UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4026

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARK IAN GAVER,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Richard D. Bennett, District Judge. (1:17-cr-00640-RDB-1)

Submitted: May 1, 2020 Decided: May 28, 2020

Before THACKER, HARRIS, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Richard S. Stolker, UPTOWN LAW LLC, Rockville, Maryland, for Appellant. Robert Hur, United States Attorney, Jefferson M. Gray, Assistant United States Attorney, Jeffrey J. Izant, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Mark Gaver appeals his convictions by a jury of bank fraud and money laundering, in violation of 18 U.S.C. §§ 1344, 1957 (2018), and the 204-month sentence imposed by the district court. He makes six assertions of error, none of which entitles him to relief. For the reasons discussed below, we affirm the judgment of the district court.

I.

Gaver contends that his trial counsel failed to inform him of a plea agreement offered by the Government. We typically will not hear a claim of ineffective assistance of counsel made on direct appeal, *United States v. Maynes*, 880 F.3d 110, 113 n.1 (4th Cir. 2018), "[u]nless an attorney's ineffectiveness conclusively appears on the face of the record," *United States v. Faulls*, 821 F.3d 502, 507 (4th Cir. 2016). In order to demonstrate ineffective assistance, Gaver must satisfy the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984). He "must show that counsel's performance was [constitutionally] deficient," *id.* at 687; *see Missouri v. Frye*, 566 U.S. 134, 145 (2012) (holding that defense counsel has duty to communicate favorable plea offers to defendant), and "that the deficient performance prejudiced the defense," *Strickland*, 466 U.S. at 687; *see Frye*, 566 U.S. at 145, 150 (describing showing of prejudice required "where a plea offer has lapsed or been rejected because of counsel's deficient performance").

With these standards in mind, we have reviewed the relevant portion of the district court proceedings and conclude that the record does not conclusively demonstrate counsel's ineffectiveness. Such a claim "should be raised, if at all, in a 28 U.S.C. § 2255

[(2018)] motion." *Faulls*, 821 F.3d at 508. We therefore decline to review this claim at this juncture.[1]

II.

Next, Gaver asserts that the district court did not adequately inform him of his right to testify. "Given the constitutional nature of [a defendant's] right [to testify], courts generally review *de novo* whether [such] right . . . was violated at trial." *United States v. Muslim*, 944 F.3d 154, 162 (4th Cir. 2019). However, Gaver failed to raise this issue below, so we review it for plain error. *Id.* at 162-63. "To show plain error, [Gaver] must show (1) that the court erred, (2) that the error is clear and obvious, and (3) that the error affected his substantial rights . . . ." *Id.* at 163 (internal quotation marks omitted). Even if Gaver can meet this test, "we retain discretion whether to recognize the error and will deny relief unless the district court's error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation marks omitted).

Generally, "the trial court does not have a *sua sponte* duty to conduct a colloquy with the defendant at trial to determine whether [he] has knowingly and intelligently waived the right to testify." *Id.* (internal quotation marks omitted). Although there exist "exceptional, narrowly defined circumstances" in which courts have such a duty, "[w]here

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[1] To the extent Gaver also asserts that the district court erred in concluding that he knew about the proposed plea agreement, we discern no error by the court. *See Frye*, 566 U.S. at 146; *United States v. Draper*, 882 F.3d 210, 216 (5th Cir. 2018) (finding no clear error in "court inquir[ing] into whether defense counsel ha[d] delivered all formal plea offers"). Here, the district court read the plea agreement into the record and ensured that Gaver still wanted to proceed to trial.

the trial court has no reason to believe that the defendant's own attorney is frustrating his . . . desire to testify, a trial court has no affirmative duty to advise the defendant of the right to testify or to obtain an on-the-record waiver of such right." *Id.* (internal quotation marks omitted). Because none of the exceptional circumstances is present here and the record does not suggest counsel frustrated Gaver's decision to testify, we conclude that the district court did not err.

III.

Gaver's third argument stems from his trial counsel's alleged failure to negotiate a "fair" discovery agreement that allowed Gaver to keep copies of the Government's evidence. We conclude that the present record does not conclusively establish that counsel provided ineffective assistance. *See Faulls*, 821 F.3d at 507-08. Accordingly, we refrain from reviewing this claim.[2]

IV.

