

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12523

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JASON VAN EMAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cr-20447-AHS-2

Before ROSENBAUM, NEWSOM, and WILSON, Circuit Judges.

PER CURIAM:

Everybody loves a captivating movie. But would-be film producers often need help financing their productions. That's where Defendant Jason Van Eman and his coconspirators came in.

They promised producers that they would match significant monetary deposits, so the producers could use the combined funds to finance their projects. After the producers and others deposited funds with Van Eman, though, he transferred the monies to his own bank account. With a little help from a former Wells Fargo Bank employee, Van Eman convinced the producers that he had matched their deposits. When some producers challenged him, Van Eman used deposits from other producers to pay them back.

But all Ponzi schemes eventually cave in on themselves. And that's what happened here.

Upon the scheme's demise, a grand jury charged Jason Van Eman and his coconspirators for their conduct. Van Eman proceeded to trial. After a 22-day trial, the jury found Van Eman guilty of one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; twenty-three counts of wire fraud, in violation of 18 U.S.C. § 1343; one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h); and six counts of money laundering, in violation of 18 U.S.C. § 1957.

Van Eman argues on appeal that the district court erred by excluding evidence in violation of his constitutional rights; instructing the jury on deliberate ignorance; allowing the prosecutor to make certain statements during closing argument; applying an aggravated-role enhancement and an obstruction-of-justice enhancement to his sentence; and improperly calculating the loss amount

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at sentencing.¹ After careful consideration, we affirm the judgment of the district court.

I. BACKGROUND²

In July 2019, a grand jury indicted Van Eman and two co-conspirators on one count of conspiracy to commit wire fraud, twenty-three counts of wire fraud, one count of conspiracy to commit money laundering, and six counts of money laundering.

The indictment alleged that Van Eman used his entertainment industry connections to find producers looking to finance movies, music festivals, and theater productions, and convinced them to sign Funding Agreements to fund those projects. Under the Agreements, after the producers wired significant deposits to specified bank accounts, Van Eman's coconspirator, Benjamin McConley, would match the deposit. Then, the Agreements continued, either Van Eman or McConley would use the combined

¹ Van Eman raised four other arguments for the first time in his reply brief: (1) that venue was improper in the Southern District of Florida; (2) that the district court's restitution error improperly attributed McConley's fraud to Van Eman; (3) that the prosecutor violated *Weaver v. Massachusetts*, 582 U.S. 286 (2017); and (4) that the Government violated *Brady v. Maryland*, 373 U.S. 83 (1963). Because Van Eman failed to raise these issues in his opening brief, he has abandoned them. See *United States v. Moran*, 778 F.3d 942, 985 (11th Cir. 2015).

² We take the facts, where applicable, from the evidence admitted at trial and view them in the light most favorable to the verdict. See, e.g., *United States v. Mena*, 863 F.2d 1522, 1529 (11th Cir. 1989).

sum as collateral for lines of credit to finance the producers' projects, which they would obtain within 120 days or else refund the deposit. The Funding Agreements assured the producers that they would have access to a secure account and that their investments would not be removed from the account until the bank issued the line of credit.

But that's not what happened. McConley never matched the producers' contributions. Instead, he and Van Eman transferred the producers' funds into their own bank accounts. And neither McConley nor Van Eman ever obtained any line of credit. All the while, the two repeatedly and falsely assured victims that they had applied for lines of credit on their behalf, and that financial institutions had approved them.

The pair concealed the fraud by working with Benjamin Rafael, a Wells Fargo Bank employee. Van Eman sent the producers fake bank letters, signed by Rafael, confirming that their investments were in "secure" bank accounts and that lines of credit would issue soon. And even after Wells Fargo fired Rafael, McConley and Van Eman continued to tell investors that he worked for the bank.

Over time, producers grew wise to the con and began to file civil lawsuits against McConley and Van Eman. Undeterred, the two used funds from new producers to resolve legal actions and make partial repayments.

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When the federal government charged the trio, McConley and Rafael both pled guilty, but Van Eman pled not guilty to all the charges against him and proceeded to trial.

In February 2020, the district court set a trial date and ordered both parties to file their lists of proposed witnesses and exhibits before the trial began. The Government submitted its lists ahead of trial, but Van Eman did not.

Two years later, in March and April of 2022, the court held a 22-day trial involving testimony from victims, financial experts, Rafael, and Van Eman. At the beginning of the trial, the court instructed the jury not to consider as evidence any statements that the lawyers made during opening statements or closing arguments.

Before openings began and outside the jury's hearing, the Government noted that it had not received Van Eman's exhibit and witness lists. Van Eman's counsel replied that he had not filed either because he had "no burden of proof on anything" and needed to "see how the [G]overnment's case play[ed] out." Before beginning, the court reminded the jury twice more not to consider as evidence any statement that the lawyers made during openings.

