

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13741

D.C. Docket No. 3:12-cv-00494-HLA-MCR

ASHLEY C. SCOTT,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA, TREASURY DEPARTMENT, INTERNAL
REVENUE SERVICE,

Defendant – Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(June 12, 2019)

Before WILSON and BRANCH, Circuit Judges, and VINSON,* District Judge.

* Honorable C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

PER CURIAM:

Ashley Scott appeals the jury's verdict finding her a responsible person of her father's company, Scott Air, for failure to collect and pay employment taxes under 26 U.S.C. § 6672. On appeal, Scott argues (1) there was insufficient evidence supporting the jury's verdict that she was a responsible person for three payroll tax quarters, (2) the district court plainly erred in failing to provide Scott's proposed jury instruction regarding the legal authority of a Corporate Secretary under Florida law, and (3) the district court erred in refusing to let her testify about Scott Air's corporate bylaws. After review and with the benefit of oral argument, we conclude that the district court's failure to instruct the jury about Scott's legal authorities and duties as the company's Corporate Secretary was plain error, and we reverse and remand for further proceedings.

I.

The IRS imposes a penalty on “responsible persons” who are required to collect and pay employment taxes to the government and fail to do so. *See* 26 U.S.C. § 6672. The IRS assessed this penalty against Ashley Scott, the Corporate Secretary of Scott Air. Scott later sought an adjudication that she was not a responsible person—an issue that ultimately went to a jury.

Determining whether an individual is a responsible person is a fact-intensive inquiry. We have described the “essential question” as “whether the person had

sufficient control over corporate affairs to avoid non-payment of the employment taxes.” *Scott v. United States*, 825 F.3d 1275 (11th Cir. 2017) (*Scott I*).

Responsibility is a matter of “status, duty, and authority, not knowledge.” *Mazo v. United States*, 591 F.2d 1151, 1156 (5th Cir. 1979).¹ “Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees.” *George v. United States*, 819 F.2d 1008, 1011 (11th Cir. 1987).

At trial, Scott’s primary defense was that she only served in a ministerial role within Scott Air. Scott testified that she did not make day-to-day managerial decisions, did not have control over corporate affairs, and only wrote checks to creditors at the direction and authorization of her father. Scott also sought to testify about Scott Air’s corporate bylaws to show that the Corporate Secretary of the company did not have control over financial affairs. Because Scott had not read the bylaws during her time at the company, the district court found that they were not relevant, and prohibited Scott from testifying about them.

Before jury deliberations, Scott asked for a jury instruction that would explain that a Corporate Secretary is defined primarily as a ministerial role under Florida law. The government objected to this instruction. The district court found

¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all Fifth Circuit decisions rendered before close of business on September 30, 1981.

that such an instruction would be more confusing than helpful, and denied the instruction. Scott did not object to this ruling. During jury deliberations, the jury sent a question to the judge seeking clarification on whether a “responsible person” was “a person with final decision-making authority or . . . a person who has the legal authority based on signed legal documents.” The next day, the judge read the jury the definition of responsibility set forth in *Scott I*, but did not clarify the legal authority of a Corporate Secretary under Florida law.

II.

Federal Rule of Civil Procedure 51 governs objections to jury instructions and preserving a claim of error for appeal. For an objection to jury instructions to be timely under Rule 51, it “must be made at a hearing before instructions and arguments are delivered or promptly upon learning that the challenged instruction will be, or has been, given or refused, whichever occurs first.” *Vista Mktg., LLC v. Burkett*, 812 F.3d 954, 975 (11th Cir. 2016); *see also* FED. R. CIV. P. 51(c)(2). We review jury instructions for plain error when a party fails to raise an objection prior to jury deliberations. *Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1329 (11th Cir. 1999); *see also* FED. R. CIV. P. 51(d)(2).

“Under plain-error review, a party must show (1) an error occurred; (2) the error was plain; (3) the error affected substantial rights; and (4) failure to correct the error would seriously affect the fairness of the judicial proceeding.” *Vista*, 812

F.3d at 975. In the context of jury instructions, we will reverse for plain error only in “exceptional cases where the error is so fundamental as to result in a miscarriage of justice.” *Farley*, 197 F.3d at 1329 (internal quotation omitted). The error must be so prejudicial as to “have affected the outcome of the district court proceedings.” *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778 (1993).

