IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-1770

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

McRAY BRIGHT,

Defendant-Appellant.

**On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 06 CR 342 Honorable Joan H. Lefkow, *Judge*.**

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

Defendant-Appellant McRay Bright's ("Defendant") jurisdictional statement is not complete and correct.

The United States District Court for the Northern District of Illinois, Eastern Division, had jurisdiction over the case pursuant to 18 U.S.C. § 3231, which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." In a superceding indictment, Bright was charged with (1) conspiracy in violation of 18 U.S.C. § 371; (2) bank robbery in violation of 18 U.S.C. § 2113(a) and 2; (3) possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A)(ii); and (4) attempted escape from custody in violation of 18 U.S.C. § 751(a). R. 80. The district court entered final judgment on the verdict on March 20, 2008. R. 158. Defendant filed a notice of appeal on March 24, 2008. R. 154. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(2).

ISSUES PRESENTED FOR REVIEW

1. Whether this Court can review Defendant's claims about bank teller Jessica Lopez's positive identification of Defendant as the bank robber when Defendant failed to raise the issue in a pre-trial motion to suppress, and now cannot demonstrate good cause for that failure under Federal Rule of Criminal Procedure 12(e).

2. Whether the district court plainly erred where it admitted evidence that Jessica Lopez identified Defendant as the bank robber in a photo array that contained individuals with similar physical characteristics, where Lopez was "very certain" that the Defendant was the bank robber, where Lopez had ample opportunity to view the Defendant during the incident, and where Defendant confessed to the crime at his sentencing hearing.

3. Whether the district court committed plain error when it admitted highly probative evidence that Defendant had previously expressed an interest in robbing a bank, the evidence was not unfairly prejudicial, and it did not result in any miscarriage of justice because Defendant has admitted his crimes.

4. Whether the district court abused its discretion under Federal Rule of Evidence 403 by admitting evidence that Defendant's aunt previously worked at the bank that was robbed, and the evidence did not cause any undue prejudice to Defendant.

5. Whether the district court clearly erred when it found that Defendant was eligible for a two-point enhancement for obstruction of justice under Guideline § 3C1.1 because he escaped from custody one day after he was arrested for the bank robbery.

STATEMENT OF THE CASE

On June 29, 2006, a federal grand jury returned an indictment charging Defendant with conspiracy in violation of 18 U.S.C. § 371, bank robbery in violation of 18 U.S.C. §§ 2113(a) and 2, and possession of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. §§ 924(c)(1)(A)(ii) and 2.[1] R. 23. On March 15, 2007, the grand jury returned a superseding indictment adding a count of attempted escape in violation of 18 U.S.C. § 751(a). R. 80.

Defendant's trial commenced on April 16, 2007 and lasted four trial days. R. 97-100. On April 24, 2007, the jury returned a guilty verdict on all counts of the indictment. R. 104. After considering the parties' submissions, the district court sentenced defendant, on March 20, 2008, to 181 months' imprisonment. R. 158. Defendant filed a notice of appeal on March 24, 2008. R. 154.

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[1]Citations to the Original Record on appeal are designated as "R." followed by the docket number. References to the trial transcript are designated "Tr." followed by the page number and sentencing transcript are designated "Sent. Tr.". References to Defendant's brief are "Br." Finally, references to the United States' attached Appendix are cited as "Govt. App."

STATEMENT OF FACTS

On March 28, 2006, three men armed with guns robbed a LaSalle Bank in Chicago. Tr. 179-180. The robbery was violent – two bank employees were hit and others were threatened with guns. Tr. 180-185. The three men forced the bank tellers to open all the teller drawers and put cash into bags. Tr. 186. A robber pointed his gun at bank teller Jessica Lopez as he ordered her to hold open a bag while another employee put money from the teller drawers into it. *Id.* The robbers also stole money from the bank's vault. Tr. 184-185. The men then forced all the bank employees into the vault in an attempt to lock them in. Tr. 189. Fortunately, the robbers did not properly lock the door and the bank employees escaped. Tr. 191. The robbers stole a total of $83,000 in cash and fled the scene. Tr. 191, 503.