Gaver next challenges the district court's exclusion of certain evidence relating to the victims' alleged negligence, complicity, or actual knowledge of Gaver's fraudulent scheme. "We review a district court's evidentiary rulings for an abuse of discretion, and we will only overturn a ruling that is arbitrary and irrational." *United States v. Farrell*,

[2] Gaver makes a passing reference to his right to assist in the preparation of his defense, implying that the relevant discovery agreement somehow violated this right. To the extent Gaver is making this argument, he does not properly develop it in his opening brief. *See* Fed. R. App. P. 28. Accordingly, we conclude that this issue is waived. *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief or by failing to develop its argument—even if its brief takes a passing shot at the issue." (brackets and internal quotation marks omitted)).

921 F.3d 116, 143 (4th Cir.) (alteration and internal quotation marks omitted), *cert. denied*, 140 S. Ct. 269 (2019). Because we have previously held that "[t]he susceptibility of the victim" is not a valid defense to bank fraud, *United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000), we conclude that the district court did not abuse its discretion in excluding the challenged evidence.

V.

Gaver asserts that the Government committed prosecutorial misconduct when it referred to him as a "scoundrel" during rebuttal closing argument, depriving him of a fair trial.[3] Because Gaver did not object at trial, we review his claim of prosecutorial misconduct for plain error. *United States v. Hale*, 857 F.3d 158, 173-74 (4th Cir. 2017), *see Muslim*, 944 F.3d at 163 (discussing standard). To prevail on a claim of prosecutorial misconduct, a "defendant must show (1) that the prosecutor's remarks or conduct were improper and (2) that such remarks or conduct prejudicially affected his substantial rights so as to deprive him of a fair trial." *United States v. Caro*, 597 F.3d 608, 624-25 (4th Cir. 2010) (internal quotation marks omitted); *see id.* at 626 (discussing factors courts consider in making prejudice inquiry). Essentially, we must determine "whether the misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 624 (alteration and internal quotation marks omitted).

[3] Gaver makes a passing reference to two other allegedly inappropriate comments by the Government, but he fails to develop any argument as to how these comments were improper, much less prejudicial. Accordingly, we conclude that he has waived review of these two comments. *See Grayson O Co.*, 856 F.3d at 316.

Assuming, without deciding, that the use of the word "scoundrel" was improper, we conclude that Gaver has not established prejudice. The challenged comment was an isolated remark that, as far as we can discern from the record, was not intended to mislead or distract the jury. *See id.* at 624-26. Moreover, the Government produced an overwhelming amount of evidence to establish Gaver's guilt, independent of the challenged comment. *See United States v. Adepoju*, 756 F.3d 250, 254-55 (4th Cir. 2014) (setting forth the elements of bank fraud); *United States v. Najjar*, 300 F.3d 466, 481 (4th Cir. 2002) (laying out elements of money laundering). We therefore conclude that Gaver's claim is meritless.

VI.

Finally, Gaver challenges the substantive reasonableness of his sentence. We review a defendant's sentence "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). To pass this review, the sentence must be both procedurally and substantively reasonable. *Id.* at 51. In determining procedural reasonableness, we consider whether the district court properly calculated the defendant's advisory Sentencing Guidelines range, gave the parties an opportunity to argue for an appropriate sentence, considered the 18 U.S.C. § 3553(a) (2018) factors, and sufficiently explained the selected sentence. *Id.* at 49-51. If a sentence is free of "significant procedural error," then we review it for substantive reasonableness, "tak[ing] into account the totality of the circumstances." *Id.* at 51. "Any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable." *United States v. Louthian*, 756

F.3d 295, 306 (4th Cir. 2014). "Such a presumption can only be rebutted by showing that the sentence is unreasonable when measured against the 18 U.S.C. § 3553(a) factors." *Id.*

We conclude that Gaver's 204-month sentence is substantively reasonable.[4] It is within the Guidelines range established by the district court at sentencing, creating a presumption of reasonableness. *Louthian*, 756 F.3d at 306. In addition, Gaver's reliance on the alleged deplorable conditions he suffered while held in pretrial detention does not rebut that presumption. *See id.*

Accordingly, we affirm the judgment of the district court. 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

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[4] Gaver does not challenge the procedural reasonableness of his sentence. As required by *United States v. Provance*, 944 F.3d 213 (4th Cir. 2019), however, we have examined Gaver's sentence and conclude that it is procedurally reasonable.