FILED
United States Court of Appeals
Tenth Circuit

October 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUSTIN WALLACE HERMAN,

Defendant - Appellant.

No. 22-8057
(D.C. No. 2:19-CR-00026-ABJ-2)
(D. Wyo.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CHARLES WINIFRED WINTERS, JR.,

Defendant - Appellant.

No. 22-8061
(D.C. No. 2:19-CR-00026-ABJ-3)
(D. Wyo.)

ORDER AND JUDGMENT*

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

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

Justin Herman and Charles Winters advertised a shell company as a legitimate business to unsuspecting investors. They issued false press releases, forged signatures, and skirted SEC rules. When interest in their illegitimate enterprise grew, they dumped millions of shares on unsuspecting investors. Though Herman and Winters duped thousands of investors, the government uncovered the fraud, and the jury convicted them on all charges. We affirm.

BACKGROUND

I. Procedural Background

The government charged Justin Herman, Charles Winters, Ian Horn, and Robert "Bob" Mitchell with fraud-related crimes arising from their conspiracy to "pump and dump" the stock of NuTech Energy Resources, Inc. All four were charged with conspiracy to commit securities fraud, 18 U.S.C. § 371, 15 U.S.C. §§ 78j(b), 78ff and 17 C.F.R. § 240.10b-5; securities fraud and aiding and abetting, 15 U.S.C. §§ 78j(b), 78ff and 18 U.S.C. § 2; and conspiracy to commit wire fraud, 18 U.S.C. §§ 1349, 1343. Winters and Herman were also charged with two and four counts respectively of aggravated identity theft, 18 U.S.C. § 1028A(a)(1). And Horn, a Florida-based lawyer, was charged with perjury for testifying falsely to the grand jury.

Herman, Winters, and Horn proceeded to trial, but Mitchell pleaded guilty. After a 14-day trial, the jury convicted Herman and Winters on all counts. The jury acquitted Horn of the fraud charges, finding him guilty of perjury only. After their sentencings Winters and Herman filed timely notices

of appeal. We now review their challenges, exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II. Factual Background

Herman, Winters, and Mitchell conspired to pump and dump NuTech stock. A pump-and-dump scheme involves controlling a publicly traded company, artificially inflating the value of the company's shares, and then selling shares to profit from the inflated prices. *See United States v. Clark*, 717 F.3d 790, 796 n.1 (10th Cir. 2013) (describing pump-and-dump schemes). The NuTech scheme is summarized below.

A. Establishing NuTech

To control a publicly traded company, Herman, Winters, and Mitchell bought EcoEmissions Solutions, Inc., a public shell company. They paid the equity holders $100,000 and debt holders, including Gordon Pardy and David Rodgers, $15,000. Mitchell financed the purchase with money he fraudulently obtained from investors in High Plains Gas.

After acquiring EcoEmissions, Herman and Mitchell changed its name to NuTech Energy Resources, Inc., and issued 60 billion new shares. Mitchell nominated Kevin Trizna to serve as NuTech's Chief Executive Offer. But Trizna was a CEO in name only: his sole responsibility was to sign documents sent to him by Mitchell.

In seeking to make the shell company appear legitimate, Mitchell created a website and email addresses for NuTech. One of the email addresses was "kevin@nutechenr.com," but Mitchell controlled this account.

The conspirators also needed a platform to trade their NuTech shares. So Winters created an account for NuTech with OTC Markets Group, an online stock-trading platform. OTC Markets also allows companies, like NuTech, to post information. Relying on these posts and nonpublic submissions, OTC Markets ranks stocks based on the amount of information disclosed. With a higher ranking, a company's stock becomes more valuable and marketable.

To increase NuTech stock's ranking, Winters submitted a fake attorney-opinion letter with Horn's signature. After reviewing the opinion letter, OTC Markets ranked NuTech higher.

