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United States Court of Appeals
Tenth Circuit

October 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NNAMDI FRANKLIN OJIMBA,

Defendant - Appellant.

No. 20-6109
(D.C. No. 5:17-CR-00246-D-1)
(W.D. Oklahoma)

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **BRISCOE**, Circuit Judges.

Nnamdi Franklin Ojimba participated in a scheme to defraud older, widowed women, including victim Pamela Bale. Mr. Ojimba appropriated the photograph of a finance professional, Hill Feinberg, and posted it on fraudulent dating profiles used to defraud victims into turning over control of their savings.

The government eventually discovered the scheme and indicted Mr. Ojimba on two counts of wire fraud, conspiracy to commit wire fraud, and aggravated identity theft. At Mr. Ojimba's first trial, the jury acquitted him of the substantive wire fraud

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

counts and the aggravated identity theft count, but it could not reach a verdict on the conspiracy count. The district court declared a mistrial on that count. The government elected to retry Mr. Ojimba on the conspiracy count, and the second jury convicted him. The district court sentenced Mr. Ojimba to 102 months' imprisonment, with a three-year term of supervised release.

Mr. Ojimba now appeals his conviction and sentence. He argues the district court abused its discretion by (1) allowing Ms. Bale to testify at the second trial and admitting evidence regarding the use of Mr. Feinberg's likeness; (2) excluding evidence of his prior acquittal; (3) admitting "WhatsApp" messages into evidence; and (4) considering acquitted conduct and applying an offense level increase for targeting vulnerable victims when determining his United States Sentencing Guidelines range.

For the following reasons, we affirm his conviction and sentence.

I. BACKGROUND

A. Factual History

Mr. Ojimba was one of several individuals behind the fictitious dating profile of "Edward Peter Duffey." "Mr. Duffey" would contact women online and develop fake romantic relationships with them. Many of the women were recently widowed or divorced and had little experience with the internet or financial matters. Although none of the women met "Mr. Duffey" in person, he would send them gifts and have his fictitious daughter, "Heather," reach out by telephone to tell them how happy she was her father had finally found love.

"Mr. Duffey," supposedly a retired financial planner, would ask the women questions about where their savings and retirement funds were invested. He would then initiate one of two schemes. Under the first approach, "Mr. Duffey" would express alarm and claim his contacts at the Securities and Exchange Commission (SEC) had informed him the firms identified were about to fail. In other instances, he would simply convince the woman that he could yield a higher return than their current investors. To facilitate the first scheme, "Mr. Duffey" would volunteer to have Mary Jo White, the then-Chairwoman of the SEC, confirm his concerns about the financial health of the firm holding the woman's money. Then, someone purporting to be Chairwoman White would often call the potential victim to buttress his claims. These tactics convinced the women to wire substantial sums of money to "Mr. Duffey." Once a woman made the transfer, "Mr. Duffey" ended the relationship and absconded with the money.

According to Mr. Ojimba's coconspirator, Akunna Ejiofor, "Mr. Duffey" was actually a pseudonym used by Mr. Ojimba, Ken Ezeah, and Anthony Benson. Ms. Ejiofor sometimes acted as "Heather," although she testified other women played that role as well. And Chairwoman White was impersonated by Curtissa Green, Mr. Ezeah's wife. At least one of the photographs used in "Mr. Duffey's" dating profile was a photograph of Mr. Feinberg, a finance professional in Dallas, Texas.

B. Procedural History

A federal grand jury sitting in the Western District of Oklahoma indicted Mr. Ojimba, charging him with conspiracy to commit wire fraud in violation of

18 U.S.C. § 1349 (Count 1); aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1) (Count 2); and two counts of wire fraud in violation of 18 U.S.C. § 1343 (Count 3 and Count 4).

Prior to the trial on these charges, Mr. Ojimba moved to exclude evidence of a "WhatsApp" chat, arguing its accuracy could not be independently verified. The district court ruled against Mr. Ojimba regarding the reliability of the evidence, but reserved ruling on the admissibility of the messages on other grounds until trial.

