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United States Court of Appeals
Tenth Circuit

October 25, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KEVIN WIECK,

Defendant - Appellant.

No. 19-6075
(D.C. No. 5:18-CR-00050-HE-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **McHUGH**, **EBEL**, and **EID**, Circuit Judges.

Defendant-Appellant Kevin Wieck defrauded several investors in a scheme involving oil wells in Oklahoma. Then he went to Mexico. Wieck was convicted of ten counts of wire fraud and five counts of money laundering. At sentencing, the district court applied a two-level enhancement under § 2B1.1(b)(10)(A) of the United States Sentencing Guidelines ("U.S.S.G.") for relocating a fraudulent scheme to another jurisdiction to evade law enforcement. Wieck contends the district court erred by applying the enhancement because he did not relocate the scheme to evade law enforcement and went to Mexico for other reasons. Wieck also argues the

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

district court erred by allowing unfairly prejudicial testimony by his ex-wife. Finally, Wieck argues that the district court erred in determining victim loss for purposes of the enhancement under § 2B1.1(b)(10)(A) and restitution.

Having jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we affirm the district court's application of the relocation enhancement and its evidentiary ruling to allow the ex-wife's testimony. However, we reverse the district court's calculation of victim loss both in reference to its restitution calculation and its calculation under the Sentencing Guidelines and remand to the district court to recalculate actual loss by using a reasonable estimate of the production costs.

I. Background

In 2014, Wieck began drilling three oil wells, known as the "School Land Wells," on land he leased in Maud, Oklahoma. There was also a fourth well on the land, but Landmark Energy[1] owned its drilling rights. Wieck solicited and sold working interests in the School Land Wells to eight parties in exchange for labor and cash investments.[2] Wieck also sold interests in the Landmark well that he did not own.

[1] Landmark Energy is "a big oil company who had bought a working interest in Mr. Wieck's oil wells and had bought the rights to drill a horizontal well into the same pool of oil." R. Vol. I at 177.

[2] A "working interest" provides investors with their share of the revenue from the well but requires them to pay a proportionate share of the costs of producing the oil. R. Vol. III at 33, 67, 201, 259. Working interests entail the risk of the prospect coming up as "a dry hole," meaning the well fails to hit oil. If that occurs, working interest owners are still obligated to pay their percentage of the drilling costs. If the well does hit oil, production costs may still exceed the revenue, meaning that the working interest owners will get a bill rather than a check.

Wieck hired Pacer Energy Marketing, LLC ("Pacer Energy"), a local oil transport company, to transport any oil produced from the School Land Wells and sell it on the open market. Pacer Energy agreed to pay Wieck the fair market value of the crude oil produced by the wells. From there, Wieck was to pay the School Land Wells' investors their share of any revenue minus production costs.

Around the time Wieck began accepting investments, he and his wife, Lori McKee, started to live lavishly. McKee recalled how, after one of the major investors was around, they "would have some kind . . . of a splurge . . . maybe go on a trip or some shopping or . . . [make a] big purchase." R. Vol. III at 268. Wieck and McKee flew first class to New Orleans, stayed at the Ritz Carlton, took a cruise, and made several trips to Mexico—including one to Cancun and two to Cabo San Lucas. They purchased multiple pickup trucks, a Harley-Davidson motorcycle, and a boat. They rented an RV for a year, which they drove to Colorado several times. And McKee received checks totaling $17,000 from the "Wieck Oil Company" bank account.

By the late summer of 2014, Wieck and McKee moved to Mexico. McKee later testified that they took with them "two campers, the Waverunner, three pickups, a motorcycle," and bundles of cash "wrapped in aluminum foil." *Id.* at 275. Wieck had also asked investor Curt Green to bring the money from School Land Well #1 to him in Mexico.

While Wieck claimed at one point that he moved abroad to escape the consequences of recent DUIs, there were multiple accounts—including his own—

maintaining that he actually left for Mexico to buy him time to get his scheme in order. R. Vol. II at 81. Wieck stated in a letter to the court: "I went to Mexico not to run from my oil wells but to buy me some time to get these wells settled in, get the books caught up and get my affairs in order." R. Vol. III at 588; R. Vol. II at 81. Robert Wieck—Kevin Wieck's brother—testified that Kevin "was just going 90 miles an hour and he was heading for Mexico and he was going to run everything from Mexico and he had it figured out how he could do it and everything was going to be fine." R. Vol. III at 241.

In October, while in Mexico, Wieck gave McKee power of attorney and instructed her to travel back to Oklahoma to tie up "loose ends" for the oil operation. *Id.* at 277–78. He also directed her to bring back $10,000, which she was supposed to do each time she came back from the United States, the majority of this money coming from the Wieck Oil bank account. However, once in Oklahoma, McKee learned "that nobody ha[d] been doing the books, nobody was taking care of anything, and . . . there wasn't any money." *Id*. at 281.