A. The Bank Robbery

In its case-in-chief, the government presented the testimony of four witnesses – Jessica Lopez, Thanh Staley, Larry Williams, and Brandon Lee – all of whom identified Defendant as one of the bank robbers that day.

First, bank teller Jessica Lopez testified that she was working at the LaSalle Bank on March 28, 2006. Tr. 178. She described how the robbery occurred and, in particular, told the jury how two bank employees were hit by the robbers and that she had a gun held to her head. Tr. 180-191. Lopez also

testified that she was shown a photo array by an FBI agent after the incident. Tr. 192. In that photo array, Lopez positively identified Defendant as one of the bank robbers that day. Tr. 193. She further identified Defendant as the assailant who hit security guard Larry Williams and bank manager Thanh Staley, and who put a gun to her to her head. Tr. 195. She testified that, when she was shown the photo array, she said: "it is this one, Look at the eyes. I just know it is this one." Tr. 193. Lopez confirmed at trial, when asked about her ability to see the offenders that day, that she "could see their face clearly" and that the offenders were not wearing masks. Tr. 201-202. When pressed under cross-examination, Lopez did not waiver: "I took my time. And the lips and eyes was what made me very certain that was the one." Tr. 221.

Next, bank manager Thanh Staley testified that one of the gunman hit security guard Larry Williams in the head and threatened to shoot him. Tr. 245. As the bank manager, Staley stated she stepped in and asked the robbers what they needed, and further asked them not to hurt anyone. Tr. 245. She escorted one of the offenders to the vault. Tr. 246. The offender pointed a gun at her head. Tr. 247. Staley testified that he threatened to kill her. Tr. 247. Staley could not open the vault and another teller, Romero, volunteered to help, but he was unsuccessful at first. Tr. 249. The offender got angry and hit Staley on the side of her head, stating: "bitch, I'm going to kill you, I'm going to put a bullet to

your head, quit stalling for time, you must really want to die today." Tr. 249. While suffering from the strike to her head, Staley testified that she calmed down Romero so that he could open the vault. *Id*. The robber continued to threaten to shoot Staley. Tr. 250. When the vault was finally opened, the three men forced the bank employees to fill their bags with money from the vault. Tr. 256. Staley further explained that the men put all the employees in the vault and closed the heavy vault door. Tr. 257. Staley testified that the robbers had not properly locked the vault and the bank employees managed to escape. Tr. 257. After the robbery, Staley stated that she attended a line-up at the Chicago Police Department. Tr. 260. Staley acknowledged that she could make an identification but that she did not voice her selection at that time because she wasn't "100 percent sure." *Id.* Staley, unfortunately, did not tell law enforcement agents about her dilemma at that time, but a few days later, she contacted FBI Agent Nicole Robertson and identified the individual in position number one as the bank robber. Tr. 260-261, 280. Staley explained at trial that she was under the impression she had to be 100% certain about the identification. Tr. 278. A law enforcement agent later testified that the individual in position number one during that line-up was the Defendant. Tr. 520.

The government's third eyewitness to the crime was security guard Larry Williams. Tr. 285. Williams explained how one robber pointed a gun at him and

demanded that he open the bank's vault, but that before he could respond, the robber struck him with a gun. Tr. 292. During trial, Williams was asked if he saw the robber who hit him that day in the courtroom. Tr. 293. Williams positively identified the Defendant. Tr. 293. Williams further explained that, soon after the robbery, he attended a line-up, but he was not "in the right frame of mind then" and could not identify anyone that day. Tr. 317. He further stated that the live view of Defendant in the courtroom "tells me a lot more than those small photos did." Tr. 304. When challenged on whether he had a sufficient opportunity to see the offender that day, Williams stated he had a clear view during the robbery: "I'm looking at him straight in the face" and made "eye-to-eye contact." Tr. 297, 304. Williams concluded by stating: "I am 100 percent positive that's the gentleman that I had an encounter with . . . He's the robber that hit me in the face." Tr. 305.