B. Obtaining Free-Trading Shares

Though the conspirators purchased a public company, they could not legally trade their shares on an open market. For companies like NuTech, the Securities and Exchange Commission requires that shareholders own their shares for a year before trading them on open markets. *See* 17 C.F.R. § 230.144(d)(1)(ii). The conspirators circumvented this rule by backdating the purchase agreement for Pardy's and Rodgers's debts. This backdated debt agreement underlies some of the aggravated-identity-theft charges.

Herman then sent the backdated debt agreement to Pacific Stock Transfer and requested free-trading shares. But Pacific Stock Transfer wanted more

information. So Herman sent altered bank records, fake attorney opinion letters, and false statements of nonaffiliation stating that Herman, Winters, and Mitchell did not control NuTech.

To mislead others into believing that NuTech was not a shell, Herman and Winters fabricated an agreement for NuTech to purchase oil and gas wells from Pardy and Rodgers. Herman sent the fake agreement to Pacific Stock Transfer to show that NuTech owned assets.

After receiving this information, Pacific Stock Transfer issued 13 billion free-trading shares to Herman, Winters, and Mitchell.

C. The First Pump-and-Dump Enterprise

Herman and Winters created accounts with a broker-dealer company and a trust company so they could sell NuTech stock while concealing their identities from the market. Herman, Mitchell, and various unindicted conspirators then coordinated NuTech stock trades via Skype Chat. Only conspirators held NuTech shares, and they sold them to each other at artificially high prices to create fraudulent trading volume. They executed sales at the start and end of the day to "mark the open" and "mark the close" of NuTech stock. Then, the conspirators publicized the artificial trading volume through press releases and email blasts.

By publicizing this information, the conspirators attracted attention and achieved their goal—people soon began trading NuTech stock. From November 2015 through January 2016, Herman, Winters, and Mitchell issued more

fraudulent press releases, and they coordinated their own sales around these releases.

The first pump-and-dump enterprise ended in late January 2016, when OTC Markets flagged NuTech as a "public interest concern" and lowered its rankings. But by then Winters and Herman had sold over seven million shares to public investors.

D. The Second Pump-and-Dump Enterprise

To make more money, Herman, Winters, and Mitchell needed OTC Markets to remove NuTech's public-interest-concern designation. In March and April 2016, the conspirators sent OTC Markets more fake attorney opinion letters, bearing Horn's letterhead. After receiving the opinion letters, OTC Markets removed the designation and raised NuTech's rankings.

But the conspirators had to reignite public interest in NuTech stock. To do so, Herman, Winters, and Mitchell announced that a Russian company had offered to buy NuTech for over $1 billion. This offer was fake. Before publicizing the offer, Herman emailed Winters and said "woo nelly . . . I am really expecting to sell several hundred million shares of [NuTech] this week." After publishing the fake buyout offer, Herman and Winters sold 53 million shares, netting over $140,000. This money was wired to Mitchell and Herman.

A week later, the SEC suspended trading in NuTech stock, ending the pump-and-dump scheme. In all, about 2,300 people purchased NuTech stock.

DISCUSSION

On appeal, Herman and Winters assert some common grounds in seeking to overturn their convictions. But they also raise independent claims. And Herman alone challenges his sentence as unreasonable. We first review the common grounds and then turn to the individual ones. Because their claims lack merit, we affirm their convictions and Herman's sentence.

I. Shared Legal Theories

Herman and Winters both claim that the government knowingly offered false testimony. They also claim that the government failed to disclose material, exculpatory evidence, as required under *Brady v. Maryland*, 373 U.S. 83, 84 (1963). Finally, they both assert Confrontation Clause challenges to some of codefendant Horn's pretrial statements that the court admitted into evidence.

A. False-Testimony Claim

Herman and Winters claim the government offered perjured testimony from Trizna about his use of an email account. Mitchell created an email for Trizna—kevin@nutechenr.com—but Mitchell used the account himself. During the direct examination of Trizna, the government asked:

Q: Did Bob Mitchell create an email account, Kevin@nutechenr.com?

A: Yes.