McKee later testified that she and Wieck got into a fight after she told him they had no money. She said she returned to the United States because Wieck got "physical" with her and had started "beating on" her.[3] *Id*. at 280, 285. Eventually,

[3] *See* R. Vol. III at 280 ("And he had his yes man with him and that was never a very good thing. And we got to the motel and he was -- he was physical and not very nice and he had his yes man take me back to the airport and I flew out the next morning."); *id.* at 285 ("Q. And why did you leave Mr. Wieck in Mexico? A. He was beating on me and it was not a good life. It was not good.").

McKee divorced Wieck and transferred operatorship of Wieck Oil to Landmark Energy. Wieck later sold his remaining interest in the oil wells.

On July 3, 2018, a federal grand jury charged Wieck with ten counts of wire fraud and five counts of money laundering in connection with the oil wells. At a hearing held before trial, defense counsel orally moved in limine to exclude possible testimony from McKee, who was now a witness for the United States. R. Vol. IV at 93 ("I do have one other matter . . . it's a bit of an afterthought."). Defense counsel had seen references in discovery materials that McKee claimed to be "a victim of domestic abuse" at the hands of Wieck. *Id.* The defense moved that the court require "the government to admonish her that [the abuse allegations] not be introduced into her testimony or referenced in her testimony." *Id.* When asked by the court whether she was arguing that the abuse allegations are "so prejudicial it's a 403 deal" (referencing Fed. R. Evid. 403), defense counsel responded: "Yes, Your Honor." *Id.* The United States argued that this "was very much part of the story . . . part of the timeline . . . and part of the ongoing scheme of fraud," and that while "McKee is very hard, frankly, to control as a witness," the government would "certainly try to direct her in that manner." *Id.* at 94. The court ruled that it would not exclude the testimony because it "ha[d] enough relationship to the case," but that it "expect[ed] everybody to stay focused on the relevant parts" of the case. *Id.* at 96–97.

At trial, McKee testified that after she went down to Mexico on one occasion, Wieck "was physical" and then "he had [an associate] take [her] back to the airport" so that she "flew out the next morning." R. Vol. III at 280. The United States asked

her to elaborate ("You said you got in a fight?"), and McKee asserted, "I knew there was going to be a fight, but he kept kind of wanting to know what had happened [regarding the oil wells] while I was home. So I just . . . said we're broke, we ain't got no money . . . to pay anybody . . . . And he didn't like that at all." *Id.* at 282. The United States then asked, "why did you leave Mr. Wieck in Mexico?" *Id.* at 285. McKee responded, "[h]e was beating on me." *Id.* At this point, defense counsel did not renew Wieck's objection.

Later at trial, the United States sought to prove the amount of victim loss through an expert witness, FBI forensic accountant Tami Nab. Nab's calculations focused on the amount investors should have received from School Land Wells #1 and #2 from April 2014 to October 2014. To illustrate her calculations, Nab provided the court with a spreadsheet. In one column, the spreadsheet listed figures for "Net Revenue"[4] produced by the wells. Relevant to the court's calculation of actual loss, the spreadsheet also provided an amount of unpaid revenue for each victim. Nab's estimate for the total unpaid revenue was $235,256.92. Nab's calculation did not address production costs.[5]

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[4] Nab's "Net Revenue" demonstrated the revenue produced by the wells after tax, but not after production costs. These same figures in this column are reflected in the invoices from Pacer Energy, the buyer of the crude oil.

[5] While Nab's calculation did not rely upon any evidence of production costs, such as utility bills, her testimony appears to contradict the idea that her calculation entirely disregarded production costs: "Q. Did you also make estimated calculations based upon the *costs of production* that we have documentation for what Wieck Oil incurred? A. Yes. . . . I based the calculations on the known vendors that I saw being paid out of the [Wieck Oil bank] accounts." R. Vol. III at 396 (emphasis

On September 14, 2018, the jury found Wieck guilty on all counts. For sentencing purposes, the district court was required to make two calculations with respect to loss: (1) a calculation of the total restitution owed, and (2) a calculation of the total applicable value under U.S.S.G. § 2B1.1(b)(1) for graduated increases to Wieck's offense level based on the amount of loss to the victims. Under § 2B1.1(b)(1), if the loss exceeds $250,000 the offense level is 12, and if the loss falls between $550,000 and $1.5 million, the offense level increases to 14.

