

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

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Lyle W. Cayce
Clerk

No. 19-20673

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

YUSUF ADEBOWALE MASHA,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-00509-1

Before JONES, CLEMENT, and GRAVES, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*:

Yusuf Adebawale Masha was indicted in a second superseding indictment on eight charges of false use of a passport, violations of 18 U.S.C. § 1543, and eight charges of misuse of a passport, violations of 18 U.S.C. § 1544. The Government now agrees the convictions under § 1544 must be vacated. Otherwise, we affirm the § 1543 convictions and the sentence.

FACTUAL BACKGROUND

At trial, John Weber testified that he was president and owner of Software Toolbox, Inc., a software manufacturing company located in

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Charlotte, North Carolina. On February 5, 2016, his chief financial officer (CFO) received an email ostensibly from him, instructing the CFO to wire transfer \$20,500 to an account at Chase Bank in the name of Adam Adewale Carter in Austin, Texas. The CFO, believing the email was from Weber who happened to be out of town at the time, complied as instructed and completed the transfer. When Weber returned later that day, he and the CFO soon realized that the email was fraudulent. Weber and his CFO immediately contacted the company's bank, PNC, which in turn requested that Chase Bank stop the transfer. The transfer, however, could not be terminated in time and Weber's company lost the \$20,500.

Edward Reed, a fraud investigator with Chase Bank, identified a signature card in the name of Adam Adewale Carter. Mr. Reed explained that a customer is required to sign a signature card when opening a new account. The signature card for Carter indicated that the account had been opened on December 16, 2015, at a Chase Bank located west of Houston. The Carter account was opened with an address of 10901 Meadowglen Lane, Apartment 79, Houston, and a date of birth of February 14, 1990. Mr. Reed further explained that a customer is required to provide two forms of identification when opening an account – in this case the person provided a Nigerian passport and a utility bill. Mr. Reed identified a monthly statement for the Carter account, which reflected a \$20,504.08 transfer from Software Toolbox, Inc., via PNC Bank on February 5, 2016. The statement indicated that the \$20,504.08 was withdrawn from the account on February 16, 2016.

Mr. Reed identified a signature card for an account opened in the name of Moses Campbell on April 13, 2017, at a Chase Bank located in Katy, Texas. The signature card for Campbell indicated an address of 11655 Briar Forest Drive, Apartment 98, Houston. Documentation identified by Mr. Reed indicated that the individual who opened the account provided a passport from the United Kingdom of Great Britain and Northern Ireland, as

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well as a bank statement from Wells Fargo. The individual provided a date of birth of July 4, 1990. Bank statements associated with this account indicated that monthly statements were mailed to a different address than the one provided at the time the account was opened – 1919 South Kirkwood Road, Apartment 98, Houston. The July statement for the Campbell account reflected a \$2,000 deposit on July 18 with a subsequent withdrawal on July 19. Banking documentation also indicated a deposit on July 18 of two postal money orders made payable to Moses Campbell for \$1,000 each.

Mr. Reed explained that a fraud investigation was not conducted into the Carter and Campbell accounts because Chase Bank did not suffer a financial loss. Mr. Reed further explained that Chase Bank keeps surveillance video and photos for approximately ninety days. Because ninety days had elapsed at the time the Government subpoenaed the records for the aforementioned accounts, no surveillance video or photos were available of any banking transactions.

Michelle Reed, a regional sales consultant for Wells Fargo Bank, identified a consumer account application for an account opened on November 6, 2017, in the name of Moses Campbell. The address provided at the time the account was opened was 1919 South Kirkwood, Apartment 98, Houston. The two forms of identification presented when the Campbell account was opened were a passport from the United Kingdom of Great Britain bearing a date of birth of July 4, 1990, and a debit card from Bank of America. Ms. Reed identified several transactions regarding the Campbell account, including a deposit on November 10, 2017, for \$12,000.

