12-4370(L)

To Be Argued By:
RICHARD SCHECHTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 12-4370(L)
13-922(Con)

UNITED STATES OF AMERICA,

Appellee,

-vs-

CHRISTOPHER PLUMMER,
MAUREEN CLARK,

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

The district court (Warren W. Eginton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Sentence was imposed on March 1, 2013. Defendant's Appendix ("DA__") 20. On March 11, 2013, the defendant filed a notice of appeal. Government Appendix ("GA__") 1; DA20. Judgment entered on March 12, 2013, and an amended judgment entered on March 14, 2013. DA21; DA293-96. Pursuant to Federal Rule of Appellate Procedure 4(b)(2), the notice is effective even though it was filed before entry of judgment. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues Presented for Review

1. Whether the district court properly charged the jury on the elements of wire fraud where the court followed Second Circuit precedent to instruct the jury that contemplating harm to a victim included depriving the victim of information necessary to make a discretionary economic decision?

2. Whether the prosecutor's initial summation was proper comment on the evidence where the prosecutor did not offer his opinion of the defendant's credibility and did not vouch for the credibility of government witnesses?

3. Whether the district court's imposition of sentence was procedurally reasonable under a plain error standard of review where the court denied defendant's downward departure motions, relied on the § 3553(a) factors to impose sentence and explained that the court's 87-month sentence was the same sentence recommended by Probation?

4. Whether the district court's decision to impose restitution in the full amount of the fraud was plain error where the defendant waived and forfeited her right to contest the amount of restitution or the victims named in the restitution order?

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Preliminary Statement

Defendant Maureen Clark defrauded more than 10 victims of $1.75 million. Clark and Christopher Plummer, her coconspirator who pled guilty prior to trial, conned victims into sending money to Clark by falsely representing that the victims' money would be used to develop a casino project in Mississippi. They told victims

that they already owned 370 acres of Mississippi land where the casino project would be developed, when they merely had an option to buy 370 acres for $450 million. Clark used the vast majority of the $1.75 million she received to fund a failing hotel in Connecticut rather than use the funds to develop the Mississippi casino project. No casino project was ever developed.

After a four-week trial, a jury convicted Clark on one count of conspiracy to commit wire fraud, 13 counts of wire fraud, and six counts of money laundering. The court sentenced Clark to 20 concurrent sentences of 87 months in prison and ordered her to pay $1.75 million in restitution.

On appeal, Clark claims that the district court erred in charging the jury regarding the definition of a scheme to defraud, and that the government engaged in misconduct during its initial summation. Clark also challenges her sentence, arguing that the court made various procedural and substantive errors. For the reasons set forth below, these claims are all meritless.

Statement of the Case

On November 23, 2010, a grand jury returned a 32-count Indictment charging Clark and Plummer with conspiracy to commit wire fraud, wire fraud, mail fraud, and money laundering. DA4. On January 26, 2012, defendant Plummer

pleaded guilty to conspiracy to commit wire fraud. DA8.

Trial began on June 12, 2012. DA11. At the end of the government's case, the government moved to dismiss 11 of the 32 counts against Clark. DA16. Closing arguments took place on July 9 and 10, 2012, and the jury returned its verdict on July 12, 2012. DA16. Specifically, Clark was convicted on 20 of the 21 remaining counts: one count of conspiracy to commit wire fraud, 13 counts of wire fraud, and six counts of money laundering. DA16. Clark was acquitted of one count of wire fraud involving an email. DA16.

Clark moved for a new trial and a judgment of acquittal challenging the court's wire fraud jury instructions and the prosecutor's initial summation, claims she reasserts in this appeal. DA150. The court denied these motions explaining that "I am denying the [Rule] 29 and the [Rule] 33 [motions] with some confidence, compared to other cases I've had, that this is a very strong case by the Government." DA194.

On March 1, 2013, the court (Eginton, J.) sentenced Clark to 20 concurrent prison sentences of 87 months and three years of supervised release. In addition, the court ordered Clark to pay restitution to her victims of $1.75 million. DA293-96. On March 11, 2013 Clark filed a timely notice of appeal. DA20. Clark is currently serving her sentence.

A. The government's case

The evidence demonstrated that victims provided more than $1.75 million to Clark by way of interstate bank wire transfers after being told by Clark and Plummer that their funds would be used in connection with a casino project planned for Lakeshore, Mississippi (the "Mississippi Project" or "Project"). GA482-84; GA684. Before receiving any funds, Clark and Plummer created an executive summary that falsely indicated that they owned 370 acres free and clear on which a casino project would be developed, that they had already invested their own money, and that they were looking to acquire options on another 417 acres surrounding the 370 acres they already owned. GA373-80; GA416-63; GA773-81.

i. Clark and Plummer made false statements about the Mississippi Project.

Clark and Plummer induced the victims to provide funds to Clark based on the executive summary and a series of materially false representations and false pretenses. For example, they told victims the following:

- That they owned land in Mississippi. Clark and Plummer deliberately failed to tell the victims that they had only an option to buy 370 acres for $450 million, GA256; GA297-98; GA323-25; GA329-30; GA357; GA697-717; GA763-65; GA773-81; GA862-72; GA904-17.

- That the funds provided to Clark would be used for the Mississippi Project, as funding to secure, for example, options on land that was adjacent to the large tract of land purportedly owned by Clark and Plummer to create a large casino resort. In fact, the vast majority of the funds were used by Clark and Plummer for other purposes. GA297-98; GA358; GA384-85; GA763-65; GA690-717.
- That Clark and Plummer had provided millions of dollars of their own money to fund the project and that Clark had liquidated her companies to provide equity. In truth, neither defendant had provided any of their own money to fund the Project. GA260-64; GA297; GA417; GA732; GA940-43.
- That Amtrak had agreed to build a passenger station on the resort land, when, in fact, Amtrak had never agreed to build a station. GA254-55; GA410-12; GA708.
- That the funds provided by victims were loans or investments, and that the victims would receive a 15% or 20% return on their loan or investment within one year, as well as an equity kicker in the overall Mississippi Project. No victim received his principal back, much less any interest or equity kicker, from Clark. GA282; GA386-87; GA782-810.

- That the loans/investments provided by the victims would be insured in the event that Clark, Plummer, or their company New England Resorts ("NER") failed to pay the funds back. In truth, the so-called insurance purchased by Clark for $9,689 did not provide any coverage to the victims when Clark, Plummer and NER defaulted. GA392-93; GA816-50.
- That Bear Stearns and Goldman Sachs had agreed to partner to finance the Project. In reality, neither of these financial institutions had agreed to provide any financing. GA258-59; GA265-68; GA388-91; GA850-55; GA918-19; and
- That Clark was on the verge of receiving huge financing from various financial institutions throughout the world. No such financing ever materialized, or was even realistic given the fact that Clark had no money, GA770; GA859-61; GA886; GA920-38; GA940-42, no equity in the Project, and was running a failing hotel (the Lighthouse Inn ("LHI")). GA936-39.

ii. Clark lied about owning land.

The fraud worked because victims were deceived into believing that Clark, Plummer, and NER owned 370 acres in Mississippi. In fact, the land was owned by a group of Mississippi residents, including Kirk Ladner and Russell Elliott,

and was never owned by Clark. GA251-53; GA326-28; GA335-39; GA343; GA348-56.

Clark and Plummer convinced Ladner and Elliot to put the 370 acres into an LLC with the name "New England Resorts of Mississippi" ("NEROM") and to transfer the deeds for the 370 acres to NEROM. GA331-34; GA350-56. Because Clark and Plummer owned a company called New England Resorts, it seemed plausible to victims that the 370 acres held in the name of "NEROM" was owned by Clark and Plummer. GA335-38; GA862-85; GA904-17.

Clark fostered this image that she owned the land in her direct communications with victims. Clark was recorded on tape speaking to an investor group before and after she obtained their funds. GA272; GA581; GA697-762. Prior to taking the investors' money, Clark referred to the 370 acres as "my 370." GA711. After she failed to return the funds to the investor group, she was asked if she owned the resort piece (the 370 acres) in Mississippi or whether she had the land under option. GA748. Clark falsely explained that she owned the land and had "deed and title." GA272-73; GA569-70; GA748. She also told the group that their funds had been used to purchase options on ancillary land in Mississippi. GA272-73. Like her earlier statement that the 370 acres were hers, both of these later representations were false. Clark and Plummer never told the victims that they only had an op-

tion to purchase the land and the option had a price of $450 million. GA256; GA380-83. Similarly, bank records demonstrated that only 3% of the investor group's investment was expended on the Mississippi Project. GA304-05; GA578-79; GA688; GA690-96.