The Presentence Report (PSR) provided the court with the same estimates reflected by Nab's calculations. For restitution, the PSR recommended an award of $358,256.92, which included (1) $123,000 that investor Ed Willis paid Wieck for an interest in the well that Wieck did not own, and (2) the $235,256.92 total unpaid revenue calculated by Nab. For the Guidelines calculation, the PSR recommended $658,256.92, which included (1) the loss amount of $358,256.92, and (2) the $300,000 investment in the well Wieck solicited but never received.[6] This resulted in an offense level of 14.

At sentencing, Wieck objected to Nab's actual loss figure, which pertained to both the restitution calculation and calculation under the Guidelines, claiming the

added). Still, Nab's bottom-line totals for unpaid revenue can be recreated to their exact amounts by taking the total revenue from Pacer Energy, multiplied by the percentage of ownership for each investor, minus Wieck's initial payments to investors. In other words, the evidence shows that Nab did not subtract production costs from her loss estimate.

[6] The Guidelines define loss to include losses that were merely "intended." U.S.S.G. § 2B1.1 cmt. n.3(A)(ii). Thus, the calculation included an additional $300,000 that Wieck solicited, but did not receive.

amounts due to investors were overstated. Wieck argued that top-line revenue was not a valid measure of investor loss because the court needed to "subtract the production costs." R. Vol. III at 604. Wieck further contended the United States's evidence was insufficient to make the required calculation. This prompted the court to ask the United States whether Nab's estimates accounted for production costs. While the United States appeared to answer that Nab's calculation did account for production costs,[7] the United States eventually confirmed that Nab failed to subtract production costs from her estimate:[8] "She did not address production costs, Your Honor." *Id.* at 602–03.

The district court adopted Nab's estimates, overruling Wieck's objection, and ordered restitution in the amount of $358,256.92, which included the $235,256.92 in "unpaid revenue." As for the Guidelines calculation, the court asserted that (1) Wieck himself paid top-line revenue in his initial payments to investors, and

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[7] The United States stated that, although it did not have evidence of utility bills, it did "have a way to calculate what investors were promised," by using Wieck's initial "payments to Ed Willis, Chuck Sullivan, Craig Rumble, and Jared Redyke back for the April 2014 monthly revenue," thus "forcing an estimate" of the total amount each investor expected to be paid by Wieck. R. Vol. III at 600–01.

[8] Highlighting the ambiguity of the United States's various answers to this question, the district court attempted to ask this same question in a variety of ways: "[W]hat is the Government's understanding in terms of the workup the FBI agent did at trial where she said here's the amount of payments? Was that net of the – net of costs that each investor would have otherwise been required to pay?" R. Vol. III at 600. "When the FBI agent did her workup, did it or did it not include those adjustments for those kinds of costs?" *Id.* at 601. "[W]hen the FBI agent prepared her chart that generated these total numbers you're talking about, was she operating off of that ratio in essentially forcing an estimate of production costs based on that?" *Id.* at 602.

regardless, (2) "operating expenses were a relatively small percentage of things." *Id.* at 616–17. The court then applied the 14-level increase, and said that, with "a liberal deduction for production costs," the loss would still be above the $550,000 threshold for the 14-level increase. *Id.* at 617. Thus, when calculating the amount of actual loss, the court did not offset the sentence enhancement or the restitution amount by Wieck's production costs.

Overall, the district court sentenced Wieck to 72 months' imprisonment and imposed restitution in the amount of $358,256.92. In determining Wieck's sentence, the court applied both the sentence enhancement under U.S.S.G. § 2B1.1(b)(10)(A), for relocating the scheme to evade law enforcement, and the enhancement under § 2B1.1(b)(1)(H), for the amount of actual loss Wieck had caused his investors.

Wieck now appeals. He claims the district court erred by applying the relocation enhancement because "the alleged scheme was never relocated to Mexico," and "any relocation of the scheme did not occur to evade law enforcement." Aplt. Br. at 35, 47 (internal quotation marks omitted). He also argues that "[t]he district court abused its discretion by allowing the jury to hear Ms. McKee's testimony that Mr. Wieck beat her" because the testimony was unfairly prejudicial. *Id*. at 19–20. Finally, Wieck claims that the court improperly calculated the victims' losses by failing to base their expected interest on the net revenue of the oil wells after production costs.