Q: Did you use that account?

A: No.

Winters R. vol. 2, at 864:17–25. In view of this testimony, Herman and Winters requested a mistrial, based on Trizna's once having sent an email from the account. They also cross-examined Trizna on his email usage from this account.

We review a denied motion for mistrial for abuse of discretion. *United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006).

The government violates a defendant's due process rights by knowingly offering false testimony. *United States v. Wolny*, 133 F.3d 758, 762 (10th Cir. 1998). To succeed on this claim, Herman and Winters must show that (1) the testimony at issue was false, (2) the testimony was material, and (3) the government knowingly and intentionally relied on the testimony. *Crockett*, 435 F.3d at 1317. But when a defendant refutes the false testimony during cross-examination, the government "cannot be said to have relied on" the false testimony "to obtain a guilty verdict." *Id.*

We are unpersuaded that Herman and Winters have shown that Trizna's testimony was false. The government asked, "Did you *use* that account?" The government did not ask a more precise question, such as "Have you ever used that account?" or "Have you ever sent an email from that account?" In context, Trizna's testimony can be fairly understood as being that he did not regularly use the account. Thus, we see no false testimony.

Even if this testimony were somehow false, we cannot say that the government wrongly relied on it to convict Herman and Winters. *See id*. After all, Herman and Winters knew their basis for challenging the truthfulness of

Trizna's testimony on this point and cross-examined him about his having sent an email from the account. In response, Trizna acknowledged having done so. The issue was fairly presented to the jury. Because the district court did not abuse its discretion, we affirm its denial of a mistrial.

B. *Brady* Claims

Herman and Winters claim the government violated *Brady* by failing to disclose (1) SEC files relating to an investigation of High Plains Gas and (2) two reports summarizing interviews of NuTech victims. Herman also raises a *Brady* claim connected to Mitchell's guilty-plea proffer. We review each of these *Brady* claims de novo but apply the clear-error standard to the district court's factual findings. *United States v. Herrera*, 51 F.4th 1226, 1243 (10th Cir. 2022).

The Fifth Amendment's Due Process Clause requires the government to provide defendants material, exculpatory evidence in its possession. *Brady*, 373 U.S. at 87. To establish a *Brady* violation, Herman and Winters must show that the prosecution suppressed material evidence that was favorable to their defense. *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009).

Though an individual prosecutor need not have known that the evidence exists, Herman and Winters must prove the prosecution's team possessed the evidence. *See United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999). The prosecution's team extends to police and other agencies investigating the

criminal venture. *United States v. Holloway*, 939 F.3d 1088, 1105 (10th Cir. 2019).

Along with proving possession, Herman and Winters must show that the evidence is material and favorable to their defense. Evidence is material when there is a reasonable probability that its disclosure would have changed the outcome of the case. *United States v. Reese*, 745 F.3d 1075, 1083 (10th Cir. 2014). Favorable evidence includes impeachment evidence and exculpatory evidence. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

1. High Plains Gas

Herman and Winters moved to compel the government to produce files on the SEC's investigation of High Plains Gas. Mitchell defrauded investors in High Plains Gas and used the funds to purchase EcoEmissions. The district court denied the motion because the prosecution never possessed any such SEC files and the files were not material. The district court found that the prosecutors neither directed the SEC to investigate High Plains Gas nor continued the SEC's investigation.

On appeal, Herman and Winters speculate that the prosecution had SEC files on High Plains Gas. But neither show that the prosecution's team included the SEC or that the prosecution's team possessed other SEC files. Mere speculation does not satisfy their burden of proving a *Brady* violation. *See Holloway*, 939 F.3d at 1105 ("A *Brady* claim fails if the existence of favorable evidence is merely suspected." (cleaned up)).