As previously discussed, indicia of responsibility include “the holding of corporate office, control over financial affairs, [and] the authority to disburse corporate funds.” *George*, 819 F.2d at 1011. Florida courts have previously described a Corporate Secretary as “a ministerial officer, without authority to transact the business of the corporation upon his volition and judgment.” *Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So. 2d 416, 417 (Fla. 5th DCA 1982). In *United States v. Falcone*, we reiterated that, under Florida law, the role of a Corporate Secretary is inherently ministerial. 934 F.2d 1528, 1544 (11th Cir. 1991), *reh’g granted and opinion vacated*, 939 F.2d 1455 (11th Cir. 1991), *opinion reinstated on reh’g*, 960 F.2d 988 (11th Cir. 1992).

Thus, in Florida, a Corporate Secretary is a primarily ministerial position with no inherent powers over finances and corporate decision-making.² At Scott’s

² We acknowledge, as the dissent recognizes, that a corporation can expand a corporate officer’s duties beyond the statutory definition.

trial, the final jury instructions did not define the authority or duties of a Corporate Secretary—information that was crucial to understanding whether Scott was a responsible person. The jury was instead left to speculate about Scott’s legal authority and duties.³ As we have previously recognized, “[t]here is fundamental error in instructions which mislead the jury or leave the jury to speculate as to an essential point of law.” *Cruthirds v. RCI, Inc.*, 624 F.2d 632, 635 (5th Cir. 1980).

A plain error affects the defendant’s substantial rights when the error is “prejudicial.” *Olano*, 507 U.S. at 734, 113 S. Ct. at 1778. That is, the error “affected the outcome of the district court proceedings.” *Id.* Here, the error prejudiced Scott. During deliberations, the jury asked the judge to clarify whether a “responsible person” was “a person with final decision-making authority or . . . a person who has the legal authority based on signed legal documents.” The fact that the jury asked for clarification shows a high likelihood that the jury was confused about Scott’s legal authority and that the outcome would have been different had the jury understood the legal authority of a Corporate Secretary under Florida law. Such confusion impaired the fairness of the proceeding.

³ As Scott argues, the jury was also not permitted to hear testimony about Scott Air’s corporate bylaws. The district court excluded the bylaws because Scott did not know that the bylaws existed until after the company closed. But responsibility is a matter of “status, duty, and authority, not knowledge.” *Mazo*, 591 F.2d at 1156. We therefore agree with the dissent that the district court’s exclusion of the bylaws was likely an abuse of discretion.

Accordingly, we exercise our discretion under plain-error review and reverse the jury's verdict. We express no position on whether the evidence was sufficient to find that Scott was a responsible person. The case is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BRANCH, Circuit Judge, dissenting:

Ashley Scott appeals the jury's verdict finding her a responsible person with respect to the failure of Scott Air to collect and pay employment taxes pursuant to 26 U.S.C. § 6672 for the three quarters ending in September 2005, December 2006, and June 2007. Scott argues that (1) the district court plainly erred in failing to provide Scott's proposed jury instruction regarding the authority of a corporate secretary under Florida law, (2) there was insufficient evidence supporting the jury's verdict, and (3) the district court erred in not allowing her to testify about Scott Air's corporate bylaws.

The majority concludes that the district court's failure to provide Scott's proposed jury instruction was plain error. I agree with the majority that plain-error review applies here. Under plain-error review, a party must show that: (1) there was an error, (2) the error was plain, (3) the error affected substantial rights, and (4) failure to correct the error is so fundamental as to result in a miscarriage of justice. *Vista Mktg., LLC v. Burkett*, 812 F.3d 954, 975 (11th Cir. 2016). I disagree that Scott has satisfied the plain-error standard. Her argument fails at the first step because it was not error for the district court to decline to give her proposed jury instruction since it was an incorrect statement of Florida law. Because I would also

conclude that there was sufficient evidence to support the jury's verdict and that any error in preventing Scott from testifying about the corporate bylaws was harmless, I would affirm. Accordingly, I respectfully dissent.

Refusal to give an instruction is reversible error only if (1) the requested instruction was a correct statement of the law; (2) the instruction deals with an issue properly before the jury; and (3) denying the instruction seriously impaired the defendant's ability to defend himself. *Fried v. Stiefel Laboratories, Inc.*, 814 F.3d 1288, 1292 (11th Cir. 2016) (quoting *Watkins v. City of Montgomery*, 775 F.3d 1280, 1291 (11th Cir. 2014)). It is thus not reversible error for the district court to decline to give a proposed jury instruction that is an inaccurate statement of the law, *see, e.g., United States v. Morales*, 978 F.2d 650, 652 (11th Cir. 1992), nor is it reversible error to refuse to give a misleading instruction, *see Roberts & Schaefer Co. v. Hardaway Co.*, 152 F.3d 1283, 1295 (11th Cir. 1998).