In another case, Plummer sent a victim copies of the deeds to the 370 acres that showed the owner as NEROM. GA373-80. It was not until after the victim provided approximately $550,000 to Clark that he discovered that NEROM was not Clark's company. GA401-03. When confronted by the victim, Clark lied by claiming falsely that she was NEROM and that she was a NEROM board member. GA343; GA354; GA401-09.

iii. The victims gave Clark $1.75 million in reliance on the false statements.

From September 2006 through November 2007, victim-investors relied on the materially false representations made by Clark and Plummer, and the false pretenses created by the conspirators, when they provided more than $1.75 million to Clark. GA257; GA684. Numerous victims explained that they would not have provided any funds to Clark if they had known that their funds would not be used in connection with the Mississippi casino project. *See, e.g.,* GA243-51; GA299; GA359-60; GA363-64. Numerous victims also explained that they would not have

provided any funds to Clark if they had known that Clark did not own any Mississippi land but merely had a $450 million option to purchase land. *See, e.g.*, GA242; GA249-50; GA256; GA329-30; GA365-67; GA862-72. In short, numerous victims explained that had they known the information that was not disclosed to them—that Clark did not own the land in Mississippi and that funds provided to Clark were not going to be used for the Mississippi Project—they would not have provided any funds to Clark. GA251; GA256; GA303; GA365; GA368-72; GA417-18.

iv. Clark lulled her victims with additional false statements.

To convince her victims that the Mississippi Project was proceeding, Clark repeatedly emailed the victims that financing was forthcoming and that all the victims would receive their money back. GA269; GA274-75; GA278-79; GA295-96; GA362; GA590-91; GA766-69; GA771-72. These emails were simply more false statements. In some cases, Clark altered emails she had received from a purported lender and sent the fraudulently created emails to victims to create the false impression that funding was forthcoming. GA299-301; GA592; GA886-903; GA945. In other cases, the conspirators sent victims purported bank documents from Standard Chartered Bank and Citibank that falsely represented that financing was forthcoming. GA342;

GA394-99; GA803-04; GA811-15; GA854-58; GA886. Witnesses from each bank testified that the documents were phony. GA344-47; GA413-14.

v. Clark lied to the FBI when she was arrested about how the victims' money was spent.

Clark was arrested on November 29, 2010 and made statements to an FBI agent. GA466-54. The principal point she made to the agent was that she took $1.4 million from investors but that all of the money went to Mississippi. GA473-81. This was false.

Contrary to Clark's statement, all of the money Clark obtained did not go to Mississippi. GA685. In fact, of the approximately $1.75 million provided to Clark by victims, only $555,000 (approximately 30%) went for expenses related to the Mississippi Project. GA485-89; GA684-85. Moreover, most of this money, approximately $498,000, was spent to maintain the option Clark had on the 370 acres. GA335; GA487-91. Thus, Clark spent almost one-half million dollars of the victims' funds to maintain an option on land she claimed to own.

Most of the money provided to Clark was used to pay expenses at the LHI in Connecticut.

GA685-96.[1] Clark, who had an ownership interest in the LHI, managed the hotel and was paid a salary. GA583. The LHI, however, was a failing business. GA309-22. As explained by the LHI controller, there was "no way to get a regular loan . . . we were always struggling to pay [the taxes]. . . we were really behind." GA319-22. The LHI closed in 2008 after the victims stopped providing funds to Clark. GA306-07; GA684.

B. The defense case

Clark's defense, established through her testimony and witness cross-examination was that: (i) the victims could have and should have figured out that she did not own the 370 acres if they had done any due diligence and checked land records; (ii) she worked hard to repay, and intended to repay, all the victims; (iii) none of the victims sued her to receive their money back; (iv) the victims should have understood the risks involved in providing money for a casino project; and (v) the 2008 economic collapse prevented the casino project from being developed. *See, e.g.*, GA284-94.

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[1] In denying the motion for a new trial, the court noted that the presentation of the financial records to demonstrate how the victims' funds were expended was "probably the most important element of the Government's case." GA197.

i. Clark's testimony

Clark, the sole defense witness, testified for three days. GA492-615. The core of her testimony was her explanation of her role in the Mississippi Project. She claimed that Plummer brought her the Project and that after Plummer's relationship with the real Mississippi land owners fell apart, Clark had to take over the project or the true land owners would no longer sell Clark the 370 acres where the casino project was planned. GA501-04. Clark signed an option contract to buy the 370 acres for $450 million that required her to make $45,000 monthly payments beginning in February 2007 to keep the option alive, and to personally guarantee the payments. GA504-05.

Clark suggested that while she was working as the point person on the Mississippi Project, she was also working on her hotel, which she described as the LHI "project." GA505. Clark explained to the jury her belief that as long as she used victims' funds—which she described as a "general loan" or a "sloppy loan"—on one of her projects, she was not engaging in fraud. GA583; GA585; GA589-90.

Clark claimed that Plummer was in charge of obtaining ancillary options—options on land adjacent to the 370 acres that Clark already had a $450 million option to purchase. GA505. While Clark initially testified that Plummer never obtained any ancillary options, she claimed that

the money she gave Plummer was supposed to be used for these ancillary options. GA507; GA525.[2] Seeking to blame Plummer for the entire fraud, Clark claimed she believed Plummer was an honest person and had no reason to doubt his honesty. GA524.[3]

Through her testimony, Clark not only presented her own version of events, but also disputed the testimony of numerous government witnesses. For example, Douglas Grossinger had testified that he met with Clark and that she told him that she owned the 370 acres in Mississippi. GA421. Grossinger further testified that he showed Clark the executive summary and that she confirmed its accuracy. GA457-58. Clark claimed, by contrast, that she never told Grossinger that she owned 370 acres. GA509. Similarly, Clark claimed she never saw or dis-

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[2] In his closing argument, Clark's attorney repeatedly sought to convince the jury that there were a few ancillary options. GA654; GA656; GA659.

[3] At her sentencing, Clark excused her 2005 misdemeanor by providing the court with a 2005 letter from Plummer in which he took sole responsibility for Clark's conviction. DA220 ("Plummer admitted he was to blame for [Clark's] 2005 misdemeanor tax offense."). Thus, when Clark told the jury in 2012 that she believed that Plummer was an honest person during 2006-07, she lied as she clearly believed by that time that Plummer was responsible for her 2005 conviction.

cussed the executive summary that unequivocally claimed that she and Plummer owned 370 acres. GA511. Likewise, Clark disputed that she told Ladner and Elliot to put the 370 acres into an LLC called NEROM. GA565.

ii. Clark's lie to the jury

During her direct testimony, Clark claimed she told the FBI agents who were transporting her after her arrest that she "had never done anything wrong in her life." GA559. Knowing that Clark had previously been convicted of a tax crime, the government notified the court that it intended to cross-examine Clark about her misdemeanor conviction. GA561-62. The defense sought to preclude this cross-examination. GA562; GA572. Ultimately, faced with the prospect of having Clark impeached with her previous conviction, defense counsel acknowledged that Clark would admit that her statement was not true. GA572.[4]

During cross-examination, Clark admitted she lied to the FBI when she said she had done nothing wrong. GA573. She admitted she told the jury something that was "not true" when she said she had done nothing wrong. GA597. On redirect, Clark sought to minimize her lie to the FBI and jury by suggesting that she was not really talking to the FBI agents but was talking to

[4] The jury never heard about the misdemeanor.

herself when she said she had done nothing wrong. GA613.

* * *

Additional facts are discussed in the appropriate sections below.

Summary of Argument

I. The jury instructions regarding wire fraud were entirely proper and there was no error. During the charge, the court made it clear to the jury that the defendant could not be convicted unless the jury found that she contemplated actual harm—a loss of money or property—to the victims. The court followed Second Circuit case law by instructing the jury that "[s]uch a contemplated deprivation of money or property can include depriving another of the information necessary to make discretionary economic decisions." In any event, any instructional error was harmless beyond a reasonable doubt as Clark intended to defraud her victims by obtaining money and did obtain money from all her victims.

II. The prosecutor's initial summation was entirely proper. The prosecutor did not offer his opinion on Clark's credibility, offered comments based on the evidence and did not vouch for government witnesses. Even assuming, arguendo, that any comment was improper, the error was harmless and did not prevent Clark from receiv-

ing a fair trial. In light of the overwhelming evidence of her guilt, she is not entitled to a new trial.