Ms. Reed identified a second consumer application for an account that was opened on November 24, 2015, in the name of Adam A. Carter. The address provided at the time the account was opened was 10901 Meadowglen Lane, Apartment 79, Houston. The two forms of identification presented

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when the account was opened were a Nigerian passport bearing a date of birth of February 14, 1990, and a Nigerian driver's license. Wells Fargo did not have a photocopy of the Nigerian passport or driver's license in its records because it is not the bank's practice to make copies of identification. Ms. Reed identified banking statements for the account reflecting various transactions that eventually resulted in a \$1 balance. Ms. Reed explained that a Wells Fargo customer can enter a branch and perform a transaction by providing a form of identification or by utilizing a debit card with a personal identification number (PIN). Wells Fargo did not have any video or photos depicting the person making any of the transactions associated with the Campbell or Carter accounts.

Deborah Mitschke, a district operations specialist for Capital One Bank, identified documentation indicating that Adam A. Carter opened an account on December 22, 2015, at a Capital One branch located on Eldridge Road in Houston. The individual who opened the account provided a Nigerian passport and a Visa card as identification. Capital One did not have copies of the identification because it is not the bank's practice to make copies at the time an account is opened. The individual who opened the account provided the address of 10901 Meadowglen Lane, Apartment 79, Houston, and a date of birth of February 14, 1990. Mitschke identified several bank statements associated with the Carter account, which included several chargebacks, i.e., the paying bank requested a stop payment of the check. Capital One never initiated a fraud investigation into the Carter account. Capital One also did not have any photos or surveillance video, which the bank keeps for only ninety days, regarding any of the transactions reflected in the banking statements for the Carter account.

Gayle Wayne Geddes, an investigator for Bank of America, identified a signature card for an account opened on November 24, 2015, in the name of Adam Adewale Carter. The individual who opened the account presented

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a Nigerian passport as identification. Geddes began investigating the Carter account due to several suspicious transactions, including three \$7,000 withdrawals on three different occasions. During the investigation, Geddes also discovered that one of the transactions occurred at a Bank of America branch located on Dunvale at 10:47 a.m. on March 18, 2016. Surveillance video captured a person leaving the bank within three minutes of this transaction. With the assistance of the teller who performed the withdrawal and the supervisor who approved the transaction due to the large amount, Geddes identified a still picture taken from that surveillance video of the suspect. It was also determined during the investigation that the Nigerian passport used to open the account “appeared to be . . . counterfeit” because the name on the passport did not match any person on public record searches. The bank elected to freeze the Carter account due to suspicious activity. Even though Bank of America did not suffer a loss with respect to the Carter account, Geddes sent the still photo from the surveillance video and information regarding the account to the Postal Inspection Service for further investigation.

Geddes identified a signature card for an account opened on April 13, 2017, in the name of Moses Campbell. The individual who opened the account used a passport from the United Kingdom of Great Britain. The address provided at the time the account was opened was 1919 South Kirkwood Road, Apartment 98, Houston.

Azeez Balogun, an inmate in the Bureau of Prisons (BOP), testified that he had been a friend of Masha’s for the last four years. Balogun, who is also from Nigeria, stated that he met Masha through a mutual friend. Balogun identified Masha in court, as well as in the photo Geddes captured in the surveillance video leaving Bank of America on March 18, 2016. Balogun also identified the photo on the United Kingdom passport as being Masha. Balogun acknowledged that he had been convicted of aggravated

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identify theft and mail fraud. Balogun further acknowledged that he was cooperating with the Government in the hope of having his 75-month sentence reduced. Balogun did not have personal knowledge regarding the allegations of Masha misusing passports.

Benjamin Rupenthal, a special agent with the Diplomatic Security Service, testified that he is responsible for investigating crimes involving passports and visas. Agent Rupenthal identified a printout from the Consular Consolidated Database, which he described as a database “use[d] to track passports and visas, their applications, and then their use.” This document reflected that Masha applied for a visa with the date of birth of January 7, 1992. It also indicated that Masha first officially entered the United States on June 23, 2013. He also entered the country on May 16, 2016, January 20, 2017, and January 14, 2018. Agent Rupenthal testified that a check in the database for Adam Adewale Carter and Moses Campbell returned no results, which meant there was no record of these individuals entering the United States.