The proposed instruction at issue here reads as follows: "Scott Air Technology, Inc. was a Florida corporation. Under Florida law, 'the secretary of a corporation, merely as such, is a ministerial officer, without authority to transact the business of the corporation upon [her] volition and judgment. A secretary has none of the powers of a general or managing agent, and has no power by virtue of

[her] office to execute checks.’ *United States v. Falcone*, 934 F.2d 1528, 1544 (11th Cir. 1991).”¹

Scott’s proposed instruction is an incorrect statement of Florida law—or at the very least a misleading one—because it suggests that a corporate secretary’s duties are limited by law to ministerial tasks. The correct rule is that a corporate secretary’s duties are ministerial unless those duties have been either expressly or impliedly expanded by the corporation. *See Ideal Foods, Inc. v. Action Leasing Corp.*, 413 So.2d 416, 417 (Fla. 5th DCA 1982) (“The secretary of a corporation, merely as such, is a ministerial officer, without authority to transact the business of the corporation upon his volition and judgment . . . [and] has no authority to bind a corporation in dealings with third persons unless expressly or impliedly authorized to do so.”); *see also* Fla. Stat. § 607.0841². The sentence in *Falcone* immediately following the one quoted in the proposed jury instruction explains that “[a]lthough the Secretary, ‘[l]ike every other corporate agent,’ ‘may have more extensive functions [than] those ordinarily incident to the office,’ there is no evidence in this

¹ This Court granted rehearing en banc and vacated the panel’s opinion on other grounds. 939 F.2d 1455 (11th Cir. 1991). After rehearing the Court then reinstated the panel’s opinion with respect to appellant’s challenges to many of his convictions including the conviction for which the panel had discussed the Florida law at issue here. 960 F.2d 988, 990 n.6 (11th Cir. 1992).

² “Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of any officer authorized by the bylaws or the board of directors to prescribe the duties of other officers.” Fla. Stat. § 607.0841

case that Sandra Falcone’s power as secretary was more extensive than the norm or that the board ever granted her express or implied authority to designate new uses for the stamp or to use it without . . . authorization; indeed, the testimony at trial indicated that she had very little to do with the day-to-day operation and management of the company.” *United States v. Falcone*, 934 F.2d 1528, 1544 (11th Cir. 1991) (quoting *Ideal Foods*, 413 So.2d 416, 417 n.1 (Fla. 5th DCA 1982)).

Of course, a jury instruction is not incorrect merely because it does not comprehensively cover an area of the law. Here, though, Scott’s proposed instruction is incorrect specifically because it omitted part of the Florida law rule regarding the authority of a corporate secretary. Florida law establishes that a corporate secretary’s role is ministerial unless the corporation, either expressly or impliedly, grants the secretary additional responsibilities. Scott’s proposed instruction, by omitting the fact that the corporation can change the corporate secretary’s duties implies that a secretary is “a ministerial officer” by law, and in no circumstances has the “authority to transact the business of the corporation.” That characterization is an inaccurate statement of Florida law and would mislead the jury into incorrectly concluding that because Scott was a corporate secretary, she could not have had control over the company’s financial affairs or day-to-day

functions. Accordingly, it was not reversible error for the district court to refuse to give Scott's proposed instruction.

Because I would conclude that the district court did not err in failing to issue Scott's requested instruction, I also address the other two issues Scott raises on appeal.

Scott argues that there was insufficient evidence to support the jury's verdict that she was a person responsible for employment taxes for the three quarters at issue. 26 U.S.C. § 6672 imposes personal liability for employment taxes on "[a]ny person required to collect, truthfully account for, and pay over" such taxes and "willfully fails to collect such tax, or truthfully account for any pay over such tax." The statute defines "person" to include "an officer or employee of a corporation . . . who as such officer [or] employee . . . is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. § 6671. The Supreme Court has interpreted those provisions to mean that every person under a duty to perform any one of the three functions enumerated in § 6671 (collecting, accounting for, and paying over employment taxes) is potentially liable under § 6672. *Slodov v. United States*, 436 U.S. 238, 250 (1978). "This is known as a 'responsible person.'" *Mazo v. United States*, 591 F.2d 1151, 1154 (5th Cir. 1979). We have explained that responsibility is "a matter of status, duty[,] and authority, not knowledge." *Id.* at 1156. "Indicia of responsibility include the holding of corporate office, control

over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees.” *George v. United States*, 819 F.2d 1008, 1011 (11th Cir. 1987). “The essential question is whether the person had sufficient control over corporate affairs to avoid non-payment of the employment taxes.” *Scott v. United States*, 825 F.3d 1275, 1279 (11th Cir. 2016).