The fourth witness to positively identify Defendant as the bank robber was his accomplice that day, Brandon Lee. Testifying pursuant to a cooperation agreement, Lee told the jury that Defendant, a man named "Mitch," and himself drove to the bank that day. Tr. 335, 340-341. Lee further testified that all three men took money from the teller drawers, and put the bank employees in the vault before they left the bank. Tr. 345-346. Lee stated that he later met with Defendant and Mitch, and received $5,500 for his role in the robbery. Tr. 351.

Lee also noted that he saw Defendant with two new cars and some jewelry after the robbery. Tr. 354-55.

The jury heard testimony that the bank robbers had left behind a demand note, which was written on the back of a temporary bank check. Tr. 537. During the investigation, government agents executed a search warrant at Defendant's residence, where they discovered bank statements with an account number that matched the temporary check. Tr. 539. FBI Agent Robertson testified that the account holder was Tierre Dean, Defendant's cousin, and was linked to an address that Defendant used as his own. Tr. 539, 540, 547, 560.

The government also introduced evidence that Defendant's aunt, Ruby Parker, used to work at the same LaSalle bank branch two years ago as a senior bank teller. Tr. 565-568, 507. Through the testimony of George Quiroga, a LaSalle bank employee, the government showed that a senior bank teller would have information about when the armored truck delivered money to the bank on behalf of the Federal Reserve. Tr. 505-507. Additional evidence was provided by Cheri Avery, who testified that she witnessed a dice game between Defendant and his friend, Antonio Harris, where Harris bragged about committing a bank robbery. Tr. 403-406. She testified that Defendant stated in response: "Sound like something I want to do." Tr. 406.

Finally, the jury heard that, shortly after the robbery, Defendant engaged in a spending spree.[2] Cheri Avery testified that Defendant bought a new car, more than one pair of shoes, hats, diamond stud earrings and chains, including gifts for Avery – something Defendant had never done. Tr. 407-408. Avery further testified that when Defendant paid for the items, he turned his back to her to pull out the money from his pocket. Tr. 410, 412. The government then proved up the purchases of these items. Noureen Jumma, a salesperson at the Reflection Jewelry Store, authenticated a jewelry receipt purchase and testified that $530 in cash was used to make the purchase on April 14, 2006 (two weeks after the robbery). Tr. 436. She further testified that a man and a woman purchased the jewelry and that the man used small bills to make the $530 in purchases. Tr. 437-440. The government showed that this jewelry receipt was found in Defendant's car during a search of his vehicle. Tr. 548-550. One witness testified that Defendant paid him $1,100 cash for a used car by flagging him down on the street. Tr. 474, 452, 558. Another witness testified Defendant bought a car from him for $5,000 in cash. Tr. 450-453. The government also showed that on the day of the robbery, Antonio Harris was bonded out of jail for

[2] In Defendant's brief on appeal, he argues that he was "'gainfully employed," suggesting that he had the funds to pay for these goods. Br. 9. In fact, however, the evidence shows that eighteen-year old McRay Bright swept the floor at his aunt's daycare facility on an occasional basis and made not more than $50 a week. Tr. 427.

$1,500. Tr. 555. Furthermore, Defendant's cousin paid $1,170 in cash to get Defendant's car out of the impound in the weeks after the robbery. Tr. 546.

B. The Attempted Escape

Defendant was arrested on May 15, 2006 for the bank robbery. Tr. 509-510. On May 16, 2006, FBI agents went to a Chicago Police Department ("CPD") station to take Defendant into federal custody for prosecution. Tr. 510. Defendant and FBI Agent Sean Burke were waiting in a hallway at the CPD station. Tr. 512. Defendant repeatedly asked the agent questions about his case, such as if any searches were done by the FBI, and whether agents talked to his family members. Tr. 513. Defendant kept asking questions even after he was told to stop. Tr. 513. Agent Burke testified that Defendant then took off down the hallway running, with his hands cuffed behind his back. Tr. 514-515. Defendant made it to the parking lot before he was tackled to the ground by FBI agents. Tr. 519. CPD officer Joseph Ferenzi testified that he witnessed the escape that day and corroborated Agent Burke's account. Tr. 527-531.