On the second day of trial, the Government attempted to introduce evidence of the civil lawsuits that producers had filed against Van Eman. Van Eman objected, arguing that the evidence conflated the burden of proof between the civil cases and his criminal one. In response, the Government asserted that the lawsuits showed that Van Eman knew he was committing fraud. The court

allowed the lawsuits into evidence with a limiting instruction to the jury.

Later that day, the Government called Anthony Buzbee, a lawyer from Texas who entered into a funding agreement with Van Eman to produce a movie for his son and daughter to star in—purportedly alongside actor Ryan Gosling. Buzbee wired Van Eman \$1.5 million under the auspices that Van Eman would use the funds to obtain a line of credit to finance the film. That never happened. Instead, McConley wired Buzbee’s investment out of the account, and Van Eman refused several times to refund it. Buzbee sued the pair and their companies in October 2014.

Returning to the criminal trial, the next day, the Government called Mark Trottier, a lawyer whose client, Adana, went into business with Van Eman in 2015. After Adana loaned Van Eman’s company, Weathervane, \$28.6 million, Van Eman sent Trottier a Wells Fargo bank confirmation letter signed by Rafael—failing to tell Trottier that Wells Fargo had in fact fired Rafael. Van Eman later sent Trottier another letter, again signed by Rafael, promising that Adana would soon get its money back. But Adana never received the money, so it sued Van Eman and obtained a TRO freezing his bank accounts. Over Van Eman’s objection, the court admitted the TRO into evidence with a limiting instruction that the standard of proof in a civil case is lower than in a criminal one.

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Several others, including producer Paul Martino, screenwriter Casey Twenter, Austrian film producers represented by lawyer Robert Cohen, producer Brad Tuckman, and filmmaker Joshua Minyard eventually sued Van Eman under similar circumstances.

On day twelve of the trial, the Government called FBI Special Agent Leonard Feula. Feula testified that he had reviewed documents from fifteen civil lawsuits filed against Van Eman and that one investor had obtained a TRO freezing Van Eman's bank account. During Feula's testimony, Van Eman re-raised his objection to certain portions of the civil lawsuits coming in, arguing that the specific language of the TRO should be redacted. In response to Van Eman's objection, the court again instructed the jury that the TRO was "based on a civil standard of proof" called "preponderance of the evidence[,]" which is a "much lower standard" than beyond a reasonable doubt.

During Van Eman's case in chief, the Government objected to Van Eman's calling of former IRS employee Andre Noisette to testify about Van Eman's tax returns. Noisette planned to present summary charts about Van Eman's finances and 72,000 pages of bank records. The Government argued that it had not received the summary charts or bank records and again reminded the court that Van Eman had never submitted an exhibit list. In response, Van Eman asserted that he could not disclose the charts because he did not receive them until the second day of trial. He also contended that not admitting the charts and bank records would violate his Sixth Amendment rights.

The court held that Van Eman's failure to disclose the charts and bank records to the Government harmed its ability to prepare for the trial. So while the court allowed Noisette to testify, it prohibited him from discussing issues related to Van Eman's taxes or using the summary charts and records. Eman moved for reconsideration, which the court denied. But the court did allow Van Eman to use the summary chart as a demonstrative aid during closing argument.

On the eighteenth day of trial, Van Eman took the stand. He testified that he relied on McConley to forward him all the confirmations from the bank and related financial documents, so he never knew that McConley was stealing investors' money. On cross-examination, Van Eman gave contradictory responses about a fake bank letter he had emailed Kevin Burke, a financial manager who represented a voice actress doing business with Van Eman. The letter was signed by Rafael and purported to confirm Wells Fargo's involvement in the "deal" between Van Eman and Burke's client. Van Eman first denied writing the letter to Burke. But then he admitted to "dictating" the letter to Rafael. And later, Van Eman said that he "wrote the letter" "[b]ased on [] request."

After the Government asked Van Eman about another fake bank letter signed by Rafael and forwarded to a producer by Van Eman, the court admonished Van Eman for failing to answer the Government's questions. Following that, Van Eman admitted that he wrote that letter, too.

On the final day of trial, the court instructed the jury that it could find Van Eman guilty of conspiracy only if the Government proved that he “knew the unlawful purpose of the plan and willfully joined it.” It issued a similar instruction for wire fraud, telling the jury that the Government had to prove that Van Eman “knowingly devised or participated in a scheme to defraud someone by using false or fraudulent pretenses, representations, or promises.” The court then defined the terms “knowingly” and “willfully” for the jury.