II. Relocation Enhancement

When reviewing a district court's application of the Sentencing Guidelines, "we review de novo the district court's legal conclusions regarding the guidelines and review its factual findings for clear error." *United States v. Porter*, 928 F.3d 947, 962 (10th Cir. 2019); *see also United States v. Whiteskunk*, 162 F.3d 1244, 1249 (10th Cir. 1998) (reviewing a court's decision to depart from the Guidelines under a "unitary abuse-of-discretion" standard, giving deference to factual findings, but reviewing legal conclusions with a plenary review).[9]

The Sentencing Guidelines dictate that if "the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials," the sentence is increased by two levels. U.S.S.G. § 2B1.1(b)(10)(A). The statutory language "clearly refers to the relocation of the *scheme* only, not the relocation of the defendant himself." *United States v. Paredes*, 461 F.3d 1190, 1193 (10th Cir. 2006); *see also* R. Vol. III at 587 (district

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[9] Wieck argues that only de novo, not clear error, applies because he merely "challenges th[e] [relocation] enhancement . . . as a matter of law." *See* Aplt. Br. at 35 (citing *United States v. Young*, 893 F.3d 777, 779 (10th Cir. 2018) (applying a de novo review where the appellant "accept[ed] the findings of fact and argue[d] solely that the facts are sufficient as a matter of law to warrant enhancement")). But Wieck goes beyond a challenge to the court's legal conclusion—that Wieck relocated the scheme to Mexico—by challenging the court's "characterization of the . . . scheme," that it "was a matter of simply not paying investors," arguing that the court "ignore[d] crucial steps in the enterprise." Aplt. Br. at 42. Here, however, it does not matter whether the standard is de novo or clear error because we find that the district court correctly concluded that Wieck relocated his scheme to Mexico to evade law enforcement.

court acknowledging that the enhancement will *not* be triggered solely by a defendant's relocation).

At sentencing, the district court found that "the essence of [Wieck's] scheme" was "not paying the investors in those wells the amounts that they were due as run payments or as their share of the production from the wells." R. Vol. III at 587–88. The court explained that Wieck relocated "the process of not paying" because he brought the profits from the wells with him to Mexico and continued not paying his investors from there. *Id.* The court also found that Wieck relocated to evade law enforcement in order to buy him time to continue this scheme.

First, the record supports the district court's finding that Wieck relocated his scheme of not paying investors specifically by bringing the profits to Mexico. McKee testified that Wieck brought to Mexico bundles of cash wrapped in aluminum foil in addition to many of his new purchases, like the campers, pickup trucks, motorcycle, and Waverunner. McKee also testified that Wieck ordered her to return with $10,000 each time she came back to Mexico, and that the majority of the money came from the Wieck Oil bank account. Further, investor Curt Green testified that Wieck asked Green to bring the money from School Land Well #1 to Wieck in Mexico.

Second, the record supports the finding that Wieck went to Mexico to evade law enforcement "to buy time to [continue] the nonpayment scheme." R. Vol. III at 588–89. Wieck's brother testified that Wieck "was . . . heading for Mexico and he was going to run everything from Mexico and he had it figured out how he could do

it and everything was going to be fine." *Id.* at 241. In a letter attached to Wieck's sentencing memorandum, Wieck also stated: "I went to Mexico not to run from my oil wells but to buy me some time to get these wells settled in, get the books caught up and get my affairs in order." *Id.* at 588.

The record also included evidence that Wieck went to Mexico to avoid going to prison for his two DUIs. While the court acknowledged the DUIs might have been part of Wieck's decision to relocate, ultimately the court concluded that the evidence suggests that Wieck's purpose for going to Mexico was more about buying time to do something with his scheme than fleeing from his DUI charges. The court found that "the essence of [Wieck's] scheme [was] not paying the investors in those wells," and that this "continued even after he went to Mexico." R. Vol. III at 588. It also found that Wieck relocated to Mexico to "buy time" and evade law enforcement. *Id.* Because we do not disturb these conclusions, we affirm the district court's application of the two-level sentencing enhancement under U.S.S.G. § 2B1.1(b)(10)(A).

III. Lori McKee's Testimony

Wieck next alleges that the district court erred by admitting McKee's testimony about domestic abuse. Wieck first raised the issue during a pretrial motion in limine. But he did not object to either of the two statements from McKee's trial testimony in which she stated that Wieck "was physical" and "was beating on [her]." *Id*. at 18 (quoting R. Vol. III at 280, 285).

As a preliminary matter, Wieck argues that he preserved this issue when he made an oral motion in limine even though he failed to raise the objection at trial. Aplt. Br. at 18–19. "Generally, a pretrial motion in limine will not preserve an objection if the objection is not renewed at the time the evidence is introduced." *United States v. Nichols*, 169 F.3d 1255, 1264 (10th Cir. 1999). However, "a motion in limine may preserve an objection when the issue (1) is fairly presented to the district court, (2) is the type of issue that can be finally decided in a pretrial hearing, and (3) is ruled upon without equivocation by the trial judge." *United States v. Goodman*, 633 F.3d 963, 966 (10th Cir. 2011) (quoting *United States v. Mejia-Alarcon*, 995 F.2d 982, 986 (10th Cir. 1993)).