At the first trial, the jury acquitted Mr. Ojimba on the count of identity theft and the two counts of wire fraud. But it did not reach a verdict on the conspiracy charge. Following the district court's declaration of a mistrial, the government informed the district court it intended to retry that count.

Thereafter, Mr. Ojimba filed two motions in limine relating to the effect of his first trial on his second trial: he moved to exclude Ms. Bale's and Mr. Feinberg's testimony, arguing it was collaterally estopped, irrelevant, and unfairly prejudicial; and he moved to admit evidence of his prior acquittal. The government opposed both motions. The district court agreed with the government and held the motion was moot as to Mr. Feinberg, whom the government did not intend to call, collateral estoppel did not apply to block Ms. Bale's testimony, and Ms. Bale's testimony would be relevant and not substantially outweighed by the danger of unfair prejudice. It also held the judgment of acquittal was inadmissible hearsay.

Mr. Ojimba later moved to preclude the government from questioning Ms. Ejiofor about Mr. Feinberg's photograph, claiming her testimony also was

collaterally estopped, irrelevant, and unfairly prejudicial. The district court denied the motion.

At trial, the government called four of "Mr. Duffey's" victims (Ms. Bale, Carol Hill, Nancy Meagher, and Beryl Wickliffe), Ms. Ejiofor, and FBI Special Agent Timothy Schmitz to testify. Mr. Ojimba's only witness was an investigator at the Oklahoma Public Defender's Office, Brenda McCray, who testified about the reliability of the WhatsApp evidence. The government connected Mr. Ojimba to the scheme through the testimony of Ms. Ejiofor and Agent Schmitz. They established that connection through the WhatsApp messages and Ms. Ejiofor's interview with the FBI, as well as the fact that Mr. Ojimba resided at the same hotel as Mr. Benson, a coconspirator.

The only references to Mr. Feinberg at trial were elicited by Mr. Ojimba. In response to defense questions, Ms. Ejiofor testified she "specifically saw [Mr. Feinberg's] picture on a dating profile that [Mr. Ojimba] was working on." ROA Vol. III at 438.

The government moved for admission of the WhatsApp chat early in the second trial. Defense counsel renewed his prior objection, "for the argument we made previously, that it's not reliable." *Id.* at 418. He also stated, "we don't have any foundational objections or anything like that." *Id.* The district court "adopt[ed] its previous ruling with respect to the WhatsApp chats[,] allowing for their admission if properly authenticated." *Id.* at 419. It specifically noted, "[t]here has been no objection to authentication." *Id.* The court explained that Mr. Ojimba could attack the

reliability of the messages at trial, but that reliability was ultimately a matter for the jury. The second jury convicted Mr. Ojimba of conspiracy to commit wire fraud.

Prior to sentencing, the U.S. Probation Office filed a Presentence Investigation Report (PSR). The PSR recommended a base offense level of seven. It then recommended an eighteen-level increase because the loss amount was between $3,500,000.00 and $9,500,000.00, pursuant to United States Sentencing Commission, *Guidelines Manual*, §2B1.1(b)(1)(J) (Nov. 2018); a two-level increase due to the financial hardship to victims, pursuant to USSG §2B1.1(b)(2)(A)(iii); a two-level increase for misrepresenting that the defendant was acting on behalf of a government agency, pursuant to USSG §2B1.1(b)(9)(A); a two-level increase for using sophisticated means to further the commission of the offense, pursuant to USSG §2B1.1(b)(10)(C); a two-level increase for unauthorized use of an identification (Mr. Feinberg's) to create the dating profile, pursuant to USSG §2B1.1(b)(11)(C)(i); and a two-level increase for targeting vulnerable victims, namely 65- to 78-year-old widows, pursuant to USSG §3A1.1(b).

Taken together, the PSR recommended a total offense level of thirty-five. Combined with his criminal history category of I, Mr. Ojimba's total offense level of thirty-five yielded a Guidelines range of 168 to 210 months' imprisonment.