It also instructed them on deliberate ignorance. The court told the jury that “deliberate avoidance of positive knowledge” is the same thing as knowledge itself; the jury could find that Van Eman knew a statement was false if he “had every reason to know but deliberately closed his eyes.” But the court cautioned the jury that “negligence, carelessness, or foolishness is not enough to prove that the defendant knew the statement was false.”

The court also issued two reminders to the jury. First, it reminded them that the TRO was based on the lesser preponderance-of-the-evidence standard, and that the jury had to reach its decision beyond a reasonable doubt. Second, it reminded them that statements made by the lawyers were not evidence.

During closing, Van Eman’s counsel argued that he “was doing business while Ben McConley was doing crime.” The Government responded in its closing with the following assertion: “[I]f you weren’t here in federal court, ladies and gentlemen, if this case hadn’t been brought, if he hadn’t been indicted and arrested, he

would be out there doing the same thing with somebody else.” Van Eman objected and moved for a mistrial on the grounds that the Government’s statement implied that, if the jury didn’t convict him, Van Eman would commit more crimes. The court determined that the Government’s comment had no effect on the jury’s ultimate decision and denied the motion for mistrial. Van Eman did not ask the court to give a separate instruction to the jury about this comment.

That same day, the jury found Van Eman guilty on all 31 counts. In preparation for sentencing, a probation officer prepared a presentence investigation report, or PSI.

Van Eman objected to three of the officer’s determinations.³ First, the officer concluded that Van Eman was responsible for a loss amount of \$60 million and assessed a 22-level increase because the loss amount fell between \$25 and \$65 million. Second, the officer added a four-level enhancement because he recommended a finding that Van Eman was an organizer or leader of a criminal activity that involved five or more participants. And third, he added a two-level enhancement for obstruction of justice because he recommended finding that Van Eman had perjured himself at trial by claiming that he didn’t know McConley was committing fraud, insisting he didn’t know Rafael had been fired, and offering false evidence to conceal his creation of false Wells Fargo Bank letters.

³ Van Eman originally also objected to an enhancement based on sophisticated means. At sentencing, he conceded the issue.

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With a criminal-history score of zero and a criminal-history category of I, this all added up to a guideline imprisonment range of 262 to 327 months.

The court overruled each of Van Eman's objections and sentenced him to 262 months' imprisonment and three years of supervised release. The court also ordered him to pay \$9,196,934.36 in restitution.

II. STANDARDS OF REVIEW

We review de novo several issues Van Eman raises. We review de novo questions of constitutional law, *United States v. Underwood*, 446 F.3d 1340, 1345 (11th Cir. 2006), claims for ineffective assistance of counsel, *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002), and challenges to the court's jury instructions, *United States v. Stone*, 9 F.3d 934, 937 (11th Cir. 1993). We review evidentiary questions for abuse of discretion. *Underwood*, 446 F.3d at 1345. As for the district court's application of the sentencing guidelines, we review legal issues de novo, factual findings for clear error, and a district court's application of the guidelines to the facts with due deference. *United States v. Isaac*, 987 F.3d 980, 990 (11th Cir. 2021).

III. DISCUSSION

We divide our discussion into five parts. First, we show that the district court did not violate Van Eman's constitutional rights by excluding or admitting certain evidence. Second, we explain that the prosecutor did not commit misconduct that affected Van

Eman's substantial rights in his closing argument. Third, we discuss why the court did not improperly instruct the jury on deliberate ignorance, and why, even if it did, any error was harmless. Fourth, we conclude that we may not consider Van Eman's ineffective-assistance-of-counsel claim on direct appeal. Fifth and finally, we explain that the district court did not err in imposing Van Eman's sentence.

A. The district court did not violate Van Eman's constitutional rights by excluding or admitting certain evidence.

First, Van Eman argues that the district court violated his rights to due process, a fair trial, and meaningful adversary proceedings by excluding Noisette's summary charts and the corresponding bank records and by admitting evidence of the civil lawsuits.

We begin with the summary charts and bank records. Under the Fifth and Sixth Amendments, criminal defendants have the right to present evidence in their favor. *United States v. Hurn*, 368 F.3d 1359, 1362 (11th Cir. 2004). When a criminal defendant argues that the district court violated this right, we must first determine whether the district court committed a constitutional violation when it excluded the evidence. *Id.* If it did, then we must decide whether the error was "harmless beyond a reasonable doubt." *Id.* at 1362–63.

Of course, a defendant's right to present evidence "is not absolute." *United States v. Mitrovic*, 890 F.3d 1217, 1221 (11th Cir.

2018). For instance, “state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.” *Id.* (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998)). For that reason, a court does not violate a defendant’s right to present evidence when it excludes evidence based on rules that are not “arbitrary or disproportionate” “to the purposes they are designed to serve.” *Id.* And neither we nor the Supreme Court has ever held that “a federal rule of evidence violated a defendant’s right to present a complete defense.” *Id.* at 1222.