III. The court did not commit plain error in sentencing Clark. The court properly denied Clark's departure motions and properly applied the § 3553(a) factors to impose a just sentence. The court did not abdicate its sentencing authority by imposing the sentence recommended by Probation.

IV. Clark waived and forfeited her right to challenge the restitution order as she did not object to the final restitution amount or the victims named. By choosing to ask for probation and claiming that such a sentence would enable her to make restitution to the victims, Clark cannot object on appeal to the restitution order. Even assuming Clark had objected, the amount of restitution would not have changed. Clark is not entitled to a remand or resentencing to lower her restitution amount.

Argument

I. The court properly charged the jury on the elements of wire fraud and properly rejected Clark's challenge to the jury charge.

A. Relevant facts

1. The proposed jury charge and charge conference

Prior to trial, the government submitted proposed jury instructions. *See* GA7-111. In the wire fraud instructions, the government proposed the following language that Clark takes issue with on appeal:

> [T]he government must prove that the alleged scheme contemplated depriving another of money or property. *Such a contemplated deprivation of money or property can include depriving another of information necessary to make discretionary economic decisions*.

See GA54-55 (emphasis added).

Prior to trial, Clark did not object to any of the government's proposed charges. At the end of the trial, Clark objected to charging the jury that under the wire fraud statute, a scheme to defraud could include depriving a victim of information necessary to make an economic decision. GA680. In response, the government filed a

memorandum providing legal support for the charge. *See* GA169-76.

Clark continued to object to the charge. She did not cite any cases suggesting that the government's proposal misstated the law; she claimed instead that the indictment did not charge her with depriving the victims of any information. *See* GA177-82. Clark claimed that she had no duty to disclose any information to the victims. And although she conceded that a duty to disclose might arise if she had made partial or ambiguous statements, she claimed there was no evidence she had made such statements. GA178. The government responded with a supplemental memorandum. GA191-96.

On July 9, 2012, prior to closing arguments, the court continued the charge conference.[5] After reviewing the submissions, the court advised that it intended to charge the jury regarding depriving a person of information necessary to make an economic decision. GA621. The defense noted its objection. GA621.

2. The jury charge

On July 11, 2012, the court charged the jury. DA117-44. With respect to the wire fraud charges, the court explained that there were three elements: first, that there was a scheme or artifice

[5] The charge conference held on June 29, 2012 was not transcribed.

to defraud another of money or property by materially false representations, statements or pretenses; second, that the defendant knowingly and willfully participated in the scheme with intent to defraud another of money or property; and third, that in execution of the scheme, the defendant caused the use of an interstate wire. DA133.

As to the first element, the court explained that "[i]n order to establish a scheme to defraud the government is required to prove that the defendant contemplated actual harm, loss of money or property. That would be for all victims due to the deception. Such a loss may include depriving another of information necessary to make discretionary economic decisions." DA133.

The court repeated this concept when it charged:

> in order to establish a scheme as a fraud the government must prove the alleged scheme contemplated depriving another of money or property. Such a contemplated deprivation of money or property can include depriving another of the information necessary to make discretionary economic decisions. A duty to disclose such information can arise in a situation where a defendant makes partial or ambiguous statements that require further disclosure in order to avoid being misleading.

DA134. Finally, the court charged "[i]ntent to defraud means to act with a specific intent to deceive for the purpose of causing some financial or property loss to another." DA134.

B. Governing law and standard of review

When challenging jury instructions on appeal, a defendant "must show that he was prejudiced by a charge that misstated the law." *United States v. Ferguson*, 676 F.3d 260, 275 (2d Cir. 2011); *United States v. Goldstein*, 442 F.3d 777, 781 (2d Cir. 2006). No particular form of words is required, so long as "taken as a whole" the instructions correctly convey the required legal principles. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994). Accordingly, a single jury instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *see also United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010). The review of the instructions in their entirety is to determine "whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law." *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001). Even if a particular instruction, or portion thereof, is deficient, this Court reviews "the entire charge to see if the instructions as a whole correctly comported with the law." *United States v. Jones*, 30 F.3d 276, 283 (2d Cir. 1994).

This Court reviews the propriety of jury instructions *de novo*. *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). If there is error, this Court will vacate a criminal conviction only if the error prejudiced the defendant. *Goldstein*, 442 F.3d at 781. "An erroneous instruction is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id.*

C. Discussion

Clark suggests that the court's wire fraud instructions were erroneous, or if legally permissible, they somehow misstated the law. Clark Brief 19. Clark is mistaken on each of her theories as the charge was legally permissible and did not misstate the law.

The court's instructions were proper in all respects and adhered to controlling Second Circuit law. The charge did not misstate the law or dilute the government's burden of proof in any manner. As a whole, it gave the jury an understandable view of the law in light of the facts of this case.

Not only were the instructions proper, they were necessary given Clark's defense. Clark sought to excuse her conduct by suggesting that victims gave her general purpose or "sloppy loans" that she was free to use any way she wished. Clark claimed she acted in good faith since she intended to repay victims and thus, her

failure to supply full and accurate information was not important. Under these circumstances, the court properly instructed the jury that if she contemplated actual harm to the victims through a loss of money or property, a scheme to defraud could include depriving a victim of information necessary to make discretionary economic decisions. Accordingly, Clark's 13 wire fraud convictions should not be disturbed.

1. The charge required the jury to find that Clark contemplated harm to a property right.

During the charge, the court explained that Clark could not be convicted unless the jury found that she contemplated actual harm—a loss of money or property—to the victims. DA133-34. The court followed Second Circuit law by instructing that "[s]uch a contemplated deprivation of money or property can include depriving another of the information necessary to make discretionary economic decisions." *See United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007) (per curiam). Given that the charge was a correct statement of the law, Clark cannot prevail.

Second Circuit authority demonstrates that the court's charge was correct. In *Carlo*, this Court explained that in order to convict a defendant of wire fraud, the government must prove that the defendant acted with "specific in-

tent to obtain money or property by means of a fraudulent scheme that contemplated harm to the property interests of the victim." *Id.* at 801 (citing *United States v. Walker*, 191 F.3d 326, 334-35 (2d Cir. 1999)). The *Carlo* panel explained:

> While the interests protected by the mail and wire fraud statutes do not generally extend to intangible rights …. they do extend to all kinds of property interests, both tangible and intangible. *Carpenter v. United States,* [484 U.S. 19, 25] (1987). Since a defining feature of most property is the right to control the asset in question, we have recognized that the property interests protected by the statutes include the interest of a victim in controlling his or her own assets. *See Walker,* 191 F.3d at 335; *United States v. Rossomando,* 144 F.3d 197, 201 n.5 (2d Cir. 1998) ("[T]he concrete harm [to the victim's property interest] contemplated by the defendant is to deny the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions.").

Id. at 801-02.

Similarly, in *United States v. Dinome*, 86 F.3d 277 (2d Cir. 1996), a defendant was charged with mail fraud by submitting false information to obtain a loan. The court charged:

> "Intent to defraud" means to act knowingly and with the specific intent to deceive for the purpose of causing some financial or property loss to another. The government is not required to prove that anyone was actually defrauded to establish a violation by the defendant you are considering. No actual pecuniary injury need result to the victim of the fraud.
>
> Under the mail fraud statute, the definition of property includes intangible property interests such as the right to control the use of one's own assets. This interest is injured when a person is deprived of information he would consider valuable in deciding how to use his assets.

Id. at 280. On appeal, the defendant claimed the charge was improper and suggested that the jury could have convicted him without finding that his false statements were material. In affirming, this Court concluded that the instruction that the defendant had to intend to cause the bank some financial or property loss read together with the deprivation of information language meant that the jury could not have convicted the defendant for defrauding the bank in an immaterial way. *Id.* at 284-85.