Mr. Ojimba objected to every offense level increase recommended in the PSR. The district court overruled all of Mr. Ojimba's objections to the offense level increases and adopted the PSR's recommended total offense level of thirty-five, criminal history category of I, and resultant Guidelines range of 168- to 210-months.

The district court determined, however, that a downward variance to 102 months' imprisonment was warranted. It noted Mr. Ojimba "was not at the top or the bottom of the hierarchy" of the conspiracy and the court was "[m]indful of the need for proportionality in sentencing and the avoidance of unwarranted disparities in sentencing." *Id.* at 1033. It also noted Mr. Ojimba's age, family status, and lack of prior convictions.

The district court entered judgment on July 10, 2020. Mr. Ojimba filed a timely notice of appeal.

II. DISCUSSION

Mr. Ojimba's issues on appeal fall into two categories—evidentiary and sentencing challenges. In the evidentiary category, Mr. Ojimba argues (1) Ms. Bale should not have been allowed to testify and evidence about Mr. Feinberg should have been excluded; (2) he should have been allowed to introduce evidence of his prior acquittal; and (3) the WhatsApp messages should have been excluded. In the sentencing category, Mr. Ojimba argues (1) the district court could not consider acquitted conduct in calculating his Guidelines sentencing range, and (2) the district court erred in applying a vulnerable victim enhancement.

We address Mr. Ojimba's challenges in turn and affirm the district court on each.

A. Evidentiary Challenges

This court "review[s] evidentiary decisions for abuse of discretion" and "legal interpretations of the Federal Rules of Evidence de novo." *United States v. Silva*, 889

F.3d 704, 709 (10th Cir. 2018). An abuse of discretion occurs when the district court "renders an arbitrary, capricious, whimsical, or manifestly unreasonable judgment," and this court will reverse "only if the [district] court exceeded the bounds of permissible choice." *Id.* (quotation marks omitted). On appeal, Mr. Ojimba argues the district court abused its discretion by (1) admitting Ms. Bale's testimony and all testimony about Mr. Feinberg, (2) excluding evidence of Mr. Ojimba's prior acquittals, and (3) admitting the WhatsApp messages.

1. Testimony of Ms. Bale and about Mr. Feinberg

Mr. Ojimba argues the government was collaterally estopped, by reason of his prior acquittal and because such evidence was unfairly prejudicial, from relying on testimony from Ms. Bale and about Mr. Feinberg. He thus contends the district court abused its discretion by admitting the testimony.

a. Collateral estoppel

Collateral estoppel is the principle that when an issue has been determined "by a valid and final judgment," it cannot be litigated again by the same parties. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). It is "an established rule of federal criminal law." *Id.* The Fifth Amendment's protection against double jeopardy incorporates the principle of collateral estoppel. *Id.* at 442–43; *see also Dowling v. United States*, 493 U.S. 342, 350–51 (1990).

Where, as here, "a previous judgment of acquittal was based upon a general verdict," we must determine "whether a rational jury could have grounded its verdict

upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444. The answer depends on two questions: "First, what facts were necessarily determined in the first law suit? . . . Second, has the government in a subsequent trial tried to relitigate facts necessarily established against it in the first trial?" *United States v. Rogers*, 960 F.2d 1501, 1508 (10th Cir. 1992).

The district court found collateral estoppel did not apply in this instance because the district court could not "divine the issue of fact at the heart of the [first] jury's verdict," given "the problematic nature of general verdicts and parsing out the issue or question of fact upon which the acquittal was based." ROA Vol. I at 165–66. We agree with the district court for two reasons.