Wieck argues that his motion in limine preserved his objection because it was fairly presented to the court, "admissibility [under Rule 403] was the type of issue that could be finally decided at a pretrial hearing, and the question was ruled upon without equivocation." Aplt. Br. at 18–19 (citing *United States v. Williams*, 934 F.3d 1122, 1132–33 (10th Cir. 2019). However, we determine that Wieck's motion in limine failed to satisfy the second prong.

After Wieck's counsel learned that McKee claimed to be a victim of domestic abuse, counsel asked the court to admonish McKee not to introduce such testimony. The district court asked defense counsel whether she was arguing that the testimony would be unfairly prejudicial under Federal Rule of Evidence 403. Counsel responded, "Yes, Your Honor." R. Vol. IV at 95. After hearing arguments from both sides, the court found that the testimony "ha[d] enough relationship to the case,

potentially" to deny the motion, but that the court "would expect everybody to stay focused on the relevant parts" of the case. *Id.* at 96–97 (emphasis added).

Here, whether this testimony was more prejudicial than probative is an issue that could not be completely or finally decided in a pretrial hearing. Defense counsel's argument on the testimony's purported prejudice, under Rule 403, involved a fact-intensive balancing inquiry between the prejudicial and probative nature of the evidence. *United States v. Cobb*, 588 F.2d 607, 612–13 (8th Cir. 1978) (requiring a party to renew at trial an objection to the admission of a conviction older than ten years because Rule 609(b) requires a balancing of the probative value against the prejudicial effect of the old conviction), *cert. denied*, 440 U.S. 947 (1979); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1118–19 (8th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986) (holding that motion in limine preserved objection to post-hypnosis recollection, noting that "[i]t was not a typical motion in limine situation where a hypothetical question is posed whose nature and relevance is unclear before trial"); *Palmerin v. City of Riverside*, 794 F.2d 1409, 1411–12 (9th Cir. 1986) (distinguishing a case where the issue was "highly dependent upon the trial context"). Even the district court hinted at this by finding that it could only conclude that this testimony was "potentially" relevant. R. Vol. IV at 96. This fact-intensive inquiry thus required counsel to raise the issue at trial when the prejudicial and probative factors could be considered in full context. *See United States v. Sides*, 944 F.2d 1554, 1559–60 (10th Cir. 1991) (cautioning counsel to not rely upon rulings on pretrial motions in limine as the basis for preserving a claim, specifically related

to admissibility, because such motions often "address hypothetical concerns that may not arise during the course of trial") (citing *Conway v. Electro Switch Corp.*, 825 F.2d 593, 596 n.1 (1st Cir. 1987); *United States v. Khoury*, 901 F.2d 948, 966 (11th Cir. 1990).

Because Wieck failed to preserve these issues, we review the district court's ruling for plain error. *See* Fed. R. Crim. P. 52(b); *see also Sides*, 944 F.2d at 1560. Plain error "authorizes the Courts of Appeals to correct only particularly egregious errors, those errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Sides*, 944 F.2d at 1560 (internal citations and quotation marks omitted); *see also United States v. Whitney*, 229 F.3d 1296, 1309 (10th Cir. 2000) (finding that the error must be "clear or obvious").

Under Rule 403, evidence is excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. "In engaging in the requisite balancing, courts give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *United States v. Henthorn*, 864 F.3d 1241, 1256 (10th Cir. 2017) (internal quotation marks omitted). "A district court has broad discretion to determine the admissibility of evidence." *United States v. Merritt*, 961 F.3d 1105, 1111 (10th Cir. 2020). "Under this standard, we will not disturb a trial court's decision unless we ha[ve] a definite and firm conviction that the [trial] court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *United States v.*

Leonard, 439 F.3d 648, 650 (10th Cir. 2006) (internal citations and quotation marks omitted).

Here, we agree with the district court that the domestic abuse testimony had "enough relationship to the case, potentially to . . . explaining the relationship between the witness and the defendant, what they did or didn't do." R. Vol. IV at 96. It was "part of the circumstances." *Id*. McKee's relationship with Wieck was integral to Wieck's furthering his scheme from Mexico. McKee had power of attorney and travelled between Mexico and Oklahoma regularly. Wieck ordered her to tie up "loose ends" involving the oil wells and retrieve thousands of dollars for him. *Id.* Eventually, McKee was the actor who signed over the oil company's operatorship. When responding to Wieck's pretrial motion in limine, the United States argued that the alleged domestic abuse was relevant to all of those interactions. The abuse explained the timing of her trips because Wieck would kick her out and send her to Oklahoma; the abuse is what finally led McKee to transfer operatorship of the company.