Kyle Shadowens, a United States Postal Inspector, testified that he obtained several driver’s licenses and applications for Masha during his investigation. The driver’s licenses for Masha indicated that he had a date of birth of January 7, 1992. However, the driver’s licenses and applications reflected various addresses in the Houston area for Masha, including 10901 Meadowglen Lane, Apartment 104. Shadowens created a map depicting the location of all the addresses belonging to Masha, as well as the addresses of the banks where accounts belonging to Adam Carter and Moses Campbell were opened. Shadowens observed that a majority of the locations were “all very close together.” During his investigation, Shadowens also discovered that the phone numbers associated with the Adam Carter and Moses Campbell accounts were the same.

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PROCEDURAL HISTORY

At the conclusion of the Government's case, Masha renewed his motion to dismiss the indictment as to the § 1544 counts. After hearing arguments on the issue, the district court denied Masha's motion. Following the district court's ruling on his motion to dismiss, Masha moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. The Government conceded there was insufficient evidence as to counts nine and ten but argued that the motion should be denied as to the remaining counts. The district court agreed and granted Masha's motion as to counts nine and ten but denied the motion as to the remaining counts. The jury returned a guilty verdict as to all the remaining counts charged in the second superseding indictment. Masha was sentenced to concurrent sentences of eighteen months of imprisonment and three years of supervised release. Masha timely appealed.

STANDARD OF REVIEW

The standard of review of the sufficiency of the evidence is de novo. *See United States v. Davis*, 735 F.3d 194, 198 (5th Cir. 2013). When considering the sufficiency of the evidence, this court evaluates all evidence, "whether circumstantial or direct, in the light most favorable to the [g]overnment[,] with all reasonable inferences to be made in support of the jury's verdict." *United States v. Terrell*, 700 F.3d 755, 760 (5th Cir. 2012) (internal quotation marks and citation omitted). The jury may choose among any reasonable constructions of the evidence. *United States v. Mitchell*, 484 F.3d 762, 768 (5th Cir. 2007). This court will uphold the verdict if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *See United States v. Vargas-Ocampo*, 747 F.3d 299, 301 (5th Cir. 2014) (en banc) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

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This court reviews “whether an indictment sufficiently alleges the elements of an offense” de novo. *United States v. Santos-Riviera*, 183 F.3d 367, 369 (5th Cir. 1999). As a motion to dismiss an indictment for failure to state an offense is a challenge to the sufficiency of the indictment, we are required to “take the allegations of the indictment as true and to determine whether an offense has been stated.” *United States v. Hogue*, 132 F.3d 1087, 1089 (5th Cir. 1998). “An indictment is sufficient if (1) it contains the elements of the offense charged, (2) it ‘fairly informs’ the defendant of the charge he must meet, and (3) there is no risk of future prosecutions for the same offense.” *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991) (citation omitted). “An indictment that tracks a statute’s words is generally sufficient as long as those words fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.” *Id.* at 145 (internal quotation marks and citation omitted).

This court reviews de novo the district court’s interpretation and application of the Sentencing Guidelines. *See United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). The district court’s factual findings are reviewed for clear error. *United States v. Rodriguez*, 602 F.3d 346, 362 (5th Cir. 2010). “There is no clear error if the district court’s finding is plausible in light of the record as a whole.” *Cisneros-Gutierrez*, 517 F.3d at 764 (internal quotation marks and citation omitted). Factual findings relevant to sentencing must be proven by a preponderance of the evidence. *United States v. Duhon*, 541 F.3d 391, 395 (5th Cir. 2008). A presentence report (PSR) generally bears sufficient indicia of reliability to be considered by the sentencing judge in making factual determinations. *United States v. Zuniga*, 720 F.3d 587, 591 (5th Cir. 2013).