The upshot is that, when a district court excludes a defendant’s evidence based on the Federal Rules of Evidence or Criminal Procedure, it does not violate the defendant’s constitutional rights unless (1) the rule is itself “arbitrary and disproportionate,” which we have never held; or (2) the district court abused its discretion in its application of the Rule. *Id.* at 1222. A district court abuses its discretion only when it applies the wrong law, follows the wrong procedure, bases its decision on clearly erroneous facts, or commits a clear error in judgment. *United States v. Willner*, 795 F.3d 1297, 1316 (11th Cir. 2015).

Here, the district court excluded the summary charts and bank records from evidence under Federal Rule of Criminal Procedure 16, as sanction for Van Eman’s failure to disclose them until the fifteenth day of trial. Under Rule 16, a district court can refuse to allow a party to introduce evidence that it failed to properly disclose. FED. R. CRIM. P. 16(d)(2). For us to reverse a district court’s Rule 16 determination, the criminal defendant must show that it

prejudiced his substantial rights. *United States v. Mosquera*, 886 F.3d 1032, 1045 (11th Cir. 2018). That happens when a defendant is “unduly surprised” and so “lacks an adequate opportunity to prepare a defense,” or when “the mistake substantially influences the jury.” *United States v. Camargo-Vergara*, 57 F.3d 993, 998–99 (11th Cir. 1995).

We do not understand Van Eman to argue that Rule 16 is itself unconstitutionally arbitrary and disproportionate. That makes sense, because the Supreme Court has held that preclusion of witnesses can be a permissible sanction against a criminal defendant who violates a discovery order. *Taylor v. Illinois*, 484 U.S. 400, 411–12 (1988) (“Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The ‘State’s interest in protecting itself against an eleventh-hour defense’ is merely one component of the broader public interest in a full and truthful disclosure of critical facts.”); *Michigan v. Lucas*, 500 U.S. 145, 151 (1991) (“We have indicated that probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule.”).

Instead, Van Eman contends that the district court abused its discretion by imposing too severe a sanction: excluding the summary charts and witness lists. We disagree. The court twice ordered Van Eman to disclose his exhibits and witness lists, but he did not. Instead, he told the court that he intended “to see how the government’s case play[ed] out.” Van Eman does not dispute that

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he violated the court's pretrial order, nor that Rule 16 allowed the court to impose a sanction for that violation.

When the court imposed the sanction, it held that Van Eman's failure to disclose the charts and 72,000 pages of bank documents hampered the Government's ability to prepare its case and adequately cross-examine Noisette. Even so, the court limited the sanction by allowing Noisette to testify about the charts and by allowing Van Eman's counsel to use the charts as demonstrative aids in closing. Based on the record here, the district court did not abuse its discretion by ruling in this way.

And in any event, Van Eman has failed to show that the sanction prejudiced his right to present a defense. *See United States v. Petrie*, 302 F.3d 1280, 1289 (11th Cir. 2002) (holding that no prejudice existed when the excluded witness would have "simply provided the jury with background information regarding financial matters"); *United States v. Yates*, 733 F.3d 1059, 1065 (11th Cir. 2013), *rev'd on other grounds*, 574 U.S. 528 (2015) (concluding that a criminal defendant failed to show that the preclusion of one expert prejudiced his right to present a defense, because another expert offered the same testimony). Indeed, compelling evidence suggests the contrary, not least that Noisette testified about the contents of the charts and that counsel used them in closing. And Van Eman's argument based on the summary charts (that he used money he earned from some victims to partially fund others) is not a defense to any of the charges he faced.

In short, Van Eman has not established that the district court abused its discretion and that he suffered constitutional harm as a result. So we do not reach the question of harmless error.

We turn next to the evidence of civil lawsuits filed against Van Eman. The court admitted, over Van Eman's objection, evidence of service of fourteen lawsuits against him, each alleging that Van Eman and McConley had defrauded the producers by luring them into fraudulent Funding Agreements and failing to match their multi-million-dollar investments, or to use that money to obtain lines of credit to finance their projects.

Under Federal Rule of Evidence 403, "[t]he court may exclude relevant evidence 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. All evidence is, by definition, prejudicial in that it makes a jury more or less likely to find an alleged fact. *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1285 (11th Cir. 2015). Rule 403 provides for the exclusion of only that evidence that is *unfairly* prejudicial. *United States Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275, 1287 (11th Cir. 2001).