First, the basis of the first jury verdict is uncertain. The verdict form simply listed the four charged counts in numerical order, with a place for the jury to check "not guilty" or "guilty." The jury placed checkmarks next to "not guilty" on the first three counts and left the fourth blank. Without any additional information, it is impossible to surmise the basis for the jury's decision. Juries may make decisions for any number of reasons. "[A] jury acquittal may simply be the result of the jury's 'mistake, compromise, or lenity,' rather than a conclusion that the codefendants are not guilty beyond a reasonable doubt." *United States v. Nichols*, 374 F.3d 959, 970 (10th Cir. 2004) (quoting *United States v. Powell*, 469 U.S. 57, 64 (1984)), *cert. granted, judgment vacated on other grounds,* 543 U.S. 1113 (2005), *opinion reinstated in relevant part,* 410 F.3d 1186 (10th Cir. 2005). Even more granularly,

we cannot tell what the jury thought about specific evidence presented. Therefore, we cannot say the evidence Mr. Ojimba wishes to foreclose, the testimony from Ms. Bale and about Mr. Feinberg, was the "actual basis for [his] prior acquittal."

Second, the elements of the charges brought against Mr. Ojimba in the first and second trials are different. While Mr. Ojimba was acquitted of the substantive charges against him, the jury could not reach a decision on the conspiracy charge. Importantly, the acquittals on those substantive charges do not preclude a finding of guilty on the conspiracy count.

"[T]he essence of a conspiracy is 'an agreement to commit an unlawful act.'" *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003) (quoting *Iannelli v. United States,* 420 U.S. 770, 777 (1975)). A conspiracy "may exist and be punished whether or not the substantive crime ensues." *Id.* (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)). It follows that a verdict of acquittal on a substantive offense does not bar the introduction of the same evidence in a subsequent prosecution for conspiracy to commit that offense. *See, e.g.*, *United States v. Brackett*, 113 F.3d 1396, 1400 (5th Cir. 1997); *United States v. Yearwood*, 518 F.3d 220 (4th Cir. 2008). And in this case, Mr. Ojimba's acquittal on the substantive counts does not bar the introduction of the same evidence in his subsequent prosecution because the elements of the charges were inherently different.

Because we agree with the district court that collateral estoppel does not apply here, we cannot say the district court's decision was "arbitrary, capricious, whimsical, or manifestly unreasonable." *Silva*, 889 F.3d at 709.

b. Undue prejudice

Nor do we agree with Mr. Ojimba that the introduction of the evidence was unfairly prejudicial due to his prior acquittal. Relevant evidence may be excluded only 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. "Overturning a Rule 403 decision on appeal is an uphill battle" because "the district court has considerable discretion in performing the Rule 403 balancing test." *United States v. Alfred*, 982 F.3d 1273, 1282 (10th Cir. 2020) (internal quotation marks and brackets omitted), *cert. denied,* No. 20-8081, 2021 WL 2519390 (U.S. June 21, 2021).

We agree with the district court that the evidence here was relevant because it went to the operation and existence of a conspiracy. Specifically, the testimony regarding Mr. Feinberg's photograph was probative because it made it more likely than not that Mr. Ojimba was a knowing participant in the conspiracy. And Ms. Bale's testimony was relevant because it described the operation and means of the conspiracy. This evidence was highly probative, and we cannot say the district court abused its discretion in finding its probative value was not outweighed by the danger of unfair prejudice.

We therefore affirm the district court on this issue.

2. Judgment of Acquittal

Mr. Ojimba also argues the district court should have allowed him to introduce evidence of his prior acquittals. According to Mr. Ojimba, this evidence should have

been admitted under the doctrine of curative admissibility to counter the impact of the erroneously admitted testimony from Ms. Bale and about Mr. Feinberg.

But we have concluded that Ms. Bale's testimony and the references to Mr. Feinberg were not erroneously admitted. *See supra* at 9–12. As a result, the doctrine of curative admissibility is inapplicable. *See United States v. Morales-Quinones*, 812 F.2d 604, 610 (10th Cir. 1987). This alone is sufficient to reject Mr. Ojimba's argument. In addition, our precedent leaves no doubt that "a judgment of acquittal is hearsay, and there is no exception to the hearsay rule for judgments of acquittal." *United States v. Sutton*, 732 F.2d 1483, 1493 (10th Cir. 1984) (citing *United States v. Viserto*, 596 F.2d 531, 537 (2d Cir. 1979)). "The Federal Rules of Evidence except from the operation of the hearsay rule only judgments of conviction, Rule 803(22), not judgments of acquittal." *Id.* at 1492 (quoting *Viserto*, 596 F.2d at 537). We cannot say the district court's adherence to our established precedent was an "abuse of discretion."