In the alternative, Herman and Winters argue that the government violated *Brady* by failing to obtain all the SEC records on High Plains Gas. Though prosecutors must learn of favorable evidence, that duty extends only to the prosecution's team. *See Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 824 (10th Cir. 1995). Herman and Winters offer no argument to counter the district court's finding that the prosecution's team did not include the SEC or the SEC's investigators. *Brady* does not burden prosecutors with the duty to scour the federal bureaucracy for potentially relevant information. Finding no error, we affirm the district court's order.

2. Interview Reports

Herman and Winters claim that the government violated *Brady* by not disclosing until trial interview reports for Alexander Albert and Nathan Hodge.

Alexander Albert and Nathan Hodge were members of an investment group with Michael Baron, called the HBA Group. Government investigators interviewed Albert and Hodge before trial because the HBA Group had invested in NuTech stock. Albert's report reveals that he felt Baron was scamming them by taking their money and investing it in NuTech. And Hodge's report shows he was not involved with NuTech trades. At trial, testimony revealed that Baron was involved with issuing fraudulent press releases about NuTech.

The district court considered Herman's and Winters's *Brady* arguments and rejected them.

Herman's and Winters's *Brady* claims fail because they do not identify any favorable material in the reports.[1] Though the reports incriminate Baron, incriminating a coconspirator is not a defense to Herman's and Winters's own involvements in the conspiracy. Instead of quoting or identifying a favorable statement in the reports, Herman and Winters both make conclusory arguments about the government's failure to investigate the "real" conspirators. We find these arguments unpersuasive and affirm the district court's ruling.

3. Access to Proffer

Herman claims the government violated *Brady* by limiting his access to Mitchell's guilty-plea proffer. Herman raises this issue for the first time on appeal.[2] So we review his claim for plain error. *United States v. Gehrmann*, 966 F.3d 1074, 1081 (10th Cir. 2020).

To succeed under plain-error review, Herman must show "(1) error, (2) that is plain, which (3) affects [his] substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (cleaned up).

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[1] Herman has not included the reports in his appendix. We do not review claims when an appellant fails to include necessary documents in his appendix. *United States v. Vasquez*, 985 F.2d 491, 494–95 (10th Cir. 1993). But because Winters has included the reports in his appendix, and Herman raises the same arguments, we will review the merits of Herman's claim.

[2] Herman has provided no record citations showing where he preserved the issue. Herman has also failed to ask for plain-error review. Though this failure waives review, *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019), we briefly address the merits of his frivolous claim.

Herman's argument fails because he cannot show error. The government allowed Herman to visit the United States Attorney's Office to review the proffer. And Herman's trial counsel reviewed the proffer before trial. *Brady* does not require the government to disclose information in a particular form or manner. *United States v. Hernandez-Muniz*, 170 F.3d 1007, 1011 (10th Cir. 1999). By alerting Herman to the proffer and making it available, the government satisfied its *Brady* obligations. As a result, we affirm Herman's conviction.

C. Confrontation Clause Claims

Herman and Winters raise Confrontation Clause challenges to statements made by codefendant Horn that were introduced at trial. Herman argues that the government's use of the "Bradenton letter" violated *Bruton v. United States*, 391 U.S. 123, 137 (1968) (rejecting "limiting instructions as an adequate substitute for the petitioner's constitutional right of cross-examination"). Herman does not identify the exhibit he is referencing.

If he is challenging Exhibit IH-Q19, that exhibit is a letter bearing Horn's letterhead. Horn's counsel argued during closing that Horn was not involved in the conspiracy because the letter misspells Horn's city of residence—Brandon, Florida. Herman challenges this exhibit and Horn's argument because they were "important to the government's case, as demonstrated by the stress the government placed on it." Herman Op. Br. 35. He seeks relief under *United States v. Glass*, 128 F.3d 1398, 1404–05 (10th Cir.

1997). *Glass* provides a narrow exception to the general rule that *Bruton* statements must directly incriminate a codefendant. *Id. Glass* extends *Bruton* to cover statements that are critical to the government's case. *Id.* Herman provides no record citation to where a statement by Horn about the letter was admitted into evidence. And Herman confuses the record. The government in fact argued at trial that the letters were evidence of Horn's involvement in the conspiracy.