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DISCUSSION

1. Sufficiency of the Evidence

Misuse of a passport convictions

To meet its burden at trial as to the § 1544 counts, the Government was required to prove that Masha (1) used or attempted to use a passport; (2) that the passport was issued or designed for the use of someone other than Masha; and (3) that the use was willful and knowing, i.e., that Masha knew that the passport was issued or designed for the use of someone other than himself. 18 U.S.C. § 1544; 5TH CIR. PATTERN JURY INSTRUCTIONS (CRIMINAL) § 2.66 (2019) (copy available at <http://library.circ5.dcn/JuryInstructions/crim2019.pdf>). This Court is not bound to accept the Government's concession that it failed to meet its burden, *United States v. Hope*, 545 F.3d 293, 295 (5th Cir. 2008), but we agree in this case.

The plain text of the statute indicates that it applies to misuse/abuse of an actual passport, “[w]hoever willfully and knowingly uses, or attempts to use, *any passport issued or designed for the use of another...*”. 18 U.S.C. § 1544 (emphasis added). Case law, albeit sparse, supports this reading.¹

Here, evidence at trial demonstrated that Masha utilized passports that looked like they were issued by Nigeria and the United Kingdom. On cross-examination Special Agent Rupenthal acknowledged that he could not testify as to whether or not the passports had been actually issued by those

¹ *United States v. Casillas-Casillas*, 845 F.3d 623, 624-25 (5th Cir. 2017) (defendant convicted under § 1544 for using a valid United States passport card bearing the name, photograph, and date of birth of another person); *United States v. Spencer*, 609 F. App'x 781, 782 (5th Cir. 2015) (defendant convicted under § 1544 for using brother's stolen United States passport to reenter the country after fleeing to Mexico).

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nations. Bank of America investigator Geddes testified that the Adam Adewale Carter passport appeared “counterfeit” since it did not match “any person on public records with that name.” Finally, the Government’s case centered on the passports being counterfeit.

Therefore, the Government now concedes, there was insufficient evidence at trial to demonstrate that the passports used by Masha were in fact issued by a government entity for someone else. These convictions must be vacated.

False use of passport convictions

Next, Masha argues that the district court erred in denying his Rule 29 motion for judgment of acquittal as to all seven § 1543 counts based on insufficiency of the evidence. To meet its burden, the Government had to have shown that Masha (1) willfully and knowingly, (2) used or attempted to use, (3) an instrument purporting to be a passport. 18 U.S.C. § 1543.

Masha argues that the Government failed to prove that the passports involved were in fact counterfeit, and that even if the passports were counterfeit, the Government failed to connect him to the use of the passports. He thus asserts that his convictions for all seven § 1543 counts should be vacated. On these counts, Masha’s argument fails.

The Government points out that there was ample circumstantial evidence for a rational jury to conclude that the Carter and Campbell passports were counterfeit, and ample evidence for the jury to reasonably conclude that the photograph on the Carter and Campbell passports was Masha. This supports the reasonable conclusion that the passports were not only counterfeit but also used by Masha in violation of § 1543. Masha is right that no evidence was introduced at trial demonstrating that the Carter and Campbell passports were found on his person or that he was actually involved in “crafting them.” However, “identity . . . may be proved by inference and

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circumstantial evidence.” *United States v. Royals*, 777 F.2d 1089, 1091 (5th Cir. 1985). In the instant case, inference, circumstantial evidence, and corroborating facts combine to prove that Masha used fraudulent passports to open accounts at various banks throughout Houston.

Bank employee testimony established that the individual who opened the Carter and Campbell accounts provided a foreign passport as one of the two forms of identification needed, per bank policy, to open a new bank account. The jury could have reasonably inferred that a bank employee would not have authorized the opening of the accounts unless the individual matched the photo in the passports. *See Mitchell*, 484 F.3d at 768. Images of these passports, copies of Masha’s driver’s licenses, as well as the surveillance photo taken at the Bank of America, minutes after a transaction was completed involving the Carter account, were admitted at trial. The jury was able to examine these images and determine whether they matched Masha.

