993) ("[s]o long as the defendant is an agent of an organization that receives more than $10,000 in federal benefits in any given year, it is not necessary that the particular funds stolen be among those 'benefits.'").

Shelton claims that some decisions in other circuits hold that "a federal interest [must be] involved in the alleged bribery." Deft. Br. 36. To the extent Shelton is arguing that some sort of "federal interest" instruction or determination should have been made that was not made, that argument comes too late. No such argument was made at trial and no instruction was proffered. In any event, the argument ignores the fact that the court's instructions required the jury to find that DPR must have "directly benefitted from the federal funding or was involved in the administration of federal funding." Supp.ER 497. And Shelton does not dispute that the Guam DPR received federal assistance in excess of $10,000 in 1998. See Supp.ER 442-45; see also Deft. Br. 13 (concedes "drawdowns" from FEMA in excess of $10,000 for Typhoon Paka projects in 1998). That is a sufficient federal "interest" and federal nexus to sustain the bribery convictions.

VII. THERE WAS NO ABUSE OF DISCRETION IN REFUSING A SPECIAL VERDICT FORM FOR COUNTS 1 AND 2

The decision whether to use a special verdict form is reviewed for abuse of discretion. United States v. Patterson, 292 F.3d 615, 630 (9th Cir. 2002).

Shelton's claim that a special verdict form was required to "ensure that the

jury was unanimous in determining upon which theory Shelton was guilty" on counts 1 and 2 (Deft. Br. 37) ignores the fact that a unanimity instruction was given.

The district court properly noted that, as a rule, special verdicts in criminal trials are not favored, and it cited the valid policies underlying that rule. Supp.ER 483-89; see, e.g., United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998). The court had another reason for rejecting the special verdict form in this case. Special verdict forms are considered the equivalent of jury instructions. United States v. Reed, 147 F.3d at 1180. But, the court noted, Shelton did not ask for a special verdict until after closing arguments had been given, the instructions had been proffered and debated, and objections had been raised and decided. Supp.ER 489-94. The court also noted that the form proffered by Shelton had mistakes in it (e.g., including Count 14, which had been dismissed). The court concluded that the proffered form was both hastily prepared and untimely, and could be a "trap for the unwary." Supp.ER 491.

Moreover, the court properly instructed the jury that to convict Shelton of wire fraud, it had to unanimously agree on at least one of the wire fraud schemes, and one of the false statements. Supp.ER 493-94, also 492. This unanimity

instruction, to which Shelton did not object,[30] was sufficient to ensure a unanimous jury verdict. United States v. Jessee, 605 F.2d 430, 431 (9th Cir. 1979) (per curiam) (where false oath count contained nine separate factual allegations to support the charge, defendant's request for a special verdict was properly denied, since the trial court instructed that the jurors must unanimously agree on at least one of the factual allegations); accord, United States v. Huebner, 48 F.3d 376, 382 (9th Cir. 1994) (no error in refusing special verdict form which would show whether the jury found a conspiracy to evade income taxes or a conspiracy to defraud the United States). Since the jury was correctly instructed concerning unanimity, its guilty verdict must be affirmed. "'[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.'" Id. at 381, quoting Turner v. United States, 396 U.S. 398, 420 (1970).

Accordingly, there was no need for a special verdict form in this case.

VIII. THE COURT PROPERLY REFUSED A CONTINUANCE

The trial court properly refused to grant a continuance on the eve of

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[30] Although Shelton now claims that the court "refus[ed] to provide a sufficient instruction" (Deft. Br. 37), he does not point to any such deficiency and he made no objection below. He asked for a unanimity instruction, Supp.ER 471, and he got one. Supp.ER 493-94.

sentencing, after sentencing had already twice been postponed. Supp.ER 534. Shelton asked for a continuance to determine whether the court might be under investigation by the U.S. Attorney's Office. If so, Shelton said he might move for recusal because such an investigation would prompt the court to try to curry favor with the U.S. Attorney's Office in this case. Deft. Br. 39-40. Defense counsel conceded, however, that, even if the facts he wished to investigate were proven, he was unsure there would be a legal basis for a recusal motion. Supp.ER 541, 544-45.