Winters argues that the government violated *Bruton* by admitting taped recordings of Horn's statements to investigators and to the grand jury.[3] In these recordings, Horn admits to writing the opinion letters. No statement was admitted that directly incriminated Winters. And these statements were part of the government's case against Horn, not Winters.

Though we ordinarily review Confrontation Clause challenges de novo, *United States v. Clark*, 717 F.3d 790, 813 (10th Cir. 2013), we decline to review the merits of Herman's and Winters's claims. Both Herman and Winters have failed to analyze any admitted statement in context. We reject challenges to admitted evidence when an appellant fails to identify and analyze the specific statements challenged. *See, e.g.*, *United States v. Gallegos*, 784 F.3d 1356, 1359 (10th Cir. 2015); *United States v. Occhipinti*, 998 F.2d 791, 801 (10th Cir. 1993). Herman and Winters have made only sweeping claims and conclusory arguments, without identifying any statement of concern.

[3] In his reply brief, Winters withdraws his argument about attorney Woodhouse's testimony.

II. Winters's Rule-of-Completeness Claim

Winters argues that the district court abused its discretion by preventing him from offering the full recordings from Horn's interviews with investigators and grand jury testimony in response to the government's admitting exhibits 601 and 602, which are snippets of Horn's recorded interviews, and exhibits 605, 608, and 610, which are portions of Horn's grand jury testimony.

When a party introduces part of a recorded statement, Rule 106 of the Federal Rules of Evidence allows an adverse party to introduce any other part "that in fairness ought to be considered at the same time." The rule serves as a "defensive shield against potentially misleading evidence." *United States v. Williston*, 862 F.3d 1023, 1038 (10th Cir. 2017) (cleaned up). To decide whether to admit evidence under Rule 106, the court must consider whether the proposed statements (1) explain the admitted evidence, (2) put the admitted evidence in context, (3) mislead the jury, and (4) ensure the jury can fairly understand the evidence. *Id.* at 1038–39. We review evidentiary rulings for abuse of discretion. *Id.* at 1038.

Winters did not provide the district court with snippets of Horn's recordings that he wanted to admit. Instead, he argued that "playing any little snippet" of Horn's statements "is totally without context because Mr. Horn gave over three hours of recorded interviews where his position on things shifted." Winters R. vol. 2, at 1442:13–21. Winters requested to play all three hours to allow the jury to determine credibility.

Winters makes the same mistake with us. Rule 106 does not confer a right to admit hours of recordings. *See Williston*, 862 F.3d at 1038 ("Only the portions of a statement that are relevant to an issue in the case and necessary to explain or clarify the already-admitted portions need be admitted."). On appeal, Winters does not identify any excluded statement or explain how that statement clarifies allegedly misleading government evidence.[4] *See id.* The district court did not abuse its discretion by declining to admit into evidence hours of recordings and grand jury testimony.

III. Herman's Other Claims

Further, Herman asserts that his conviction lacked sufficient evidence and that he was selectively prosecuted. Herman also claims that his sentence is unreasonable. Like his arguments above, we are not persuaded.

A. Sufficiency of the Evidence

Herman claims the district court erred by failing to grant his motion for judgment of acquittal. We review sufficiency of the evidence claims de novo. *United States v. Gordon*, 710 F.3d 1124, 1141 (10th Cir. 2013). Because Herman was convicted at trial, we consider the evidence in the light most

[4] Winters also argues that the jury needed to hear Horn's pauses before answering questions. But Winters has not included the interview recordings in his appendix. And though he has included transcripts of the recordings, the transcripts do not reflect pauses. Thus, we cannot reach the merits of Winters's argument. *See United States v. Brody*, 705 F.3d 1277, 1280–81 (10th Cir. 2013) ("[W]hen an appellant fails to provide necessary parts of the record . . . this court must affirm the judgment of the court below.").

favorable to the government. *Id.* To reverse, we would have to conclude that no rational jury could find guilt beyond a reasonable doubt. *United States v. Griffith*, 928 F.3d 855, 869 (10th Cir. 2019).[5]

Herman challenges all his convictions, which include (1) conspiracy to commit securities fraud, (2) securities fraud and aiding and abetting that offense, (3) conspiracy to commit wire fraud, and (4) four counts of aggravated identity theft.