We therefore affirm the district court's exclusion of the prior acquittals.

3. WhatsApp Messages

Mr. Ojimba makes several arguments as to why the district court abused its discretion in admitting the WhatsApp messages. Each depends on his assertion that the WhatsApp platform is accessible to third-party hackers and therefore the messages cannot be fairly attributed to Mr. Ojimba. Because it is uncertain whether Mr. Ojimba was the author of the comments reflected in the WhatsApp messages, he contends they are irrelevant, more prejudicial than probative, and inadmissible

hearsay that runs afoul of the Sixth Amendment's Confrontation Clause. The government responds that these arguments are waived because Mr. Ojimba stated he had no foundational objections to the WhatsApp messages, and because his arguments are inadequately briefed.

a. Trial waiver

When the government sought to introduce the WhatsApp messages at trial, the district court gave Mr. Ojimba an opportunity to place his objections on the record. Mr. Ojimba's counsel "renew[ed] our objection" from the first trial that the WhatsApp chat was "not reliable" but also stated Mr. Ojimba did not "have any foundational objections." ROA Vol. III at 418–19. In response, the district court acknowledged there was "no objection to authentication" and admitted the evidence, noting that questions of reliability could be addressed to the jury. *Id.*

Relying on this exchange, the government argues Mr. Ojimba has waived the objections he raises on appeal, which are foundational objections. We agree. With one exception that we address below, Mr. Ojimba's challenges to the WhatsApp messages are related to authentication—whether they are what they purport to be. And authentication is a foundational objection.

For example, in *United States v. Durham*, 902 F.3d 1180 (10th Cir. 2018), the court held "testimony laid a sufficient foundation for authentication" of cellphone videos, *id.* at 1230, stated the standard for authentication in terms of foundation, *id.* at 1232, and ultimately determined the district court did not abuse its discretion in finding "a sufficient foundation supporting the cellphone videos' authenticity," *id.*

See also United States v. Bush, 405 F.3d 909, 918 (10th Cir. 2005) ("Rule 901 . . . requires authentication or identification to establish a foundation for evidence as a precursor to admitting audio recordings . . . ."); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1220 (10th Cir. 2007) (holding "that the admission of the audio tapes was supported by sufficient evidence to satisfy the foundational requirements of Rule 901(a).").

Here, Mr. Ojimba stated he had no foundational objections, and the court noted there were thus no authentication objections. While Mr. Ojimba preserved his right to bring concerns about reliability to the jury's attention, he waived any foundational objection to admissibility, including those related to authentication. Under these circumstances, Mr. Ojimba has waived any objection to admissibility of the WhatsApp chat based on foundation or authenticity.

b. Briefing waiver

On appeal, Mr. Ojimba raises one objection to the admission of the WhatsApp messages that does not fall within the foundational waiver—his Sixth Amendment argument. But this argument is inadequately briefed.

We have instructed that "a party's failure to address an issue in its opening brief results in that issue being deemed waived" and that "rule applies equally to arguments that are inadequately presented in an opening brief" or advanced "only in a perfunctory manner." *United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019) (internal quotation marks omitted). Here, the whole of Mr. Ojimba's Sixth Amendment argument is found in a single conclusory sentence: "Admission of this

unreliable evidence also denied Mr. Ojimba the right to confront evidence or witnesses against him. U.S. Const. Amend. VI." Appellant Br. at 31. This argument is wholly inadequate, and we do not consider it.