In Clark's case, there is no concern that she was convicted of making immaterial false statements or depriving the victims of immaterial information as the court defined "materiality." The

court expressly noted that false statements were not by themselves sufficient to demonstrate a scheme to defraud. Rather, the court explained that false statements, fraudulent half-truths or omissions of fact (*e.g.*, depriving victims of information) needed to be material. DA134. The court defined "material" as a statement or omission of fact that a reasonable person might have considered important in making his or her decision. DA134. Thus, Clark's suggestion that the court gave a materiality instruction only with regard to false statements and not with respect to omissions of fact is baseless. Clark Brief 25, n.18.[6]

Moreover, it is disingenuous for Clark to complain that the *Dinome* case is an "overly broad interpretation of the wire fraud statute." Clark Brief 28. When Clark submitted her instructions to the court, her proposed charges included repeated citations to *Dinome*. *See* GA152; GA161. While Clark takes issue with the language in Sand 44-4 regarding depriving a victim of information necessary to make a discretionary

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[6] In light of the court's materiality instruction, the court properly rejected the proposed language offered by Clark that the information withheld must have some "independent value." Clark Brief 24. As the court explained in rejecting the proposed language as too vague, "I wish I knew what that meant, because I don't know what it means. What's the word independent mean there?" DA113.

economic decision (Clark Brief 22), she repeatedly cited this instruction in her charges. *See* GA147; GA157.

Not only was the charge correct, it was necessary to help the jury understand Clark's arguments. Clark raised a "good faith" defense,[7] suggesting that she could not have committed fraud because she fully intended to repay victims. Thus, she argued that even if she deprived victims of accurate information, she committed no fraud because she intended to repay everyone. Given the "good faith" defense, it was proper to charge the jury about the right of a victim to control their assets based on accurate information.

This conclusion is buttressed by this Court's decision in *United States v. Karro*, 257 F.3d 112 (2d Cir. 2001), where this Court affirmed a decision to reject a defendant's attempt to withdraw a fraud plea. Defendant Karro argued she had not committed fraud by using a fraudulently obtained credit card to incur charges because she lacked the intent to fail to repay. This Court affirmed:

> Stated in terms relevant to Karro's case, *Rossomando, Chandler* and *Dinome* establish that sufficient intent to inflict harm can be found from the intentional with-

[7] At Clark's request, the court gave the jury a charge on good faith. DA135.

> holding of information from a lender which lowers the value of the transaction due to the lender's lack of information pertinent to the accurate assessment of the risk it faces and the propriety of extending credit to that particular individual, and because of the increased expense and difficulty of any necessary bill collection efforts. Because this intent is sufficient, it is irrelevant whether the borrower intended in good faith to repay the loan. *See Rossomando,* 144 F.3d at 201 ("[W]here a defendant deliberately supplies false information to obtain a bank loan, but plans to pay back the loan and therefore believes that no harm will 'ultimately' accrue to the bank, the defendant's good-faith intention to pay back the loan is no defense because he intended to inflict a genuine harm upon the bank—i.e., to deprive the bank of the ability to determine the actual level of credit risk and to determine for itself on the basis of accurate information whether, and at what price, to extend credit to the defendant.").

257 F.3d at 118.

Like defendant *Karro*, Clark used a good faith defense and claimed she had no intent to defraud because she intended to repay victims. Under these circumstances, for the reasons explained by the K*arro* panel, the court properly

instructed that contemplated harm to a victim includes depriving the victim of information necessary to make discretionary economic decisions.

2. The charge properly reflected the allegations in the Indictment and the evidence at trial.

Clark suggests, albeit without any Circuit authority, that the charge regarding depriving the victims of information is invalid unless such language is set forth in the Indictment. Clark Brief 23, 26. Clark reads the Indictment too narrowly. Indeed, the Indictment repeatedly made clear in both the conspiracy and wire fraud counts that the scheme to defraud involved false and fraudulent pretenses, in addition to false representations regarding the ownership of land. *See* DA30-31; DA37. Any accusation that a defendant made false statements as part of a fraud scheme includes the notion that when the defendant made a false statement to a victim she deprived the victim of truthful information.

Furthermore, Clark was well aware that a core part of the case against her was her failure to reveal material facts about the Project to her victims. Accordingly, her decision to wait until after the evidence was completed before complaining that neither the Indictment nor the government's evidence placed her on notice that she deprived victims of information rings hollow. *See* GA177-82. First, the Indictment expressly

charged that Clark falsely represented that *she owned 370 acres*. DA31. What made this representation false was that Clark omitted to tell the victims she only had an option to buy. Second, the option contract was made available to Clark well in advance of trial. Thus, Clark certainly knew before the charge conference that the government would offer the option contract and argue that she did not disclose the option contract, to demonstrate that her representations about owning land were false. Third, both parties mentioned the option contract during the openings. *See* GA240-41 ("[Clark] did not tell the investors …. she had the right to buy the 370 acres"). Given Clark's decision to wait until the close of evidence to feign ignorance of the charges against her, her cry of prejudicial variance is baseless.

3. Clark's other challenges to the jury charge are baseless.

Clark seeks to confuse the issue by suggesting that the court's instructions somehow permitted the jury to convict Clark if she merely deprived victims of information. Clark Brief 22. Indeed, Clark claims that the instruction given meant that "loss of information" is "tantamount to a property interest." *Id.* at 31. Clark further seeks to obfuscate the issue by raising an argument that she did not raise below—that "infor-

mation is not property per se." *Id.* at 27.[8] All of these suggestions miss the point as no one argued that *information* was the property right involved here.

Indeed, nothing in the court's charge instructed that "loss of information" was a "property right." Rather, the instruction correctly advised that the jury had to find that a defendant deprived the victim of information *in an effort to harm the victim's right to make an economic decision.* The property right is not the "loss of information" but rather the right to control one's money or property when making an economic decision, *e.g.*, a decision to invest or loan money to Clark. The right to invest money or loan money on the basis of complete and accurate information is not some "metaphysical right to information." Clark Brief 32. On the contrary, the right to decide whether to make a loan or in-

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[8] Clark's argument that information is not property should be considered under the plain error standard of review. Moreover, the cases she cites have nothing to do with the definition of property under the wire fraud statute at issue here. *See, e.g. Sekhar v. United States,* 133 S. Ct. 2720 (2013) (discussing scope of language in Hobbs Act and holding that compelling an employer to recommend an investment is not "obtaining of property from another"); *Cf. McNally v. United States*, 483 U.S. 350 (1987) (holding prior to the enactment of section 1346 that right to honest services is not within scope of mail fraud statute).

vestment, and a correct assessment of the risk involved in making a loan or investment, is a protected property right. *See*, *Carlo*, *Dinome*, *Rossomando, Karro* discussed above.

Clark is simply mistaken that the court's instructions permitted the jury to convict her merely because she deprived victims of information. Clark Brief 32-33. Indeed, the point heading in Clark's brief suggesting that the court's instructions advised the jury that a wire fraud scheme was "established where the defendant deprives another of information necessary to make a discretionary economic decision" is totally inaccurate. In short, the court never instructed that a scheme was established merely by depriving a victim of information. Further, nothing in the court's instructions lowered the government's burden to demonstrate intent to defraud.

When reviewing the instructions as a whole, the flaw in Clark's heading becomes obvious. First, the court instructed that an omission had to be "material." DA134. Thus, the court instructed that the jury was required to find that the deprivation of information was important, *e.g.*, capable of influencing the victim to part with his money. Second, the court instructed that the jury had to find that Clark contemplated harm to the victims, not simply that she deprived victims of information. DA133-34. Both of these instructions prevented the jury from con-

victing Clark merely because she deprived victims of information.

Clark's suggestion, raised for the first time on appeal, that the jury should have been given a unanimity instruction to decide whether Clark intended to deprive the victims of money *or* information (Clark Brief 33-35) is equally baseless. First, Clark never requested any type of unanimity instruction or special verdict. Second, Clark creates a false construct by suggesting that there could be any type of confusion about whether the jury convicted her of: (a) engaging in a scheme to obtain money or property; or (b) depriving the victims of information. Clark Brief 34. The instructions repeatedly advised the jury that it had to find that Clark engaged in a scheme *to obtain money or property*. DA133-34. The charge did not permit the jury to find Clark guilty merely because she deprived the victims of information. Rather, the charge only permitted the jury to find that a scheme to obtain money or property existed *if it found that Clark contemplated harm to the victim*. The fact that the concept of contemplating harm to a victim could include depriving victims of information necessary to make discretionary economic decisions did not create an alternative theory.

Because there was only one theory for conviction (whether Clark engaged in a scheme to harm the victims' property rights), there was no need for a unanimity instruction or special ver-

dict. There is simply no basis to conclude that their absence constitutes error, let alone plain error.

4. Any instructional error was harmless and certainly not plain error.

Assuming *arguendo* there was anything erroneous about the court's instructions, the error would be harmless beyond any reasonable doubt. When the jury convicted Clark on thirteen counts of wire fraud, it necessarily rejected her good faith defense. The jury also necessarily rejected her defense that she never intended to harm the victims because, she claimed, she intended to repay victims. Thus, by convicting Clark on thirteen counts of wire fraud, the jury found that Clark contemplated harm to the victims' property interests.