First, Herman argues that the government never proved that a conspiracy existed or that Herman was involved in a conspiracy. To prove a conspiracy, the government must show that (1) "an agreement existed between two or more people to violate the law," (2) "the defendant knew at least the conspiracy's essential objectives," (3) "the defendant knowingly and voluntarily" joined, and (4) "the co-conspirators were interdependent." *United States v. Hill*, 786 F.3d 1254, 1266 (10th Cir. 2015). Interdependence requires proof that "each co-conspirator [has] a shared criminal objective." *Id.* The government also must show an overt act in furtherance of the conspiracy. *United States v. Dazey*, 403 F.3d 1147, 1159 (10th Cir. 2005).

[5] Herman has not cited record pages at which he preserved this claim. Though that failure normally would forfeit his claim, we may review the record independently to see whether the issue was preserved. *See Leffler*, 942 F.3d at 1196. We conclude that Herman preserved the issue by moving for a judgment of acquittal and renewing that motion. Herman R. vol. 8, at 155:1–11; vol. 9, at 11:5–15:12; vol. 12, at 16:2–17:6.

The government must prove the criminal intent needed for the substantive offense. *Id.* Here, securities fraud requires proof that the defendant acted willfully. *See* 15 U.S.C. § 78ff. And wire fraud requires proof of intent to defraud. 18 U.S.C. § 1343.

The government proved the essential elements of conspiracy to commit securities fraud and wire fraud. Though Herman argues that the jury lacked sufficient evidence to find a conspiracy, we conclude the jury had ample direct and circumstantial evidence with which to do so. *See Dazey*, 403 F.3d at 1159 ("[C]onspiracy convictions may be based on circumstantial evidence, and the jury may infer conspiracy from the defendants' conduct . . . .").

Viewing the evidence in the light most favorable to the government, the jury had sufficient evidence by which to convict on the conspiracy counts:

- Tom Crom's testimony that Herman negotiated the purchase of EcoEmissions;
- Herman's email with Horn directing money from Mitchell's investment fraud to fund the purchase of EcoEmissions;
- Inspector Hacker's testimony that Mitchell wired Herman $10,000 from Michell's investment fraud;
- Herman's emails to Pacific Stock Transfer to fraudulently obtain free-trading shares of NuTech;
- Winters's email to Herman containing a blank document with Horn's letterhead and signature;
- Herman's emails with Winters about backdating the debt purchase agreement;
- Herman's emails with Winters about forging a wire transfer;

- Herman's Skype messages with his coconspirators where he helped them arrange manipulative NuTech trades;
- Herman's email to Winters saying "woo nelly . . . I am really expecting to sell several hundred million shares of [NuTech] this week";
- Herman's and Winters's emails coordinating sales of NuTech stock;
- Manipulative trades by Herman, Mitchell, and others to mark the open and close of NuTech stock; and
- Recordings of Herman's phone calls with his broker-dealer company where he ordered NuTech sales around fraudulent press releases.

This evidence shows that Herman purchased EcoEmissions, which was later changed to NuTech. He then worked with Winters to fraudulently obtain free-trading shares of NuTech from Pacific Stock Transfer. To get the free-trading shares, he and others backdated documents to satisfy the SEC's one-year holding period. Then, Herman and Winters coordinated NuTech trades to profit from inflated share prices. In all, the jury could reasonably find the essential elements of conspiracy to commit securities and wire fraud.