In sum, Mr. Ojimba's counsel objected to the WhatsApp messages only on the basis that they were "not reliable," expressly waiving all foundational objections. He cannot now challenge the foundation of the WhatsApp messages for the first time on appeal. Based on Mr. Ojimba's concession, the district court did not abuse its discretion by admitting the WhatsApp messages and permitting Mr. Ojimba to raise his concerns about reliability with the jury. Although Mr. Ojimba's Sixth Amendment challenge to the WhatsApp messages was not included in his waiver of foundational objections, it is inadequately briefed and we do not consider it.

For the foregoing reasons we affirm each of the district court's evidentiary rulings and turn now to Mr. Ojimba's sentencing challenges.

B. Sentencing Challenges

This court typically "review[s] sentences for reasonableness under a deferential abuse of discretion standard." *United States v. Nkome*, 987 F.3d 1262, 1268 (10th Cir. 2021) (quotation marks omitted). A sentence's procedural reasonableness implicates the district court's Guidelines calculation and the court's explanation of the underlying sentence, while a sentence's substantive reasonableness focuses on the court's application of the sentencing factors in 18 U.S.C. § 3553(a). *Id.*

Mr. Ojimba claims the district court made two errors in calculating his Guidelines sentencing range: it improperly considered acquitted conduct and it inappropriately applied the vulnerable victim increase. A challenge to the district court's calculation of the Guidelines range implicates the sentence's procedural reasonableness. *Id.* In analyzing such a challenge, we "review de novo the district court's legal conclusions regarding the [G]uidelines and review its factual findings for clear error." *Id.* (quotation marks omitted). "[W]hether facts satisfy a prescribed standard is a mixed question of fact and law;" the court reviews "mixed questions under the clearly erroneous standard or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or legal principles." *United States v. Patton*, 927 F.3d 1087, 1101 (10th Cir. 2019) (quotation marks and ellipses omitted).

We consider Mr. Ojimba's argument that the district court should not have considered his acquitted conduct in sentencing before turning to his argument that the vulnerable victim enhancement was not properly applied. "In evaluating the application of a Guidelines enhancement, we review factual findings for clear error, but to the extent the defendant asks us to interpret the Guidelines or hold that the facts found by the district court are insufficient as a matter of law to warrant an enhancement, we must conduct a de novo review." *United States v. Scott*, 529 F.3d 1290, 1300 (10th Cir. 2008) (quotation marks and brackets omitted).

1. Acquitted Conduct

Mr. Ojimba argues the district court's imposition of his sentence was procedurally unreasonable because the court's consideration of acquitted conduct violated his "Sixth Amendment right to a jury trial and his Fifth Amendment rights to due process of law and equal protection of th[e] law." Specifically, he challenges the district court's consideration of the misappropriation of Mr. Feinberg's identity and the loss incurred by Ms. Bale. He posits that because he was acquitted of the substantive charges, the district court was precluded from considering this evidence at sentencing.

To the contrary, "[t]he Supreme Court and this circuit have both expressly held that acquitted conduct *can* be considered for purposes of sentencing." *United States v. Todd*, 515 F.3d 1128, 1137 (10th Cir. 2008) (emphasis in original); *see also United States v. Lewis*, 594 F.3d 1270, 1289 (10th Cir. 2010) (same). In *United States v. Watts*, 519 U.S. 148, 155–57 (1997) (per curiam), the Supreme Court explained the Double Jeopardy Clause does not bar considering acquitted conduct at sentencing for several reasons: (1) sentencing implicates a lower standard of proof; (2) it is impossible to know exactly why a jury found a defendant not guilty on a certain charge; and (3) it does not constitute punishment for a separate offense. The Court thus held "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. And we have held that *United States v. Booker*, 543 U.S. 220 (2005)—a Sixth Amendment case—did not

change this reasoning. *United States v. Magallanez*, 408 F.3d 672, 684 (10th Cir. 2005).

Mr. Ojimba fails to show why we should depart from our precedent on this issue, and we decline his invitation to do so. We therefore affirm the district court's consideration of previously acquitted conduct in sentencing.