Furthermore, the jury heard the testimony of Balogun, a friend of Masha, who positively identified Masha as the person in the surveillance photo taken at the Bank of America branch, as well as the British passport. Although Balogun acknowledged that he was testifying in order to reduce his sentence, it was within the sole province of the jury to assess his credibility. *See United States v. Zuniga*, 18 F.3d 1254, 1260 (5th Cir. 1994). Furthermore, the address on the Carter bank accounts matched the address on one of Masha’s driver’s licenses, albeit a different apartment number. Nevertheless, the jury could have reasonably concluded that, like Balogun, Masha used an unsecured mailbox at his apartment complex for receipt of mail during his fraudulent scheme. Lastly, a check in the public record databases and the Consular Consolidated Database revealed no results for an Adam Adewale Carter or a Moses Campbell.

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When viewing all of the evidence and reasonable inferences therefrom in the light most favorable to the Government, there was ample evidence, both direct and circumstantial, to conclude that Masha used fraudulent passports to open accounts at various banks in the Houston area.

2. Motion to dismiss the indictment

Next, Masha contends that the district court erred in denying his motion to dismiss the § 1544 counts alleged in the second superseding indictment. Specifically, he asserts that the Government's inclusion of the phrase "purported to be issued by" negated its burden of proving the essential element that the passport was "issued or designed for the use of another." He thus asserts that he is entitled to have the § 1544 counts of conviction vacated. Because we have determined that there is insufficient evidence to support Masha's § 1544 convictions, we need not address Masha's argument that the district court erred in denying his motion to dismiss the indictment as to those charges. *See United States v. Whitfield*, 590 F.3d 325, 344 n.14 (5th Cir. 2009) (declining to address Rule 12 motion to dismiss indictment because Rule 29 motion was dispositive).

3. Admission of identification testimony

Masha argues that Balogun gave inadmissible lay-opinion testimony when he identified him as the person in the surveillance picture from Bank of America and in the passport photos. As he acknowledges, his failure to object at trial results in this court reviewing his argument for plain error. *United States v. Leach*, 918 F.2d 464, 467 (5th Cir. 1990). To establish plain error, a defendant must show a forfeited error that is clear or obvious and affects his substantial rights. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). Masha fails to meet this burden.

Under Rule 701 of the Federal Rules of Evidence, a lay witness may testify as to opinions that are "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to

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determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of [Federal Rule of Evidence] 702.” FED. R. EVID. 701. A lay witness may give an opinion that is based upon first-hand knowledge or observation. *United States v. West*, 22 F.3d 586, 591 n.15 (5th Cir. 1994). To be admissible, “a lay opinion must be based on personal perception, must be one that a normal person would form from those perceptions, and must be helpful to the jury.” *United States v. Riddle*, 103 F.3d 423, 428 (5th Cir. 1997) (internal quotation marks and citations omitted). Lay opinion testimony is admissible if it requires “[n]o great leap of logic” and draws “straightforward conclusions from observations informed by [the witness’s] own experience.” *Id.* at 428–29.

The record reflects that the Government laid the foundation for the lay opinion by questioning Balogun about his relationship with Masha. Balogun testified that he, also a native of Nigeria, met Masha through a mutual friend; he has known Masha for approximately four years; he has interacted with Masha approximately thirty to forty times during those four years; and he considered Masha a “close” friend. Contrary to Masha’s assertion, Balogun’s testimony was helpful to the jury given that the Bank of America surveillance photo, as well as the British passport photo, had been taken several years prior to trial but during a time Balogun knew Masha. Accordingly, Masha has failed to show that the district court plainly erred in allowing the lay opinion testimony. *See Puckett*, 556 U.S. at 135.

4. Loss Calculation

Masha challenges the district court’s loss amount calculation. He asserts that there was no evidence indicating that \$375,825.89 found in the banks associated with the Carter and Campbell accounts were attributable to fraudulent conduct. He asserts that the only deposit that the Government produced evidence of being linked to fraudulent conduct was the

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\$20,500 from Software Toolbox, Inc. As such, he argues that he should have only received a four-level increase to his base offense level under U.S. Sentencing Guidelines § 2B1.1(b)(1)(C).