Second, Herman argues that he cannot be convicted of securities fraud because he still holds 98–99% of his NuTech stock. For this, Herman cites his trial counsel's closing argument. Assuming his assertion is true, Herman ignores that the conspirators issued themselves 60 billion new shares of NuTech, 13 billion of which were free trading. Obviously, a person charged with securities fraud cannot escape liability by arguing that he issued a massive number of shares and kept most of them. Herman's conviction arises from the

shares he sold and the harm his scheme inflicted, not from the shares he still had when it was shut down. Thus, any reasonable juror could reject Herman's argument.

Finally, we address Herman's proposed defenses to his aggravated-identity-theft convictions. In a single sentence, Herman claims that "[a]ny alteration or signature was a consequence of Tom Crom detailing that Mr. Herman had the authority to do so, as getting it signed was for the benefit of the investors, not Mr. Herman." Herman Op. Br. 19. This argument suffers fatal defects. First, Herman does not provide record citations supporting the statement. Second, the jury certainly had full bases to reject this self-serving declaration if it in fact has a basis in the record. And third, the "authority" described isn't even from those whose identities were thieved. The evidence more than suffices to meet 18 U.S.C. § 1028A(a)'s elements that "[w]hoever . . . knowingly transfers, possesses, or uses, *without lawful authority*, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.") (emphasis added).[6]

[6] In a Rule 28(j) letter, Herman directs us to the Supreme Court's recent decision in *Dubin v. United States*, 599 U.S. 110 (2023). Under that case, the government must show that "the means of identification" was "used in a manner that is fraudulent or deceptive" and that the use of another's identification "play[ed] a key role" in the underlying felony. *Id.* at 129, 132. Here, the government met its burden.

Finding the evidence more than sufficient, we affirm the district court's denial of Herman's motion for a judgment of acquittal.

B. Selective Prosecution

Herman claims that he was a victim of a selective prosecution. He raises this argument for the first time on appeal.

Under Rule 12(b)(3)(A)(iv) of the Federal Rules of Criminal Procedure, defendants must bring any selective-prosecution motions before trial. We do not review untimely Rule 12 arguments "absent good cause." *United States v. Bowline*, 917 F.3d 1227, 1237 (10th Cir. 2019). Because Herman does not attempt to show good cause, we affirm his conviction.[7]

C. Unreasonable Sentence

Finally, Herman challenges his sentence as both procedurally and substantively unreasonable.

We review sentences for abuse of discretion, looking for both procedural and substantive reasonableness. *Gordon*, 710 F.3d at 1160. We review legal conclusions de novo and factual conclusions for clear error. *Id.* Procedurally, a sentence is unreasonable when the district court incorrectly calculates the United States Sentencing Guidelines range or treats the Guidelines as

[7] Herman does not allege that he was prosecuted "based on an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (cleaned up). Instead, Herman simply complains that the government could have prosecuted other alleged coconspirators.

mandatory. *Id.* Substantive reasonableness asks "whether the length of the sentence is reasonable given all the circumstances of the case" and the sentencing factors. *United States v. Huckins*, 529 F.3d 1312, 1317 (10th Cir. 2008) (cleaned up).

1. Procedural Reasonableness

Herman argues that the district court procedurally erred by miscalculating the actual loss from the NuTech scheme. The district court calculated the total loss as over $1.5 million, which added sixteen specific-offense levels.

The Guidelines set incremental offense-level increases for the greater of actual or intended loss under § 2B1.1(b)(1), cmt. n.3(A). Actual loss is the "reasonably foreseeable pecuniary harm." *Id.* And intended loss is the harm the defendant "sought to inflict." *Id.* At sentencing, the government must prove loss by a preponderance of the evidence, which requires showing actual and proximate causation. *See United States v. Schild*, 269 F.3d 1198, 1200 (10th Cir. 2001); *United States v. Evans*, 744 F.3d 1192, 1196 (10th Cir. 2014).