Given that the purpose of Clark's scheme was to obtain the victims' money and enrich herself,[9] not merely to interfere with the victims' right to control their assets, it is impossible to understand how the jury convicted Clark without finding that her scheme contemplated obtaining real money from the victims. Thus, even assuming the jury's verdict was in any way based on the

[9] The Indictment provided that "the purpose of the conspiracy was for defendants Plummer and Clark . . . to enrich themselves and their companies by defrauding individuals out of money and property. . . ." DA31.

deprivation of information instruction, the jury necessarily found that Clark intended to obtain money from the victims. This is necessarily the case because Clark could not possibly benefit by merely seeking to interfere with the victims' right to control their assets when making a discretionary economic decision. In short, Clark could only benefit if she obtained real money, real loans or real investments from victims.

Each wire fraud conviction was based on an interstate wire transfer of the victims' funds to Clark's bank accounts. Thus, there can be no doubt that the jury found that each of these bank wire transfers was caused by Clark in furtherance of the fraud. Hence, even assuming that the jury convicted Clark because it found that she deprived victims of information, the jury necessarily decided that the victims wired their money to Clark in furtherance of her fraud.

Hence, any instructional error did not prejudice Clark and is not a basis to set aside her wire fraud convictions. There is no doubt that the jury would have convicted Clark of engaging in wire fraud even assuming the court never instructed the jury that contemplating harm to a victim could include depriving the victim of information.

II. The prosecutor's initial summation was proper and there was no misconduct of any kind.

A. Relevant facts

During the initial summation, the prosecutor argued that none of the victims knew the truth about Clark's lack of ownership of the Mississippi land and thus, were defrauded when they provided Clark funds as part of the Project. GA642. As to Clark's claim that the victims gave her general purpose loans, the government argued that the victims were defrauded because they were not told about Clark's or the LHI's true financial condition. GA642. Thus, the government argued that Clark's decision not to disclose accurate information to the victims deprived them of an opportunity to make an informed decision to provide their money to Clark. GA649. The prosecutor also referenced the court's anticipated instruction and provided examples of the type of information that Clark did not provide the victims. GA649.

Defense counsel raised no objection during the government's three-hour summation. When the summation ended, the defense moved for a mistrial alleging that: "[the prosecutor] went over the line in terms of prosecutorial misconduct. He repeatedly called my client a liar. He didn't say the evidence shows that she's a liar; he expressed his personal opinion repeatedly."

GA651. The court denied the mistrial motion. GA651.

Clark's counsel conceded in his summation that the big claim was that Clark said she owned the 370 acres when all she had was an option to purchase. GA656. Nevertheless, counsel argued that the claim about ownership was immaterial because the victims did no due diligence and did not sue Clark. GA656; GA663. Counsel argued that Clark acted in good faith and was the real victim here. GA656-57; GA663.

Prior to the rebuttal, the defense moved again for a mistrial claiming that the government improperly vouched for witnesses. GA669. The court again denied the mistrial motion. GA669. In rebuttal, the government reminded the jury to focus on what the victims were not told. GA672-74. Finally, the government argued that Clark did not act in good faith by telling half-truths and depriving the victims of accurate information. GA675.

After the rebuttal, the defense requested that the court charge the jury that the prosecutor's comment that Clark was a "liar" was improper. GA682. The court agreed to give the jury a charge that comments made by any attorney were not evidence or a personal opinion. GA682.

B. Governing law and standard of review

A prosecutor enjoys wide latitude in giving his closing argument so long as he does not misstate evidence. *United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003); *United States v. Tocco*, 135 F.3d 116, 130 (2d Cir. 1998). "'[A] prosecutor is not precluded from vigorous advocacy, . . . the use of colorful adjectives,'" or the deployment of rhetorical devices or sarcasm. *United States v. Jaswal*, 47 F.3d 539, 544 (2d Cir. 1995) (quoting *United States v. Rivera*, 971 F.2d 876, 884 (2d Cir. 1992)); *United States v. Rodriguez*, 587 F.3d 573, 583 (2d Cir. 2009) (approving prosecutor's use of sarcasm in closing to "consider the implausibility" of the defendant's claim). The prosecutor is also given broad range regarding the inferences he may suggest to the jury during summation. *Edwards*, 342 F.3d at 181; *United States v. Nersesian*, 824 F.2d 1294, 1327 (2d Cir. 1987).

When a defendant testifies at trial and places her credibility in issue as Clark did here, the prosecutor may give a fair appraisal of the defendant's testimony and demeanor. *Edwards*, 342 F.3d at 181. A prosecutor may also make temperate use of forms of the word "lie" to highlight evidence directly conflicting with the defendant's testimony. *See United States v. Thomas*, 377 F.3d 232, 244-45 (2d Cir. 2004); *United States v. Coriaty*, 300 F.3d 244, 255-56 (2d Cir.

2002); *United States v. Shareef*, 190 F.3d 71, 79 (2d Cir. 1999).

"Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *United States v. Young*, 470 U.S. 1, 11 (1985); *accord United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981) ("Reversal is an ill-suited remedy for prosecutorial misconduct . . . ."). To warrant reversal, prosecutorial misconduct must "'cause[] the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process.'" *United States v. Carr*, 424 F.3d 213, 227 (2d Cir. 2005) (quoting *Shareef*, 190 F.3d at 78); *see also Shareef*, 190 F.3d at 78 ("Remarks of the prosecutor in summation do not amount to a denial of due process unless they constitute 'egregious misconduct.'") (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 647 (1974)).

Where, as here, the defense failed to make a timely objection to the prosecutor's initial summation, the statement will not be deemed a ground for reversal unless it amounted to "flagrant abuse." *Carr*, 424 F.3d at 227; *Coriaty*, 300 F.3d at 255; *United States v. Rivera*, 22 F.3d 430, 437 (2d Cir. 1994). In deciding whether the challenged comments meet this test, this Court considers "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct,

and (3) the certainty of conviction absent the improper statements." *Thomas*, 377 F.3d at 245; *Shareef*, 190 F.3d at 78. "The 'severity of the misconduct is mitigated if the misconduct is an aberration in an otherwise fair proceeding.'" *Thomas*, 377 F.3d at 245 (quoting *United States v. Elias*, 285 F.3d 183, 191 (2d Cir. 2002)).

C. Discussion

Although Clark failed to object during the three-hour initial summation, she now argues that comments made during this summation warrant reversal. Clark Brief 39-50. She suggests that the prosecutor engaged in misconduct by offering his personal opinions, misusing the word "liar," and vouching for witnesses. Because Clark is mistaken on each of her allegations, and none of these allegations taken separately or together amount to plain error, this Court should affirm.

When evaluating the prosecutors' initial and rebuttal summations as a whole—coupled with the defense's failure to raise any objection during the initial summation—the record demonstrates that there was no misconduct. *United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975) (failure to object not only precludes the consideration of this issue on appeal, but "indicates counsel's own difficulty in finding any prejudice"). Furthermore, the court's instruction

to the jury to disregard any opinions expressed by the attorneys cures any hint of misconduct.

1. The prosecutor did not offer his personal opinion of Clark's credibility.

Immediately prior to the start of the prosecutor's summation, the court reminded the jury that: (1) summations are not evidence; (2) counsel will be giving the jury their advocacy approaches in the summations; and (3) the jury's job was to evaluate witness credibility. GA627. There can be no suggestion that the jury thought the prosecutor's summation was an opportunity to offer personal opinions on the credibility of witnesses.

From the start of the summation, the prosecutor argued to the jury that he was commenting on what "*the evidence establishe[d]*." Specifically, the prosecutor argued:

> About one month ago, I stood here before you and said: Maureen Clark is a con artist. She lied to people, she took their money, and she spent their money….We've had three weeks of trial, hundreds of documents, 15 or so witnesses, and *I submit to you that the evidence establishes exactly that.*

GA627 (emphasis added).

Furthermore, during this summation, the prosecutor repeatedly advised the jurors that it was their decision to decide witness credibility, including Clark's credibility. *See, e.g.*, GA628; GA630; GA632 ("you will be the judges of her credibility"). Thus, the prosecutor did not use the initial summation to offer improper, inflammatory, and extremely personal opinions.