2. Vulnerable Victim Enhancement

Mr. Ojimba also argues the district court abused its discretion in applying the vulnerable victim enhancement. The Guidelines provide for a two-level increase "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." USSG §3A1.1(b)(1). Vulnerable victim "means a person (A) who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct); and (B) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." USSG §3A1.1 comment (n.2).

Mr. Ojimba argues application of the enhancement here "merely reflects unfortunate 'ageism.'" Appellant Br. at 35. The government disagrees, claiming that the coconspirators carefully selected their victims based on their particular vulnerability to the scheme. Under the present facts, we agree with the government.

In *United States v. Proffit*, 304 F.3d 1001, 1008 (10th Cir. 2002), this court reversed the district court's application of the vulnerable victim enhancement. There, the defendant pretended to be a wealthy rancher interested in buying the victim's cattle ranch. *Id.* at 1004. During the negotiations, the victim revealed he was selling

the ranch due to his cancer diagnosis. *Id.* The defendant continued to express interest in buying the ranch and eventually defrauded the victim out of $50,000, allegedly to invest in cattle futures. *Id.* The defendant instead used the money for personal expenses, while the victim retained ownership of the ranch. *Id.*

The defendant pleaded guilty to a single count of mail fraud. *Id.* at 1003. At sentencing, the district court imposed a two-level vulnerable victim offense increase. *Id.* at 1004. On appeal, this court reversed. We explained that:

> Membership in a class of individuals considered more vulnerable than the average individual is insufficient standing alone. *See United States v. Tissnolthtos,* 115 F.3d 759, 761-62 (10th Cir. 1997) (rejecting enhancement based on advanced age alone).

Id. at 1007 (additional citations omitted).

In reaching that conclusion, the panel noted the victim was "a successful businessman who built a multi-million dollar ranch from the ground up." *Id.* It also acknowledged the victim's "illness may have opened the door for [d]efendant's criminal conduct," because it allowed the defendant to approach the victim as an interested buyer. *Id.* at 1008. We found it significant that the defendant never fraudulently obtained ownership of the ranch and never attempted to do so. Rather, pretending to be interested in buying the ranch was simply how the defendant initiated communications with the victim about cattle futures. *Id.*

Importantly, we clarified that the result may have been different if "[d]efendant had defrauded Mr. Cook of his ranch after discovering Mr. Cook was ill and wished to sell it." *Id.* We explained that under those circumstances, "the

correlation between Mr. Cook's health, his decision to sell the ranch, and [d]efendant's ability to defraud him of ranch ownership would be direct." *Id.* In this case, the connection between the scheme to defraud and the vulnerabilities of the victims is direct.

The dating profile conspiracy in the instant case targeted not only women who were older, but also women who were vulnerable in other ways that made them desirable targets of this specific fraud. As the district court noted, "the trial evidence established that the scheme targeted older, divorced, or widowed women," many of whom "only recently became users of online dating websites." ROA Vol. III at 1038–39. And the PSR related Mr. Ezeah's testimony at Ms. Ejiofor's separate trial, in which Mr. Ezeah admitted the scam targeted a particular age group to "reflect people who were either divorced, widowed, more - - more available both emotionally and physically" and those who were "less sophisticated enough to understand the ropes of investments." ROA Vol. II at 37.

This evidence/testimony provided ample support for the district court's application of the vulnerable victim offense level increase. *See United States v. Brown*, 7 F.3d 1155, 1160–61 (5th Cir. 1993) (holding that a "district court could have reasonably concluded that lonely, elderly widows, *as a group,* are more susceptible than the general public to" a scam involving a "lonely hearts pen-pal magazine") (emphasis in original). The district court therefore did not err in finding the victims were unusually vulnerable and in applying the Guidelines enhancement. We therefore affirm the district court's application of the enhancement.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** Mr. Ojimba's conviction and sentence.

Entered for the Court

Carolyn B. McHugh
Circuit Judge