The district court need only reasonably estimate the loss. *United States v. Sutton*, 520 F.3d 1259, 1263 (10th Cir. 2008) (quoting U.S.S.G. § 2B1.1, cmt. n.3(C)). Because the district court "is in a unique position to assess the evidence and estimate the loss," we give "appropriate deference" to the district court's determination. *Id.* (quoting U.S.S.G. § 2B1.1, cmt. n.3(C)).

To calculate actual loss in stock-manipulation schemes, the Guidelines recommend subtracting the average share price after the fraud was disclosed to the market from the average share price during the fraud. U.S.S.G. § 2B1.1, cmt. n.3(F)(ix). This difference gives the amount that the scheme inflated the price of the stock. *Id.* The inflated price of the stock is then multiplied by the number of free-trading shares to determine actual loss. *Id.*

The district court relied on this method to calculate Herman's total loss to nondefendant investors. The actual loss totaled $1.79 million. The court also found this amount as the intended loss.

Herman contends that the government must identify the defrauded investors to prove causation for the loss enhancement. For this, Herman relies on *United States v. Stein*, 846 F.3d 1135 (11th Cir. 2017). Herman misreads this out-of-circuit case. In *Stein*, the defendant issued false press releases about a publicly traded company that sold medical devices. *Id.* at 1140. The company was real: it had employees, sales, and inventory. *See id.* at 1141. The court ruled that the government had to show which investors relied on the fraudulent press releases because people may have traded the stock even without the press releases. *Id.* at 1154.

Unlike in *Stein*, every NuTech stock trade was attributable to Herman's conspiracy. No market for NuTech stock would have existed without the conspiracy because Herman had to backdate documents to circumvent the

SEC's one-year holding rule. As a result, the government did not have to identify investors to prove causation for the loss enhancement.

Finding no error, we affirm the district court's sentence as procedurally reasonable.[8]

2. Substantive Reasonableness

Herman next argues that his sentence is substantively unreasonable when compared to other sentences for fraud convictions. The district court sentenced Herman to concurrent sentences of 60 months for conspiracy to commit securities fraud, 63 months for securities fraud, and 63 months for conspiracy to commit wire fraud. To that, the court added a consecutive sentence of 24 months as required for aggravated-identity-theft convictions under 18 U.S.C. § 1028A(a)(1), (b)(2) (running the sentences concurrently for the convictions for that violation).

For the conspiracy and fraud charges, the district court calculated Herman's total offense level as 31. Herman's base offense level was 7. He received 16 levels for losses over $1.5 million, 2 levels because the offense involved ten or more victims, 2 levels for using sophisticated means, and 4 levels for his leadership role. The district court rejected the government's

[8] In one sentence of his brief, Herman states that the district court erred in applying a leadership-role enhancement under § 3B1.1. Because Herman has offered no record cites or arguments challenging this application, we do not address this issue. *See United States v. Isabella*, 918 F.3d 816, 845 (10th Cir. 2019).

proposed specific-offense characteristics for his using a special skill and for obstructing justice. With an offense level 31, and a criminal-history category II, Herman's advisory Guidelines range was 121 to 151 months imprisonment.

When reviewing a sentence for substantive reasonableness, we consider whether the sentence "fell within the range of rationally available choices." *United States v. Blair*, 933 F.3d 1271, 1274 (10th Cir. 2019) (cleaned up). We reverse only when the district court's judgment is arbitrary, capricious, or manifestly unreasonable. *Id.* We presume that a sentence within the Guidelines range is reasonable. *Id.*

Here, the district court's sentence was reasonable. The court varied downward to 63 months for the fraud convictions. And the district court's consecutive 24-month sentence for aggravated identity theft was mandated by statute. *See* 18 U.S.C. § 1028A. Though Herman asserts that other white-collar criminals have received lighter sentences, he does not explain how his sentence was unreasonable. Finding the district court's conclusion reasonable, we affirm Herman's sentence.

CONCLUSION

We find no error in Herman's and Winters's convictions or Herman's sentence. Accordingly, we affirm the district court's judgment.

Entered for the Court

Gregory A. Phillips
Circuit Judge