Wieck argues that McKee's testimony was unfairly prejudicial because of the public stigma attached to domestic abuse. Wieck claims the testimony was likely to persuade the jury that he is a bad person, "thereby provid[ing] a strong temptation toward the forbidden inference that [he] was more likely to be guilty of the fraud and money laundering charges for which he was being tried." Aplt. Br. at 26. However, only two words—"physical" and "beating"—among thirty pages of McKee's

transcribed testimony, are at issue here. R. Vol. III at 280, 285.[10] Beyond this, McKee did not elaborate on the abuse, and the United States similarly did not revisit or mention the abuse in its closing argument. In context, it is not "clear or obvious" that McKee's statements would prejudice or lure the jury into declaring guilt on an entirely different ground. *Whitney*, 229 F.3d at 1309.

In sum, we conclude the error, if any, was not plain.

IV. Victim Loss

Wieck also argues that the district court incorrectly calculated the amount of loss his victims suffered, which determined both the district court's restitution award and its sentence enhancement for loss under the Guidelines. Wieck contends that the court miscalculated loss by considering gross profit, instead of net profit which would have properly accounted for production costs. Wieck objects to this part of the calculation both as to restitution and to the Guidelines enhancement.

First, Wieck's challenge to the district court's loss calculation for restitution is a legal question that we review de novo. *United States v. James*, 592 F.3d 1109, 1114 (10th Cir. 2010). A "district court need not calculate actual or intended loss with exact precision[;] it need only make reasonable estimates," using "reasonable

[10] "[B]eating" arose where McKee was testifying about her relationship with Wieck, explaining that she left Mexico because "[h]e was beating on [her] and it was not a good life." R. Vol. III at 285. "[P]hysical" arose in a similar context: "Q. Ms. McKee, is that when you went back down to Mexico? A. Yeah. . . . I didn't stay in Oklahoma as long as I had wanted to. Kevin wasn't feeling good . . . . And we got to the motel and he was -- he was physical and not very nice and he had his yes man take me back to the airport and I flew out the next morning." *Id.* at 280.

method[s]." *James*, 592 F.3d at 1115 (citing *United States v. Galloway*, 509 F.3d 1246, 1251 (10th Cir. 2007)). "In determining the amount of loss, a sentencing court may resolve restitution uncertainties with a view towards achieving fairness to the victim, so long as it still makes a reasonable determination of appropriate restitution *rooted in a calculation of actual loss*." *United States v. Howard*, 887 F.3d 1072, 1076 (10th Cir. 2018) (internal quotation marks omitted); *see also James*, 592 F.3d at 1115 (defining actual loss as the "reasonably foreseeable pecuniary harm that resulted from the offense") (citing U.S.S.G. § 2B1.1).

At sentencing, the district court included Nab's unpaid revenue estimate of $235,256.92 in its final restitution order, requiring Wieck to pay $358,256.92.[11] While the United States and Nab both made ambiguous statements that seem to contradict the fact that their estimate failed to account for production costs,[12] the United States eventually confirmed that Nab failed to subtract production costs from her estimate: "She did not address production costs, Your Honor." R. Vol. III at

[11] Total restitution included $123,000 that an investor paid for an interest in the well Wieck did not own plus $235,256.92 in "unpaid revenue" for all investors' interests in the wells Wieck did own.

[12] On direct-examination, Nab was asked: "Did you also make estimated calculations based upon the *costs of production* that we have documentation for what Wieck Oil incurred?" R. Vol. III at 396 (emphasis added). Nab answered: "Yes. . . . I based the calculations on the known vendors that I saw being paid out of the [Wieck Oil bank] accounts." *Id.* At sentencing, the United States stated that, although it did not have evidence of utility bills, it did "have a way to calculate what investors were promised," using Wieck's initial "payments to Ed Willis, Chuck Sullivan, Craig Rumble, and Jared Redyke back for the April 2014 monthly revenue," thus "forcing an estimate" of the total amount each investor expected to be paid by Wieck. *Id.* at 601–02.

602–03. Additionally, Nab's estimate for unpaid revenue can be recreated by multiplying total revenue from Pacer Energy, from April 2014 to October 2014, by the percentage ownership of each investor, and then subtracting any checks Wieck actually paid. *See* Supp. R. at 48–52 (Pacer Energy Payments to Wieck); *see also* R. Vol. III at 396. The sum of all eight investors' unpaid revenue is $235,256.92, which is the amount Nab claimed to be owed to each investor, and the amount reflected in the Presentence Report. The fact that this figure can be recreated without accounting for production costs stands as additional evidence that Nab did not subtract production costs from her final estimate.