But cautionary jury instructions can cure potential unfair prejudice. *United States v. Calderon*, 127 F.3d 1314, 1334 (11th Cir. 1997). Because district courts should invoke the rule only "sparingly," *United States v. Lopez*, 649 F.3d 1222, 1247 (11th Cir. 2011), when we conduct a Rule 403 inquiry, we view evidence in a light

most favorable to admission, *United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006).

Here, the district court did not abuse its discretion in admitting evidence from the civil lawsuits. That evidence showed that, several years before Van Eman faced any kind of criminal sanction, he was a named defendant in over a dozen civil lawsuits alleging that he and McConley had defrauded producers and run away with the ill-gotten gains.

This evidence contradicted Van Eman’s testimony that, as he recruited producers and sent them fake confirmation letters from fired bankers, he had no idea that the Funding Agreements were a sham or that McConley never intended to match the producers’ deposits. That’s, of course, probative of his guilt—not least because Van Eman defended himself by claiming that he had “no knowledge” and “no intent” to “do[] fraud.”

The lawsuits also helped show that Van Eman defrauded later producers to obtain money he used to resolve his pending civil cases, as charged in the indictment. And the wire-fraud charge involved an allegation that Van Eman told McConley that one producer, Buzbee, would sue the pair if they didn’t refund his investment. So the lawsuits provided evidence of motives: personal profit and cover up.

But even assuming this evidence might have unfairly prejudiced Van Eman—a proposition with which we disagree—the district court mitigated that risk by instructing the jury several times about the higher burden of proof in a criminal trial. We assume

juries follow the judge's instructions. *United States v. Kennard*, 472 F.3d 851, 858 (11th Cir. 2006).

Van Eman also made a minimalist argument that the district court erred by refusing to admit into evidence an email from McConley to one of his attorneys. But Van Eman offers no citations to the record or the law in support of his argument. So he has forfeited it. FED. R. APP. P. 28(a)(8)(A); *see also Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (holding that an appellant abandons a claim “when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.”).

In sum, the district court did not violate Van Eman's constitutional rights (or abuse its discretion) by excluding the summary charts and bank records or by admitting evidence of the civil lawsuits.

B. The prosecutor's statement during his closing argument did not affect Van Eman's substantial rights.

Next, we consider Van Eman's argument that the prosecutor made an improper statement in closing argument by telling the jury that, if Van Eman had “never been indicted and arrested,” he “would be out there doing the same thing to somebody else.” Van Eman argues that this statement warrants reversal. We disagree.

We may reverse a conviction based on a prosecutor's argument only if it was both improper and prejudicial to Van Eman's substantial rights. *United States v. Nerey*, 877 F.3d 956, 970 (11th Cir.

2017). “A prosecutor’s remarks, suggestions, insinuations, and assertions are improper when they are calculated to mislead or inflame the jury’s passions.” *United States v. Azmat*, 805 F.3d 1018, 1044 (11th Cir. 2015). And improper remarks prejudice a defendant’s substantial rights only when “there is ‘a reasonable probability . . . that, but for the remarks, the outcome of the trial would have been different.’” *Nerey*, 877 F.3d at 970 (omission in original) (quoting *United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006)).

That standard is high, and Van Eman does not meet it. The Government argues that the prosecutor did nothing more than respond to Van Eman’s arguments. And it’s true that a prosecutor “is entitled to make a fair response to the arguments of defense counsel.” *United States v. Reeves*, 742 F.3d 487, 505 (11th Cir. 2014). In particular, the Government asserts that the prosecutor’s statement countered the argument that Van Eman believed he participated in a legitimate business by emphasizing that he was involved in multiple fraudulent arrangements with McConley. We assume without deciding that the statement was improper.

But even after making that assumption, we can’t say the statement prejudiced Van Eman’s substantial rights. Indeed, there’s no “reasonable probability” that this single statement, made in closing after a 22-day trial with testimony from fifteen victims, changed the outcome of the case. *Nerey*, 877 F.3d at 970. The court also mitigated any risk of prejudice by instructing the jury five separate times that the lawyers’ statements were not evidence. *See*

United States v. Bobal, 981 F.3d 971, 976 (11th Cir. 2020) (holding that a court may rectify improper statements by instructing the jury that the lawyers’ statements are not evidence, and that they may only consider the evidence). So we affirm the district court on this score.

C. The district court did not improperly instruct the jury on deliberate ignorance, but even if it did, any error was harmless.

Third, Van Eman argues that the district court should not have instructed the jury on deliberate ignorance because (1) the prosecution’s theory was based on actual knowledge; (2) the instruction was unsupported by the facts; and (3) the instruction lessened the Government’s burden of proof.