Fraud cases are governed by § 2B1.1 of the Sentencing Guidelines. “The Guidelines’ commentary explains that under § 2B1.1, loss serves as a measure of the seriousness of the offense and the defendant’s relative culpability and is a principal factor in determining the offense level under this guideline.” *United States v. John*, 597 F.3d 263, 279 (5th Cir. 2010) (quoting U.S. SENT’G GUIDELINES MANUAL § 2B1.1, cmt. background (U.S. SENT’G COMM’N 2007)). “Accordingly, § 2B1.1(b)(1) creates a sliding scale that increases the defendant’s base offense level by zero to thirty points depending on the amount of loss.” *John*, 597 F.3d at 279. Further, “loss is the greater of actual loss or intended loss.” § 2B1.1, cmt. n.3(A). “Actual loss” is “the reasonably foreseeable pecuniary harm that resulted from the offense.” § 2B1.1 cmt. n.3(A)(i). To be “reasonably foreseeable,” the harm must be “pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.” § 2B1.1 cmt. n.3(A)(iv). “The district court receives wide latitude to determine the amount of loss and should make a reasonable estimate based on available information.” *United States v. Jones*, 475 F.3d 701, 705 (5th Cir. 2007).

As pointed out by the Government, this court’s decision in *United States v. Jackson*, 798 F. App’x 793 (5th Cir. 2020), although unpublished, is instructive. In *Jackson*, the defendant was convicted of five counts of using a counterfeit Nigerian passport to open several bank accounts. *Id.* at 795. Using the amount of funds transferred through the accounts, the PSR determined the loss amount to be \$389,252.79. *Id.* at 798. When the defendant objected to the PSR’s loss calculation, the Government supplemented the PSR with various text messages involving interviews

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from five of the defendant's fraud victims. *Id.* at 798-99. These interviews accounted for \$32,950, approximately 10% of the entire loss amount. *Id.* at 799. On appeal this court rejected the defendant's challenge to the loss amount. *Id.* Pointing to evidence indicating that the accounts were opened in order to receive fraudulent transfers, coupled with the victim interviews and evidence of the defendant misrepresenting himself, the court concluded that it was "plausible that the total loss amount was derivative of fraudulent activity, especially considering that Jackson failed to submit rebuttal evidence legitimizing the funds." *Id.*

Similarly, the PSR used the amount of funds transferred through the Carter and Campbell accounts and determined that the loss calculation in the instant case amounted to \$375,825.89. This loss amount included the \$20,500 loss John Weber testified to at trial. In response to Masha's objection, the Government submitted four additional examples of fraudulent transfers involving the Carter and Campbell accounts. These examples were taken from the case agent's review of bank records involving the Carter and Campbell accounts. In its addendum, the PSR cited to these examples, as well as to the fact that Masha used fake names, addresses, phone numbers, and counterfeit passports to open the accounts. Given this evidence, coupled with the fact that Masha failed to offer any rebuttal evidence legitimizing the remaining funds, the PSR maintained its position that the loss amount was \$375,825.89. In overruling Masha's objection at sentencing, the district court concluded that a preponderance of the evidence supported the conclusion that Masha's purpose and motivation in opening the accounts was fraud and that the PSR's loss amount calculation was correct.

In light of the foregoing, the district court's finding that the deposits into these accounts were fraudulent is plausible in light of the record as a whole. *See Cisneros-Gutierrez*, 517 F.3d at 764. Accordingly, Masha has failed to demonstrate the district court clearly erred in its loss calculation. *See id.*;

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see also Zuniga, 720 F.3d at 591 (“Rebuttal evidence must consist of more than a defendant’s objection; it requires a demonstration that the information is ‘materially untrue, inaccurate or unreliable.’” (quoting *United States v. Harris*, 702 F.3d 226, 230 (5th Cir. 2012))).

Accordingly, the 18 U.S.C. § 1544 convictions are VACATED, the § 1543 convictions and sentence are AFFIRMED.