Considering the fact that the estimate did not account for production costs, the primary question under the restitution inquiry is whether it was "reasonably foreseeable" that Wieck would have made the remaining payments without deducting production costs. *See* U.S.S.G § 2B1.1 cmt. n.3(A)(i) (defining actual loss as "the reasonably foreseeable pecuniary harm that resulted from the offense"). Here, investors purchased working interests, which meant they would be required to pay their percentage of the production costs. Wieck's written agreements also state that "[b]y executing this Participation Agreement, I have committed myself to become a working interest owner in this prospect." Supp. R. at 2, 7, 14, 18, 22. As the United States explained, "working interests in the oil and gas industry . . . meant that [the investor] would bear a percentage of the production and drilling costs but also receive a percentage of any oil revenue earnings." R. Vol. III at 18. Testimony throughout the record supports this fact. *See id.* at 33 ("[A] working interest means I have to pay my percentage of the bills."); *id.* at 61–

62 ("Those are costs, production costs, and I'm responsible for my portion of them."); *id.* at 67 ("[W]e would be paying for a percentage of the cost of the well as well as participating in the net revenue interest of the well."); *id.* at 201 ("Working interest is you participate in the cost of the well."); *id.* at 259 ("[A] 4 percent working interest mean[s]" that "you also pay 4 percent of the costs[.]"); *id.* at 311 (stating that owners of a working interest in a nonproductive well "still have to pay [their] share" of the "cost to drill it and plug" the "dry hole").

In applying Nab's estimate, the court reasoned that Wieck used top-line revenue when he made initial payments to investors, and that "operating expenses were a relatively small percentage of things." *Id.* at 616–17. But these initial payments were not considered the same as any regular working interest payment. Rather, Wieck's initial payments were "lulling payments" specifically used "to induce further investment;" Wieck used them as lures to bait investors into giving him more money. Aple. Br. at 33; *see also* R. Vol. III at 524 (describing the initial payments as "lulling payments" used "to throw [investors] off the scent of the scheme"). Thus, because investors bought working interests, the court should not have assumed that Wieck's lulling payments stood as a reasonable metric to estimate total victim loss under circumstances where investors expected to pay a portion of the production costs.

The record also lacks any support for the finding that production costs were insignificant. Here, no testimony at trial definitively established that production costs were negligible. Rather, witnesses testified that production costs for any given month sometimes exceed oil revenue. *See id.* at 61–62 (Dewayne Streater's testimony that

"costs sometimes exceed the revenue coming in from the well"). Also, School Land Well #3 did not hit oil, which meant that the six victims who purchased working interests in #3 would have been required to assume their share of the costs associated with drilling and then plugging the "dry hole." *See id.* at 311. Investor Tim Mathews testified that the costs attributable to School Land Well #3 were $226,450, of which he paid his 10% share. *Id.* at 311; *see id.* at 312 (Mathews's testimony that this bill seemed "pretty close" to reasonable). But there is no indication that any other investors outside of Mathews bore those production costs. Therefore, because victims purchased working interests, and because Nab's loss estimate did not deduct for the costs associated with those interests, the district court erred in its restitution calculation by applying an unreasonable method of calculation.

Second, Wieck's challenge to the loss calculation for the Sentencing Guidelines enhancement is a challenge to the sentence's procedural reasonableness, which is also a legal question reviewed de novo. *James*, 592 F.3d at 1114. Under that standard, "we may disturb the district court's loss determination—and consequent Guidelines enhancement—only if the court's finding is without factual support in the record or if, after reviewing all the evidence, we are left with a definite and firm conviction that a mistake has been made." *Mullins*, 613 F.3d at 1292 (internal quotation marks omitted). When calculating loss for a sentence enhancement, the Guidelines advise courts to use "the greater of actual or intended loss." U.S.S.G. § 2B1.1 cmt. n.3(A). A Level 14 adjustment applies to actual or intended loss over $550,000. U.S.S.G. § 2B1.1(b)(1)(H). "The district court need

not calculate actual or intended loss with exact precision, it need only make reasonable estimates." *Galloway*, 509 F.3d at 1251 (10th Cir. 2007) (citing § 2B1.1(b)(1), cmt. n.3(C)). "But a loss estimate is reasonable only when it is calculated under a reasonable method." *James*, 592 F.3d at 1115. And as with restitution, "[t]he government has the burden of proving actual and intended loss by a preponderance of the evidence." *Galloway*, 509 F.3d at 1251.