We will not reverse a conviction based on a jury instruction unless the court presented the issues of law inaccurately or “improperly guided the jury in such a substantial way as to violate due process.” *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000). That’s so because district courts have “broad discretion” to formulate jury instructions, so long as the instructions accurately reflect the law and the facts. *United States v. Williams*, 526 F.3d 1312, 1320 (11th Cir. 2008) (per curiam) (citing *Prather*, 205 F.3d at 1270).

When a charge requires the Government to show the defendant’s “knowledge,” it can do that by providing evidence of either actual knowledge or deliberate ignorance. *United States v. Hristov*, 466 F.3d 949, 952 (11th Cir. 2006); *United States v. Arias*, 984 F.2d

1139, 1143 (11th Cir. 1993) (holding that deliberate ignorance is “the equivalent of knowledge”). If the evidence supports it, the court can instruct the jury on both theories. *United States v. Matire*, 898 F.3d 1151, 1157 (11th Cir. 2018). So a court may give the jury a deliberate-ignorance instruction “when ‘the facts . . . support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.’” *United States v. Perez-Tosta*, 36 F.3d 1552, 1564 (11th Cir. 1994) (quoting *United States v. Rivera*, 944 F.2d 1563, 1571 (11th Cir. 1991)). Either direct or circumstantial evidence can support a finding of deliberate ignorance. *Arias*, 984 F.2d at 1143.

Here, Van Eman claimed he did not know what McConley was doing. Yet at least circumstantial evidence suggested that Van Eman was, at best, deliberately ignorant of the con. We repeat some—but not all—of that evidence here.

In 2012, Van Eman received a letter alleging that McConley had no assets and was providing producers fake bank letters; several producers complained to Van Eman that their investments had been removed from their bank accounts; over a dozen producers sued Van Eman because their investments were never refunded, and one lawsuit led to a TRO freezing Van Eman’s bank accounts; and at least three people told Van Eman that Rafael had been fired from Wells Fargo and his letters were fake, or that his Wells Fargo e-mail address did not work.

Still, Van Eman never inquired further and continued to rely on McConley for all information about the investors' accounts:

Q. So when it comes to confirmations of the bank, receipt of funds, attachment of funds or insurance, who are you depending on?

A. That was all Ben McConley.

Van Eman also testified that McConley “never once” told him that Rafael had been fired, that he “was not doing fraud” but was “doing real business,” and that he “didn’t find it odd” that three separate banks all sent letters with the same language. *See United States v. Calhoon*, 97 F.3d 518, 533 (11th Cir. 1996) (explaining defendant’s testimony can establish deliberate ignorance). In other words, evidence shows that Van Eman ignored several warnings that he engaged in illicit activity. Because this circumstantial evidence supports a finding of deliberate ignorance, the district court appropriately put that question before the jury.

But in any event, any error would have been harmless. We’ve held that when a court instructs the jury on both deliberate ignorance and actual knowledge and sufficient evidence exists to support a conviction under actual knowledge, any error in giving the deliberate-ignorance instruction is harmless. *Rivera*, 944 F.2d at 1572.

Here, the court instructed the jury that it could convict Van Eman only if the Government “proved beyond a reasonable

doubt” that he “knew the unlawful purpose of the plan and willfully jointed in it” (for the conspiracy counts), or “knowingly devised or participated in a scheme to defraud someone” (for the fraud counts). Several witnesses offered testimony to support a conviction under the actual-knowledge theory. For instance, Rafael testified that Van Eman knew that he was part of a criminal scheme, and that he told Rafael what to say to investors and sent him language to use in fake letters from Wells Fargo. Plus, Van Eman did all this after he knew that Wells Fargo had fired Rafael. And Marroso, one of Van Eman’s employees, testified that Van Eman coordinated and authored bank letters, so he knew that they were fake.

In short, the district court did not err in instructing the jury on deliberate indifference. And even assuming it did, any error was harmless. So we affirm on this issue, too.

D. We do not consider Van Eman’s claim for ineffective assistance of counsel on this appeal.

Van Eman asks us next to hold that he received ineffective assistance of counsel because his attorney failed to comply with the district court’s pretrial discovery order. To prevail, he must show both that (1) his counsel’s performance was deficient and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In general, though, we don’t consider ineffective-assistance-of-counsel claims on direct appeal. *United States v. Curbelo*, 726 F.3d 1260, 1267 (11th Cir. 2013). That’s so because the district court

hasn't yet considered the claim, so the parties have developed no record on counsel's performance. *Id.*; see also *Massaro v. United States*, 538 U.S. 500, 504 (2003) (explaining that the parties should generally litigate ineffective-assistance claims in the first instance in district court). The district court is also better positioned than we are to develop the facts, given that it observed counsel's performance at trial firsthand. *Massaro*, 538 U.S. at 506. For those reasons, except in the in the "rare instances" when the record is sufficiently developed, a criminal defendant should raise an ineffective-assistance claim in a collateral attack on the conviction under 28 U.S.C. § 2255. *United States v. Verbitskaya*, 406 F.3d 1324, 1337 (11th Cir. 2005).