The government used the rebuttal to further emphasize that it was for the jury to decide the credibility of witnesses. *See, e.g.*, GA669-70; GA672. The government repeatedly reminded the jury of the inability of attorneys to offer personal opinions. *See, e.g.,* GA670; GA675.

Thus, a review of the prosecutors' two summations belies any suggestion that the prosecutors were seeking to offer their personal opinions. After the defense belatedly complained, the court instructed:

> [l]awyers are never permitted to express their own opinion regarding the guilt or the non-guilt of the defendant. So to the extent that the lawyers in this case may have made any comments about the ultimate issues in this case, which are for you, I caution you that you must disregard those comments of the lawyers, because you are the ultimate deciders of the defendant's guilt or non-guilt in this case.

DA120.

Under these circumstances, there is no prosecutorial misconduct of any kind, let alone of the degree that would warrant a reversal of Clark's convictions under a plain error standard.

2. Each of the prosecutor's remarks was a proper comment on the evidence and Clark's concession that she lied to the jury and FBI.

Clark takes numerous summation comments out of context in a Herculean effort to demonstrate misconduct. Clark Brief 41-43. None of these comments by themselves, or in combination with each other, demonstrate any impropriety. Rather, they demonstrate proper prosecutorial comments based on the evidence. All of the comments were proper argument to assist the jury to evaluate the defendant's credibility—a defendant who was caught lying on the stand.

Significantly, Clark admitted at trial that she lied to the FBI *and* the jury during her direct when she testified she told agents that she had done nothing wrong in her life. GA573; GA597. After admitting on cross-examination that she had lied to the jury and the FBI, Clark offered a new explanation on redirect to explain away her previous concession that she had lied. GA613. It is against this backdrop that the closing comments cited by Clark must be viewed.

Where a defendant admits to lying to the FBI and to the jury during her direct, it is certainly

proper to argue that the jury should find that the defendant lacks credibility. Under these circumstances, there is no misconduct of any kind to argue that the jury should find that the defendant is a "liar." Thus, there was nothing improper when the prosecutor argued: "[n]ow, there are also some other, you know, lies in this case. I submit to you, ladies and gentlemen, you'll be the judge of the credibility, but I submit that *the evidence establishes* that she lied and lied and lied." GA630 (emphasis added). *Canniff*, 521 F.2d at 571 ("[S]tatements, which at first glance look like expressions of the prosecutor's personal belief regarding the guilt of the defendants or the credibility of witnesses, turn out upon closer examination of the entire text to be arguments fairly based on record evidence rather than personal opinions.").

Furthermore, when Clark admitted that she had lied during her direct, she did so to prevent the jury from hearing about her prior conviction. GA561-62; GA572. Thus, the price of keeping the conviction from the jury after Clark herself opened the door was for Clark to admit that she had lied to the jury. Clearly, Clark realizes that it was a tactical blunder to admit to being a liar in a case in which she was charged with fraud involving false statements. Now that the prosecutors have used her concession against her in closing arguments, Clark's crying "foul" rings hollow.

The problem for Clark is that she cannot have it both ways. Having admitted that she lied to the jury to prevent the jury from learning about her misdemeanor, Clark should not be allowed to complain that her concession was used against her. To permit Clark to profit from this tactic by later claiming the prosecutors engaged in misconduct by repeatedly using her tactical concession against her would be perverse.

Given the clear contrast between Clark's own tape recorded statements versus her trial testimony,[10] the jury was certainly entitled to find that Clark was a liar. Thus, the prosecutor was entitled to cite this contrast when arguing to the jury that it should find that Clark was a liar. "Well, listen to the tape and you'll hear Maureen Clark talking, talking, talking and lying, lying, lying. You be the judges of her credibility, ladies and gentlemen. But I submit to you that *the evidence shows that she's lying, lying, lying*." GA632 (emphasis added). Because a prosecutor may argue what the evidence shows, there was nothing improper about this argument.

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[10] For example, while Clark indicated to a victim on tape that she owned the 370 acres in "deed and title," she testified at trial that she never said that. GA570. In denying her motion for a new trial, the trial judge observed that "what convicts her, in my mind, as it did in the jury's mind, is her e-mails and her voice on the tapes." DA191.

Similarly, in arguing that Clark had lied on the day of her arrest, the prosecutor once again commented *about what the evidence showed*: "Then [Clark] explained she took in $1.4 million from investors for the Lakeshore Project and all of the money went to the Mississippi Project. And, ladies and gentlemen, *you've now seen the bank records,* you've seen what none of the investors saw, and Agent Lyons had seen them before making the arrest that morning. And *you know* that this is a lie and that she lied to Agent Lyons when she said all of the money went to the Mississippi project." GA650 (emphasis added).

Finally, the fact that the prosecutor reminded the jury that "Clark said one thing one day and something different the next," GA628, was fair comment on her testimony which—as the record reflects—did change from day to day. *See, e.g.*, GA573; GA597; GA613. Such an argument is proper as it comments solely on the evidence and the fact that the jury would remember her changing her story. The fact that the prosecutor repeated the argument that the evidence showed that Clark was a "liar" and used the refrain of "talking, talking, talking" and "lying, lying, lying" is not misconduct. *United States v. Bagaric,* 706 F.2d 42, 60 (2d Cir. 1983) (use of rhetorical devices permissible). Nor was there anything improper in using the phrase "that's just Maureen Clark being Maureen Clark" as the ju-

ry heard her testify for three days in addition to hearing her speak on tape.

Clark complains on appeal about the prosecutor's use of the phrase "I submit" when making arguments about the evidence. Clark Brief 48. Clark, who raised a belated objection to the use of this phrase in her motion for a new trial GA200, cannot demonstrate any error, let alone plain error. *See United States v. Eltayib*, 88 F.3d 157, 172-73 (2d Cir. 1996) ("[W]e think it clear that the prosecutor's use of the phrase 'I submit that' on numerous occasions in this case was not improper.").

Furthermore, this Court has made clear that a prosecutor's use of "lie" or "liar" in summation to characterize disputed testimony when the witness's credibility is in issue "is ordinarily not improper unless such use is excessive or is likely to be inflammatory." *United States v. Peterson*, 808 F.2d 969, 977 (2d Cir. 1987)) (affirming conviction when summation referred to defendant's testimony as a "lie" as the argument was "not accompanied by intemperate statements evincing either the purpose or the likelihood of appealing to the jury's emotions rather than to its reason"). Even a prosecutor's repeated use of the words "lie" or "liar" to characterize the defendant's testimony is not improper if it is tied to the pertinent evidence of record as it was here in this case. *Id.; see also United States v. Resto*, 824 F.2d 210, 212 (2d Cir. 1987) (prosecutor's re-

marks that the defendant's testimony was "flat out-and-out lies" was neither "excessive nor inflammatory"); *see also United States v. Williams*, 529 F. Supp. 1085, 1106-07 (E.D.N.Y. 1981) ("The prosecutor pulled no punches; he called a lie, a lie. . . . [T]he prosecutor's arguments were supported by the evidence."), *aff'd*, 705 F.2d 603 (2d Cir. 1983).

Under these circumstances, there is no misconduct in the summation merely because the prosecutor used the term "liar" to describe the testimony and statements of a defendant who admitted that she lied to the jury and FBI.

3. There was no vouching during the initial summation.

This Court has held that the prosecution is permitted to argue for the jury to find its witnesses credible as long as it does not link its own credibility to that of the witness, *see Rivera,* 971 F.2d at 884, or imply the existence of extraneous proof supporting the witness's credibility, *see Bagaric,* 706 F.2d at 61. Nevertheless, Clark suggests that the government improperly vouched for three witnesses during its summation. Clark Brief 43-45. In none of the instances that Clark complains about did the prosecutor link his own credibility to the witness or imply the existence of extraneous proof.

In the case of Grossinger, the prosecutor was commenting on Grossinger's demeanor when he

pointed out that Grossinger was careful. During his three days of testimony, Grossinger repeatedly asked to have questions reread or repeated to him and was careful and precise in his answers. *See, e.g.,* GA464-65.

Similarly, the prosecutor's comments about two other witnesses, Kwan and Jurgens, were also proper. Describing Kwan's answers during his trial testimony as "straightforward" does not link the prosecutor's credibility to the witness or imply the existence of extraneous proof. As for the reference to the 30-page report written by Krauss, the Citibank investigator, the prosecutor's comment was directly tied to the testimony given by this witness. The comment that Clark's name did not appear in the report as someone who received the fraudulent letter of credit from the corrupt Citibank employee was indeed testified to by Krauss. GA415. Thus, there was no vouching of any kind.