According to the evidence presented, Scott: held corporate office; had check-signing authority; signed the company’s Form 941 tax returns for two of the relevant quarters and transferred information from the payroll report to the Form 941 for the third quarter at issue; personally guaranteed a company debt, signed payroll checks; and had some managerial, hiring, and firing authority. For the following reasons, those facts constitute sufficient evidence from which a jury could reasonably conclude that Scott was a responsible person for the three quarters at issue. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1010 (11th Cir. 2004) (“We review a jury’s verdict to determine whether reasonable and impartial minds could reach the conclusion the jury expressed in its verdict,” and “[t]he verdict must stand unless ‘there is no substantial evidence to support it.’” (quoting *Liberty Mut. Ins. Co. v. Falgoust*, 386 F.2d 248, 253 (5th Cir. 1967))).

This Court has concluded that check-writing authority is relevant to assessing whether a person qualifies as a responsible person. *Williams v. United States*, 931 F.2d 805, 810 (11th Cir. 1991). Scott, along with her mother, father,

and brother, had authority to sign checks for Scott Air's only corporate account, which required only one signature. Scott would print and sign payroll checks. Scott also wrote other checks including checks giving herself a salary advance. Scott argued that she wrote checks only with her father's approval or when he was unavailable. But the government presented evidence that, on at least one occasion, Scott wrote checks on the same day that her father was in the office and writing checks. Although Scott testified that her father may have postdated the checks, her father testified that he never postdated checks. The jury could have reasonably inferred from this evidence that Scott had some independent authority to decide which checks to write. *See Strickland v. Norfolk S. Ry. Co.*, 692 F.3d 1151, 1154 (11th Cir. 2012) ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.")

The jury also heard testimony that Scott, along with her brother and mother, personally guaranteed a debt of Scott Air. The fact that Scott personally guaranteed a debt of the company could, along with other evidence, demonstrate that Scott had some control over the company's financial affairs. *See, e.g., Erwin v. United States*, 591 F.3d 313, 322 (4th Cir. 2010); *Brown v. United States*, 591 F.2d 1136, 1139 (5th Cir. 1979). Further, the jury heard an employee of Scott Air testify that Scott fulfilled the duties of an office manager and had supervisory authority over

individuals who worked in the office. The jury was entitled to credit this testimony, and to find on the basis of such testimony that Scott was a responsible person. *See id.* (recognizing that control over the day-to-day operations of a business can support a finding that an individual is a responsible person).

Moreover, the jury heard evidence that Scott was involved in filing Scott Air's Form 941 tax returns during the relevant quarters. Scott had signed the forms for two of the quarters at issue. With respect to the third quarter at issue, Scott testified that she recalled her father signing the form though she was not sure because the signature page "just disappeared." Scott's father testified that Scott had copied the information into the form because she had better handwriting than he did. Scott, however, testified that she prepared the form with information that she got from the payroll report and the company's accountant. The jury was entitled to credit Scott's testimony and could have reasonably determined that "she read them and understands more than she pretends." *Scott*, 825 F.3d at 1281.³

Scott also argues that the district court erred in not allowing her to testify about the corporate bylaws. The district court excluded the bylaws on the grounds of relevance. "We review the evidentiary rulings by the district court for an abuse

³ Scott argues that the jury's verdict was irrational because it determined she was a responsible person only for the quarters ending in September 2005, December 2006, and June 2007. That assertion is undermined, however, by the fact that those are the same quarters in which Scott was involved with the preparation of Scott Air's Form 941 tax returns.

of discretion.” *Anderson v. WBMG-42*, 253 F.3d 561, 563 (11th Cir. 2001). And we will reverse “only if the complaining party establishes that the evidentiary ruling resulted in a ‘substantial prejudicial effect,’ thus warranting reversal of the jury’s verdict.” *Id.* (quoting *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1305 (11th Cir. 1999)). Because the corporate bylaws were relevant to the question of whether Scott had the express authority to control corporate finances, the district court abused its discretion in excluding them. There was, however, significant evidence that notwithstanding the bylaws Scott had authority over the corporation’s financial affairs. The district court’s ruling excluding the bylaws, therefore, did not result in substantial prejudice and was therefore harmless.

Because the district court did not err in declining to give Scott’s proposed jury instruction on Florida law, any error in preventing Scott from testifying about the corporate bylaws was harmless, and there was sufficient evidence from which the jury could conclude that Scott was a responsible person, I would affirm. Accordingly, I respectfully dissent.