Van Eman argues that we should nevertheless consider his ineffective-assistance claim because deficient performance and prejudice are both clear on the face of the record. Not so. We have no record, for instance, of when Van Eman provided the bank records to counsel, or whether counsel might have waited to decide whether to present financial evidence until after the Government's financial witness testified. We also have no indication of how long Noisette may have taken to do his work and why.

These holes in the record leave us with no way to tell whether counsel had sound strategic reasons for their actions. See *Strickland*, 466 U.S. at 682. In other words, the record as it stands tells us *what* Van Eman's counsel did, but not *why*. And while Van Eman argues that "any reasonable attorney" would have behaved differently than counsel did here, the court went out of its way to

note the contrary: “I don’t think at all that the record should reflect that [defense counsel is failing to disclose exhibits] willfully.” So although the record contains “some evidence” about defense counsel’s performance, “it is not sufficiently developed to allow us to address the ineffective assistance of counsel claim.” *United States v. Puentes-Hurtado*, 794 F.3d 1278, 1285 (11th Cir. 2015).

Plus, even if we assume deficient performance, prejudice certainly isn’t clear on its face. The two summary charts and underlying bank records showed that Van Eman transferred some victims’ money to other victims’ production budgets—but did not undercut the evidence fifteen victims offered that Van Eman lied to them, sent them fake bank letters, and delayed returning their investments for months, if ever.

But Van Eman’s ineffective-assistance claim is not now properly before us, so we do not reach the question of whether a developed record might later reveal deficient performance and prejudice. *See United States v. Padgett*, 917 F.3d 1312, 1318 (11th Cir. 2016) (emphasizing that a “collateral attack is the preferred vehicle for an ineffective-assistance claim”).

E. The district court did not err in imposing Van Eman’s sentence.

Finally, we consider Van Eman’s argument that the district court erred in sentencing him to 262 months in prison, because it (1) miscalculated the loss amount; (2) applied a four-level enhancement for Van Eman’s leadership role in the scheme; and (3) applied a two-level enhancement for Van Eman’s obstruction of justice.

We may overturn a district court’s finding of fact at sentencing only if our review of the evidence leaves us with “‘a definite and firm conviction a mistake has been made.’” *United States v. Green*, 981 F.3d 945, 953 (11th Cir. 2020) (quoting *United States v. Dimitrovski*, 782 F.3d 622, 628 (11th Cir. 2015)). If, on the other hand, the facts give rise to “two reasonable and different constructions, the factfinder’s choice between them cannot be clearly erroneous.” *United States v. Almedina*, 686 F.3d 1312, 1315 (11th Cir. 2012).

We begin with the court’s loss-amount calculation. Under the 2021 Sentencing Guidelines, a defendant convicted of a fraud offense receives a 22-level increase if the loss amount totals between \$25 million and \$65 million. U.S.S.G. § 2B1.1(b)(1)(L)–(M). Van Eman argues that the court clearly erred by applying that increase here.

At sentencing, the government has the burden to prove by a preponderance of the evidence loss that the defendant caused. *United States v. Stein*, 846 F.3d 1135, 1152 (11th Cir. 2017). “Loss” is the greater of either actual loss or intended loss. *United States v. Rodriguez*, 751 F.3d 1244, 1255 (11th Cir. 2014). “Actual loss” is the “reasonably foreseeable pecuniary harm that resulted from the offense.” U.S.S.G. § 2B1.1 cmt. n.3(A). And “intended loss” is the “pecuniary harm that was intended to result from the offense,” even if the harm was “impossible or unlikely to occur.” *Id.* § 2B1.1

cmt. n.3(A)(ii). When neither actual nor intended loss can be reasonably calculated, the court may instead use the amount of the defendant’s personal gain from the fraud. *Id.* § 2B1.1 cmt. n.3(B).

Van Eman appears to argue that the court should have done that here. He asserts that, of the \$20.9 million that “flowed through” his bank accounts, he sent back out to various projects about \$20.7 million. He contends that he legitimately earned the money he kept, which he says brings the loss amount under \$200,000. The Government counters that Van Eman misunderstands the guidelines: because the court reasonably determined actual and intended loss, it declined to consider Van Eman’s personal gain.