4. Clark suffered no prejudice from the initial summation.

Assuming, *arguendo*, that any comment made by the prosecutor in the initial summation was improper, Clark would not be entitled to a reversal. The district court concluded that the government's case was "overwhelming," GA197, and "very strong," DA194. Under these circumstances, Clark cannot meet her burden to demonstrate the type of prejudice required for a

reversal. *See United States v. Miller*, 116 F.3d 641, 683 (2d Cir. 1997) (refusing to grant a new trial despite prosecutorial misconduct, due to overwhelming evidence of guilt); *United States v. Orena*, 32 F.3d 704, 717 (2d Cir. 1994) ("Only prosecutorial conduct so severe and significant as to result in the denial of . . . a fair trial will lead to reversal." (internal quotation marks omitted)); *United States v. Bossinger*, 311 Fed. Appx. 512, 515 (2d Cir. 2009) (where prosecutor called defendant's statement lies more than 30 times, this Court held, "[w]e think the repeated derogatory comments, while inappropriate, did not suffice to deprive the defendant of a fair trial").

Furthermore, Clark was acquitted on one count of wire fraud. Thus, despite the defense's belated contention that the initial closing was "egregious" and "clearly improper," DA188, the jury was able to evaluate the evidence and render a fair verdict. As this Court explained, an acquittal by the jury on some counts—as happened here—may be evidence that the trial was not unfair. *See United States v. Myerson*, 18 F.3d 153, 163 (2d Cir. 1994).

For all of these reasons, Clark is not entitled to a reversal based on her belated attack on the prosecutor's initial summation.

III. The court's sentence was procedurally reasonable and should be affirmed.

A. Relevant facts

Prior to Clark's sentencing, both parties submitted lengthy memoranda. DA196-276; GA946-1035. Clark requested that the court depart from the 87 to 108 month sentence recommended by the Guidelines as calculated in the PreSentence Report ("PSR") and sentence her to probation. DA212; DA227-76. The government opposed the departure requests. GA984-1019.

At sentencing, the court explained it was looking at the sentencing factors set forth in § 3553 to impose sentence. After balancing the 3553 factors, the court imposed sentence at the bottom of the Guidelines range—87 months. GA230. The court noted that this was the sentence recommended by Probation. As the court explained, "I'm going to adopt the recommendation of the presentence; I would like to do something below that, but I've talked with experienced probation officers and, looking at it, we feel that our job is to uphold what 3553 stands for and the guidelines do in helping us interpret the law and the facts in a case, to apply 3553." GA229. The court imposed restitution in the amount of $1,750,000 in favor of the victims who provided funds to Clark. GA230.

B. Governing law and standard of review

1. Plain error review

To the extent that Clark did not object to a perceived sentencing error below, this Court reviews for plain error. *United States v. Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007). This Court has applied plain error review to unpreserved claims that the district court failed to adequately consider the § 3553(a) factors or explain its reasoning for imposing a particular sentence. *Id.* at 207-212. Requiring that such claims be raised before the sentencing judge "alerts the district court to a potential problem at the trial level and facilitates its remediation at little cost to the parties, avoiding the unnecessary expenditure of judicial time and energy in appeal and remand." *Id.* at 208. Moreover, "[r]equiring the [sentencing] error to be preserved by an objection creates incentives for the parties to help the district court meet its obligations to the public and the parties." *Id.* at 211.

Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*, 535

U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. In plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.* This Court has cautioned that reversal under the plain error standard of review should "be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Villafuerte*, 502 F.3d at 209 (internal quotation marks omitted).

2. Reasonableness review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the Sentencing Guidelines "effectively advisory." *Id.* at 245. After *Booker*, a sentencing judge is required to "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

On appeal, a court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. Reasonableness review is akin to a

deferential review for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 46 (2007); *see also United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012) ("We are constrained to review sentences for reasonableness, and we do so under a deferential abuse-of-discretion standard.") (quotation marks and citation omitted). Reasonableness review "encompasses two components: procedural review and substantive review." *Watkins*, 667 F.3d at 260 (quotation marks and citation omitted).

Once the court makes its determination as to the sentence, it must "state in open court the reasons for its imposition of the particular sentence . . . ." 18 U.S.C. § 3553(c). "By articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve." *Rita v. United States*, 551 U.S. 338, 357 (2007).

The Supreme Court has emphasized that a court's statement of reasons need not be exhaustive, particularized, or uniform: "The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends on circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not . . . . The law leaves much, in this respect, to the judge's own professional judgment." *Rita*, 551 U.S. at 356. To satisfy his burden under Section 3553(c), "[t]he sentencing judge should set forth

enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.*

With respect to the consideration of departure grounds as a basis for procedural error, this Court has explained that "a refusal to downwardly depart is generally not appealable." *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (quotation marks and citation omitted). A narrow exception to this general rule exists "when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *Id.* (quotation marks and citation omitted). Absent "clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority," however, this Court presumes that the judge understood the scope of his authority. *Id.*; *see also United States v. Sero*, 520 F.3d 187, 193 (2d Cir. 2008) (per curiam) (noting that the "presumption that a district court understands its authority to depart may be overcome only" in a "rare situation") (quotation marks and citation omitted).

In addressing motions for downward departures, this Court "does not require that district judges by robotic incantations state 'for the record' or otherwise that they are aware of this or that arguable authority to depart but that they have consciously elected not to exercise it." *Unit-*

ed States v. Diaz, 176 F.3d 52, 122 (2d Cir. 1999) (quotation marks and citation omitted); *see also United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir. 1996) (per curiam) ("Sentencing is rigid and mechanistic enough as it is without the creation of rules that treat judges as automatons.").

C. Discussion

Clark raises no challenge to the substantive reasonableness of her 87-month sentence. Rather, Clark only challenges the procedural reasonableness of her sentence, claims that she largely failed to make below. A review of the record demonstrates that the imposition of sentence was procedurally reasonable. Since Clark cannot meet her burden to demonstrate any error, let alone plain error, her sentence should be affirmed.

Clark raises three separate grounds to attack her sentence claiming that the court: (i) failed to consider her departure requests; (ii) failed to consider the § 3553(a) factors; and (iii) abdicated its authority by imposing the sentence recommended by Probation. None of these claims, however, demonstrates that the court committed any procedural error, let alone the plain error required to disturb her sentence.

1. The district court's denial of Clark's downward departure requests is unreviewable.

Clark complains that the judge failed to consider her departure requests. Clark Brief 51-52. The record demonstrates, however, that the judge did consider all the requests but found they were not worthy of a departure. Since a refusal to grant a downward departure is not appealable, Clark cannot succeed by dressing up her claim as a purported procedural error. The record amply demonstrates that the judge was aware of his authority to depart and did consider the requests in fashioning a just sentence.

First, as the judge explained at the start of the sentencing "I have a wide discretion in sentencing. There's no strict limits put on how a federal judge conducts sentencing." GA212. When the judge indicated that he had thought about imposing a below Guidelines sentence, he made it clear that he knew he had the authority to grant a departure but that it would not be a proper application of the § 3553(a) factors to do so. GA229.

Second, the judge repeatedly explained that he had read all the papers including the sentencing memoranda that discussed the departure requests at great length. *See* DA227-65; GA984-1019; GA208; GA222 ("I read that" referring to

the psychiatric report of the defendant which defendant claimed was a basis for departure).[11]

Finally, the court made it clear that it was denying all of defendant's departure requests and imposing a Guidelines sentence. "Yes, all the departure arguments that [Clark's counsel] made are rejected." GA232.

All of these factors indicate that the judge was well aware of his ability to depart. Given that a refusal to depart is not appealable, and the court here properly considered and rejected her departure requests, Clark's claim that the court failed to consider her departure requests is baseless.

2. The judge properly considered the § 3553(a) factors.

Clark complains that the court failed to consider the § 3553(a) factors when imposing sentence. Clark Brief 51. There is no doubt, however, that the court considered the § 3553(a) factors and understood their importance. *See, e.g.*, GA224 ("3553 is the Bible"); GA229 ("[w]e should all be trying to fill what Congress has asked us to fill in 3553; that's our job and that's what we

[11] At the end of the sentencing, the court asked Clark's counsel "is there anything you want me to rule on that I haven't ruled on" and counsel indicated no. GA231. Counsel certainly understood that the court had denied the departure requests.

should carry out"). Throughout sentencing, the judge referred to these factors and explained that they were guiding his sentencing discretion. GA221 ("we've done these sentencings for years—3553 is what we really look at in the sentencing guidelines"). The court was correct that the advisory Guidelines do in fact seek to incorporate the § 3553 factors. *See United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) (noting that Guidelines ranges reflect the considered judgment of the Sentencing Commission, "an expert agency whose statutory charge mirrors the 3553(a) factors").

