UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4357

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

APRIL CORMELIUS MILLER,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Anderson. Timothy M. Cain, District Judge. (8:12-cr-00030-TMC-1)

Submitted: April 9, 2020 Decided: May 20, 2020

Before WYNN and RUSHING, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Joshua Snow Kendrick, KENDRICK & LEONARD, P.C., Greenville, South Carolina, for Appellant. Sherri A. Lydon, United States Attorney, Brook Bowers Andrews, Assistant United States Attorney, David Calhoun Stephens, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

PER CURIAM:

April Cormelius Miller challenges on two grounds her wire fraud convictions and sentence following a jury trial: the district court incorrectly admitted Federal Bureau of Investigation (FBI) Agent Paul Jacobs' testimony, and the district court incorrectly calculated the intended loss amount. We affirm.

"We review a district court's decision to qualify an expert witness, as well as the admission of such testimony, for abuse of discretion." *United States v. Garcia*, 752 F.3d 382, 390 (4th Cir. 2014). "A court abuses its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Id.* (internal quotation marks omitted). As relevant here, a witness may testify as an expert if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

We conclude that the district court did not abuse its discretion in admitting Jacobs' testimony. Jacobs had extensive experience as an FBI agent and worked in the financial fraud field for 13 years. He took this experience and applied it to the facts at hand, concluding that Miller's scheme was fraudulent. Miller's arguments that Jacobs inappropriately opined on legal matters and Miller's mental state in so doing are also unavailing. Jacobs concluded that the scheme in which Miller participated was fake, not that Miller's conduct met the legal definition of fraud. Moreover, Jacobs never concluded

anything as to Miller's intent. He only gave factors he looks for when discerning intent. Lastly, Miller emphasizes that Jacobs inappropriately served as both a lay witness and an expert witness. And while we have explained the dangers in permitting this dual testimony, district courts can allow such evidence so long as the court provides proper safeguards, subject to the balancing test of Fed. R. Evid. 403. *United States v. Smith*, 919 F.3d 825, 837 (4th Cir. 2019). The district court provided the necessary precautions here. Accordingly, we conclude that the district court did not abuse its discretion in admitting Jacobs' testimony.

Miller's second assignment of error is also without merit. "When reviewing whether a district court properly calculated the [Sentencing] Guidelines range we review the district court's legal conclusions *de novo* and its factual findings for clear error." *United States v. Lawing*, 703 F.3d 229, 241 (4th Cir. 2012) (internal quotation marks omitted). The "clear error" standard "does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985). Rather, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it." *Id.* at 573-74. Put another way, "[a] finding is clearly erroneous when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Butts v. United States*, 930 F.3d 234, 238 (4th Cir. 2019) (internal quotation marks omitted), *cert. denied*, __ S. Ct. __, No. 19-740, 2020 WL 871744 (U.S. Feb. 24, 2020).

The Guidelines instruct that to calculate a loss amount, the court must take the larger of actual or intended loss. U,S, Sentencing Guidelines Manual § 2B1.1 cmt. n.3. Application note 3 also defines "intended loss" as "the pecuniary harm that the defendant purposely sought to inflict." *Id.* Notably, this calculation "includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation)." *Id.*; *see United States v. Miller*, 316 F.3d 495, 502 (4th Cir. 2003). However, the method to calculate a loss amount should have a reasonable relationship to the intended harm of the offense. *United States v. Savage*, 885 F.3d 212, 227-28 (4th Cir. 2018).

An unindicted coconspirator explained in a recorded conversation that to be in this fraudulent investment program, the victim would have to be willing to invest $30,000,000. Moreover, while speaking with the undercover FBI agents, Miller said "I understand you guys have thirty million dollars that you're willing to put into the trade." (J.A. 272-73; *see* J.A. 463-64).[*] The district court's determination that $30,000,000 was the intended loss amount not clearly erroneous.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

[*] "J.A." refers to the joint appendix filed by the parties in this appeal.