At the chambers conference, the court explained the circumstances giving rise to the rumors of an "investigation" into its conduct, explained that the situation had been resolved, and assured Shelton that no investigation was pending or contemplated. Supp.ER 535-40, 547-50. In addition, Acting U.S. Attorney Fred Black, who had been named as the person involved in the so-called "investigation," informed defense counsel that no such investigation was in progress or contemplated and that, even if there was an investigation, the U.S. Attorney's office would not conduct it. Supp.ER 552-53, 557-58.[31]

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[31] Shelton now suggests, although it was not argued below, that Mr. Black's statement that the investigation of a local judge would be conducted by the Department of Public Integrity constituted a basis for a continuance. Deft. Br. 41. But he does not explain why. There is no nexus between a completely hypothetical investigation by the Department of Public Integrity and the court's motivation "to

The court did not foreclose Shelton from investigating the facts further if it did not wish to take the court and the Acting U.S. Attorney at their word. Supp.ER 551 ("you can continue your investigation and then you can always say, well, you know, there was some bias here, whatever. But, you know, it's a big ado about nothing, it seems to me"). The court simply refused to postpone the sentencing while Shelton's research continued, since Shelton had gotten "the critical piece of information" he needed, *i.e.*, that there was "no investigation." Id.

The district court's refusal to postpone sentencing again was not an abuse of discretion. Shelton could have begun his investigation into the rumors concerning the alleged investigation of the court when they had first surfaced months before. Supp.ER 554-57. In any event, although there was nothing to investigate, defense counsel was not precluded from pursuing an investigation and raising any matters that might arise from it on appeal. Supp.ER 559-63.

Finally, Shelton does not argue on appeal that further investigation has in fact turned up any evidence to controvert the information provided by the district court and the AUSA. Accordingly, there was neither error nor prejudice in the court's refusal to grant a continuance.

IX. THE COURT DID NOT PRECLUDE SHELTON FROM PRESENTING

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curry favor with the United States Attorney's Office." Deft. Br. 40, 42.

HIS DEFENSE

Shelton's argument (Deft. Br. 44-45) that the court prevented him from presenting a defense and adequately cross-examining witnesses is frivolous. These claims involve witnesses and cross-examination relating solely to Count 15 of the indictment. Since Shelton was acquitted on Count 15, even if the court had abused its discretion in finding that the testimony sought to be admitted was not relevant,[32] there was clearly no prejudice.

[32] We do not concede that there was any abuse of discretion in this case. See United States v. Munoz, 233 F.3d 1117, 1134 (9th Cir. 2000) (no abuse of discretion where evidence was irrelevant or "marginally relevant at best").

X. THE COURT WAS NOT PREJUDICED TOWARD SHELTON

Shelton's claim he was denied a fair trial because of the trial court's prejudice toward him essentially repeats arguments that we have already responded to in other sections of this brief. His additional claim that "[t]he court's demeanor and actions toward defense counsel throughout the trial exhibited hostility in front of the jury" is not supported by the record. Deft. Br. 46. Shelton cites three brief instances in the course of a three-week trial to support this claim, without providing the substance of what the trial court said or did, or how they demonstrate bias. But he never sought to disqualify the judge on the basis of bias; nor was any objection made to the remarks below. Shelton thus "bear[s] a greater burden on appeal." United States v. Hernandez, 109 F.3d 1450, 1453-54 (9th Cir. 1997) (also noting that judicial rulings do not of themselves constitute a valid basis for a bias or partiality motion).

In fact, there was no bias. In two of the cited incidents, the court was properly cautioning defense counsel not to misstate the evidence (Supp.ER 80, 465-66), and in the third instance the court was cautioning defense counsel not to continue with questions that the court had overruled. Supp.ER 176. That the court may have demonstrated impatience with defense counsel once or twice in the course of a three-week trial does not demonstrate prejudice, and is hardly grounds

for reversal. See, e.g., United States v. Bosch, 951 F.2d 1546, 1549 (9th Cir. 1990); United States v. Poland, 659 F.2d 884, 892, 907 (9th Cir. 1981); Enriquez v. United States, 293 F.2d 788, 792 (9th Cir. 1961).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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STATEMENT OF RELATED CASES

Appellee knows of no related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 13,714 words.

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January 6, 2003 Andrea Limmer