At sentencing, the district court calculated the total for the Guidelines calculation by taking the loss figure in its restitution order ($358,256.92), which included Nab's unpaid revenue estimate of $235,256.92, and adding an "intended" loss of $300,000.[13] In total, the district court found that Wieck intended to cause a loss of $658,256.92. The court found that this met the $550,000 threshold for the 14-level increase, explaining: "even if you make an ample -- or a liberal deduction for production costs, you're still left with a net number in excess of 550,000. . . . whether it's 600,000 or 650[,000] doesn't really matter because it ends up in the same place." R. Vol. III at 617.

Here, the court used the same flawed methodology to calculate Wieck's sentencing enhancement as it did to calculate restitution—relying upon Nab's calculation which used Wieck's initial payments to estimate unpaid revenue. Thus, as discussed above, because victims purchased working interests and expected to pay

[13] $300,000 represents the amount that Wieck solicited but did not receive. *See* U.S.S.G. § 2B1.1 cmt. n.3(A)(ii) (allowing "intended" losses into the calculation).

a percentage of the costs, and because Wieck's initial lulling payments were merely understood to induce further investment, we similarly conclude that the district court's loss determination and consequent Guidelines enhancement were in error. In the same manner as the restitution calculation, the court disregarded production costs, which led it to improperly apply the 14-level sentence enhancement.

Contrary to the district court's understanding, Mathews did not testify to the relative size of production costs compared to revenue; he merely stated that production costs were not necessarily higher during the initial period of production than they are later—they "are usually going to be the same today as they are tomorrow as they are a year from now." *Id.* at 338. Mathews also indicated that return on investment varies significantly from month to month. But he said nothing about the average fixed costs or profit margin of an oil well. No other witness or expert gave an estimate of the approximate level of production costs of the wells. Thus, there is no support for the court's assumption that production costs could have reasonably been less than $100,000.

The United States argues that "[n]othing in the record supports the assertion that production costs even approached [an] amount" large enough to push the loss below the $550,000 threshold. Aple. Br. at 37. However, this similarly lacks factual support. Multiple witnesses testified that production costs can exceed oil revenue in any given month, which means that "production costs sometimes exceed[] 100% of top-line revenue." Aplt. Br. at 54. The record shows that the costs of producing oil involved substantial outlays, including paying the pumper, paying insurance

premiums, and "do[ing] the maintenance on the equipment." R. Vol. III at 338; *see also id.* at 396–97 (Nab testifying that, from January 2014 to April 2015, "Wieck actually pa[id] to vendors" "costs of production" totaling "[a]pproximately $590,000"). The record also includes specific evidence that Wieck made substantial payments to numerous companies that supply oil well equipment and provide oil production services. *See* Supp. R. at 30, 32 (Wieck's outgoing bank statements, including but not limited to the following payments: $63,037 to Mills Well Service; $34,205 to Ada Energy Services; $22,249 to Wallace Acid Frac; $11,721.41 to Kay Production Co.; $5,000 to Seminole Mud; $4,108 to JMG Vacuum Trucks, Inc.; $2,972.49 to C&H Bit Company; $2,250 to Toro Casing Services; $2,009.25 to Baxter Oil Tool Ltd.). Testimony also suggested that, at any given month, production costs could entirely exceed the revenue generated by a well. But even if costs only totaled 47% of top-line revenue, the total loss would be $547,686.17, below the $550,000 threshold.[14] The record also fails to include any evidence that production costs were below this threshold, and "the government has the burden of proving loss by a preponderance of the evidence."[15] *Sutton*, 520 F.3d at 1262.

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[14] This figure is calculated by adding $423,000 in uncontested loss (Kersey's $300,000 intended loss and Willis's $123,000 actual loss) with 53% of $235,256.92.

[15] The fact that the United States was without any utility bills does not mean it was without an ability to estimate production costs. For example, since testimony at trial stated that oil well production costs are largely fixed, staying constant from month to month, the United States could have presented the court with an average of the monthly production costs paid by the new operator after it assumed operation of the wells in October 2014.

In conclusion, we hold that the district court erred in both its restitution and Guidelines calculations by failing to deduct production costs. The victims purchased working interests in the oil wells requiring Wieck to deduct production costs before paying their shares of the revenue. The record demonstrates that the district court did not deduct production costs from its loss estimate. Accordingly, we direct the district court to recalculate actual loss with respect to restitution and the Sentencing Guidelines by deducting a reasonable estimate of production costs.[16]

V. Conclusion

For the reasons stated above, we AFFIRM the district court's application of the relocation enhancement and its evidentiary ruling to allow McKee's testimony. However, we REVERSE the district court's calculation for restitution and its calculation under the Sentencing Guidelines, and REMAND for the district court to recalculate actual loss using a reasonable estimate of the production costs.

Entered for the Court

Allison H. Eid
Circuit Judge

[16] In issuing this order and judgement, we also deny Wieck's motion to expedite as moot.