The judge also explained which § 3553 factors he was relying upon to impose sentence. "[T]he major concern we all have under 3553 in a case like this is general deterrence. You've stressed that, and it's important. The general deterrence is a major thing." GA226. He also discussed other § 3553(a) factors such as the seriousness of the offense, the need to provide Clark with help in prison, the need to make restitution to the victims, and the need to avoid an unwarranted sentencing disparity with Plummer. § 3553(a)(1), (2), (4), (6) and (7); *see, e.g.*, GA226-30.[12]

Clark complains that the court opted not to hear from one of her sons as a character witness at sentencing. Clark Brief 53. Clark did not

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[12] Clark and Plummer received the bottom of their respective ranges.

identify which son wanted to speak. Nor has Clark ever proffered any information that the son would have provided. Since the court had already received lengthy letters from Clark's sons, the court did not err in declining to hear this unspecified information from this unidentified son. *See, e.g., United States v. Prescott*, 920 F.2d 139, 143 (2d Cir. 1990) ("A defendant had no absolute right to present witnesses" at sentencing); *United States v. Pugliese*, 805 F.2d 1117, 1123 (2d Cir. 1986) (noting that "a convicted defendant has no absolute right to present his own witnesses" at sentencing); *accord United States v. Jackson*, 700 F.2d 181, 191 (5th Cir. 1983); *United States v. Cruzado-Laureano*, 527 F.3d 231, 237-38 (1st Cir. 2008); *United States v. Jones*, 643 F.3d 275, 277-78 (8th Cir. 2011).

Further, the court fully understood that the information that was presented by Clark's sons through letters was relevant. Indeed, the court explained that "family can testify to a fare the[e] well, but you expect that from the family; you hope you'll get that from the family." GA221. Opting to rely on the sons' letters, the court declined to give any further weight to an oral presentation by a family member. The decision to give no weight to an oral plea for mercy by a family member at sentencing is not error as the court has discretion when employing the § 3553(a) factors. *See, e.g., United States v. Verkhoglyad*, 516 F.3d 122, 131 (2d Cir. 2008)

(weight afforded any § 3553(a) factor "is a matter firmly committed to the discretion of the sentencing judge and is beyond our review").

Given that Clark's Guidelines range was 87-108 months, the oral reasons provided by the sentencing judge were more than "enough to satisfy the appellate court that [the district court] has considered the parties' arguments and has a reasoned basis for exercising his own legal decision." *Rita*, 551 U.S. at 356; *see also United States v. James*, 280 F.3d 206, 208-09 (2d Cir. 2002) ("no further explanation is required for the selection of a sentence at a particular point *within a range of 24 months or less*") (emphasis added).

3. The court did not abdicate its authority.

Finally, Clark complains that the court abdicated its authority by imposing the sentence recommended by Probation. Clark Brief 54-56. Significantly, Clark did not raise this issue below. A review of the record demonstrates that the court's sentence was proper and not improperly based on Probation's recommendation.

First, Clark cites no authority stating that a court may not impose the precise sentence recommended by Probation. Courts routinely rely on Probation to prepare thorough PSRs. Thus, even assuming a court does impose the precise sentence recommended by Probation, this deci-

sion does not mean that the court abdicated its authority. *Cf. United States v. Ahders*, 622 F.3d 115, 119 (2d Cir. 2010) ("[I]t is sufficient for the district court to adopt the findings in the presentence report—*if* those findings are adequate to support the sentence imposed.").

Second, the court explained why it imposed the 87-month sentence recommended by Probation. After reviewing all the submissions, the judge concluded that the PSR "was one of the best [PSRs] I've ever read, because we have a very complex defendant here, and Probation took the time and the energy and the attention and the hard work to really analyze everything." GA229. Furthermore, the court explained that the excellent PSR was helpful to the court because "Probation has no ax to grind." GA225.

Given that the court adequately explained its rationale for imposing the 87-month sentence by reliance on the appropriate § 3553(a) factors, there is no error in relying on Probation's recommendation.

IV. Clark waived any objection to the restitution order.

A. Relevant facts

Prior to sentencing, the government submitted a memorandum in which it requested restitution for the victims of Clark's fraud. GA1030-34; GA1035 (Attachment A containing victims'

names and their respective losses). Clark filed no objection to the restitution request. She repeatedly requested a sentence of probation by arguing that such a sentence would allow her to make restitution to the victims. DA207; DA269. At sentencing, while Clark did complain about one victim on the list, GA222 (Filanowski—loss of $186,900), she did not complain about the victims on Attachment A who had received some reimbursement from Grossinger. Clark never suggested the remaining restitution figures or victims should be adjusted due to the fact that Grossinger had reimbursed some of the victims approximately $250,000 and planned to provide additional funds to certain victims.[13]

Deducting the Filanowski loss of $186,900 from the $1,936,900.32 figure on Attachment A, GA1035, the court imposed $1,750,000.32 in restitution. GA230. Clark did not challenge this number. She did, however, successfully request that interest not run on this amount. GA234.

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[13] Grossinger, who was used by Clark to obtain funds from victims, gave a personal guarantee to one victim and voluntarily agreed to reimburse other investors. Clark Brief 17 citing Tr. 94, 1498, 1528-29. There is nothing in the record below, however, to indicate how much money Grossinger had provided to any particular victim by the time of sentencing.

B. Governing law and standard of review

To the extent that the defendant did not raise a perceived sentencing error below, this Court applies a plain error standard of review. *Villafuerte*, 502 F.3d at 207; *accord United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012). A defendant, however, may do more than merely forfeit a claim of error. A defendant may through her words, her conduct, or by operation of law waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See Olano*, 507 U.S. at 733; *United States v. Broxmeyer*, 699 F.3d 265, 278-79 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786 (2013); *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (internal quotation marks omitted). "The law is well established that if, as a tactical matter, a party raises no objection to a purported error, such inaction constitutes a true waiver which will negate even plain error review." *United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007) (internal quotations omitted; footnote omitted).

C. Discussion

Clark is not entitled to a remand or a resentencing to lower her restitution amount by the amount of money Grossinger provided victims. Clark made a tactical decision not to challenge the list of victims on Attachment A, or the amounts of their losses. Rather, Clark sought to convince the court to impose probation to enable her to make restitution. DA269. Clark also addressed the victims at her sentencing by telling them, "I intend to get you repaid and I will not stop trying to do that. . . . [I]f I'm incarcerated it will take me longer . . . ." GA228. Having made this tactical decision not to object to the restitution amount or list of victims to bolster her plea for leniency, Clark has waived her right to contest restitution. Thus, she is not entitled to lower her restitution amount merely because her tactical gambit failed to convince the judge to give her probation.

Moreover, had Clark complained that certain victims had received an unspecified amount of reimbursement from Grossinger, the court would have been required by law to order Clark to pay that amount of restitution to Grossinger. *See* 18 U.S.C. §§ 3664(f)(B), 3664(j)(1) ("If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided . . . the compensation."). Thus, if there was any error, Clark would still be re-

quired to pay the exact same amount of restitution. Had Clark demonstrated any error at sentencing, the only difference in her restitution order would be that Clark would be required to pay certain funds to Grossinger, rather than to pay those same funds to other victims.

Even assuming, *arguendo*, that Clark had not waived her ability to contest restitution, she cannot demonstrate each of the prongs of the plain error standard. Significantly, Clark cannot meet her burden to demonstrate any prejudice. The decision by the court to impose restitution to certain victims who had received some reimbursement, rather than to impose restitution to Grossinger in the amount he reimbursed these victims, does not affect substantial rights or seriously affect the fairness, integrity, or public reputation of judicial proceedings. *See Zangari*, 677 F.3d at 95-96 (Court refused to disturb restitution order on plain error review where defendant failed to demonstrate that erroneous restitution order prejudiced him or resulted in miscarriage of justice). Because the purported error that Clark now raises does not amount to the rare instance in which a "miscarriage of justice would otherwise result," *Villafuerte*, 502 F.3d at 209, she is not entitled to a remand or a resentencing to lower the restitution amount.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: June 30, 2014

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,908 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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