We agree. The court reached a reasonable loss estimate based on “reliable and specific evidence.” *United States v. Horn*, 129 F.4th 1275, 1302 (11th Cir. 2025). For instance, the Government’s financial expert testified at trial that Van Eman’s actions led fifteen victims to wire over \$67 million into accounts that McConley emptied. *See United States v. McCrimmon*, 362 F.3d 725, 731–33 (11th Cir. 2004) (per curiam) (holding that a defendant who recruited clients into a fraudulent scheme was accountable for the entire loss). Another victim, Trottier, also testified that his company wired over \$28 million into a bank account—which immediately disappeared. The \$28 million figure alone put Van Eman above the \$25 million threshold for enhancement. And Van Eman doesn’t contest any of these factual findings on appeal. Because the sentencing court sat

in the best position to estimate the loss amount based on this evidence, we will not upset its reasoned loss calculation. See *United States v. Gupta*, 463 F.3d 1182, 1200 (11th Cir. 2006).

Next, we consider Van Eman’s argument that the court erred in applying a four-level leadership enhancement. To show that a defendant was a “leader or organizer” of a criminal scheme, the Government must establish by a preponderance of the evidence that he exerted some control, influence, or decision-making authority over at least one other participant in the criminal activity. *United States v. Martinez*, 584 F.3d 1022, 1026–27 (11th Cir. 2009). If the Government clears that hurdle, then the enhancement applies if the criminal activity involved five or more participants. U.S.S.G. § 3B1.1(a). A “‘participant’ is a person who is criminally responsible for the commission of the offense,” regardless of whether they were convicted. U.S.S.G. § 3B1.1, comment. (n.1); see also *United States v. Holland*, 22 F.3d 1040, 1045 (11th Cir. 1994).

Here, Van Eman was a leader because he exercised control over at least one other participant in the crime: Rafael. Rafael testified that Van Eman directed him to write fake bank letters, which they used to deceive the producers. And the evidence at trial revealed at least five participants in the scheme: Van Eman; McConley; Rafael; bankers John Torres and Hernan Bermudez; and employees Gayle Dickie, Aaron McConley, and Ross Marroso. Like Rafael, Torres and Bermudez signed fake bank letters that Van Eman forwarded to producers, representing that various banks would comply with the sham Funding Agreements. Aaron

McConley, Benjamin McConley's brother, instructed Bermudez to write one such letter and worked alongside his brother to open and manage producers' accounts. And Dickie and Marroso, Van Eman's employees, both helped him recruit producers and encourage them to invest with Van Eman and McConley.

Van Eman argues that McConley played a larger role in the scheme than he did, but that's beside the point; a conspiracy can have more than one leader. *United States v. Dixon*, 901 F.3d 1322, 1348 (11th Cir. 2018). So we cannot say that the district court erred in applying the four-level leadership enhancement.

Finally, the court did not err in increasing Van Eman's offense level based on an obstruction of justice. The court should increase a defendant's offense level by two if he willfully obstructed or impeded "the administration of justice" and the "obstructive conduct related closely" to the offense of conviction. U.S.S.G. § 3C1.1. A defendant obstructs justice by committing or attempting to commit perjury, which we define as making "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). A matter is "material" when it "would tend to influence or affect the issue under determination." *United States v. Ram Kumar Singh*, 291 F.3d 756, 763 (11th Cir. 2002).

When it applies this enhancement, the district court should make specific findings about each materially false statement—though a general finding will do if it "encompasses all of the factual

predicates necessary[,]” meaning that the testimony was made under oath, was false, was material, and was intentional. *United States v. Lewis*, 115 F.3d 1531, 1538 (11th Cir. 1997) (per curiam); *see also United States v. Arguedas*, 86 F.3d 1054, 1059 (11th Cir. 1996). We then give “great deference” to the district court’s determination. *United States v. Gregg*, 179 F.3d 1312, 1316 (11th Cir. 1999).

Here, the district court did not clearly err when it applied the obstruction-of-justice enhancement. The district court made the necessary findings to support that enhancement. It determined that Van Eman perjured himself at trial when he testified that he did not know that McConley was stealing investors’ money or that Wells Fargo had fired Rafael when Van Eman directed him to write bank letters.

The record supports that finding. To begin with, we, of course, defer to the district court’s credibility determination. Only it had the opportunity to watch Van Eman testify and to find that he wasn’t “telling the complete truth.” *Singh*, 291 F.3d at 764. But more than that, several witnesses, including Rafael, expressly contradicted Van Eman’s testimony that he didn’t know that Rafael had been fired from Wells Fargo. The sentencing court also pointed to the Government’s cross-examination of Van Eman, where he repeatedly offered “convoluted answers to simple questions.”

Ultimately, we conclude that the district court applied the appropriate standard and reached a reasoned decision that Van

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Eman perjured himself during his testimony. So it did not err in applying the obstruction-of-justice enhancement.

IV. CONCLUSION

We affirm Van Eman's convictions and sentence.

AFFIRMED.