C. The Verdict

On April 20, 2007, the jury began deliberating on the four counts in the indictment: conspiracy (Count One), bank robbery (Count Two), possession of a firearm in furtherance of a crime of violence (Count Three) and attempted escape

(Count Four). Tr. 755. On April 24, 2007, the jury returned a verdict of guilty on all four counts. Tr. 771-772.

D. The Sentencing Hearing

On March 20, 2008, the district court held a sentencing hearing. Sent. Tr. 1. Among other things, the government argued that a two-level enhancement for obstruction of justice under Sentencing Guideline § 3C1.1 should be added to the base offense level for the bank robbery conviction. Tr. 27. The government argued that several factors supported this enhancement, including Defendant's escape from federal custody at the CPD police station, and false statements made after his arrest. Tr. 27-28. In response, Defendant contended that his flight was a product of his young age and suffering in his life, and some cussing by the FBI agent at the police station. Sent. Tr. 29. The district court found that Defendant's conviction for attempted escape satisfied the obstruction of justice enhancement under § 3C1.1. Sent. Tr. 31.

Defendant also admitted, to his court-appointed mitigation specialist, that he robbed the bank. At the sentencing hearing, the mitigation specialist testified that Defendant claimed to have robbed the bank under the influence of "spiked" marijuana. Sent. Tr. 9-11, 14. At the hearing, Defendant also provided the teller victims with some "cards" that purportedly expressed his remorse for the crime. Sent. Tr. 41, 50. Finally, Defendant addressed the Court:

> First and foremost, your Honor, I'm not here to justify my acts, because it's already been done; but I am here to show remorse and let the victims know how sorry I am for what happened to them. You know, I was very young and immature and *that was a very stupid thing to do.* So, I would like to let them know that I'm sorry for what happened. *If they can't forgive me, then I can understand because what I tried to do wrecked their life.* That's why I prepared those cards for them . . . I would like to apologize to the Court for taking you through all of this trial when you could have been doing other things with your time, *when I could have just gave the information to the Court*, but I was too ashamed and embarrassed and afraid to provide the information that you wanted.

Sent. Tr. 56-57. (emphasis added). (Govt. App. 2, attached).

Defendant was sentenced near the low-end of the guidelines range, specifically, 60 months on Counts One and Four to run concurrently with 97 months on Count Two, followed by 84 months on Count Three, for a total of 181 months' imprisonment. Sent. Tr. 63.

SUMMARY OF ARGUMENT

Defendant has presented this Court with a plethora of appellate claims in an attempt to reverse his conviction for a violent bank robbery. Defendant's appellant challenges are primarily based on evidentiary issues that were not raised in the district court and thus were not preserved for appellate review. Indeed, Defendant's chief contention about bank teller Jessica Lopez's positive identification of Defendant as the bank robber is completely barred from review because Defendant failed to demonstrate good cause for not raising the issue in a pre-trial motion to suppress, as required under Federal Rule of Criminal

Procedure 12(b)(3) and (e). Even under the plain error standard, Defendant cannot succeed because, among other reasons, Defendant *admitted* to committing the bank robbery at his sentencing hearing and pled for remorse from the district court. Thus, there was no miscarriage of justice in this case. As a result, most of Defendant's appellate claims can easily be rejected because he cannot overcome the significant hurdles under the Court's standard of review.

1. Turning to the substance of Defendant's appellate claims, Defendant fails to show that Lopez's identification of Defendant in a photo array is both unduly suggestive and unreliable. The photo array used shows six African-American men of similar age, weight, complexion, and features, without any unusual physical characteristics that demonstrates suggestiveness. Moreover, Lopez testified that she was "very certain" she had selected the correct person as the bank robber and further explained that she had an excellent opportunity to view Defendant's face during the bank robbery. Also, since Defendant confessed to the crime at sentencing, there was no misidentification here because Lopez selected the right person.

2. Defendant also complains about the admission of two pieces of highly probative evidence and launches a Federal Rule of Evidence 403 challenge. However, the district court's admission of Defendant's prior statement expressing an interest in committing a bank robbery to his friend was highly probative

evidence of his participation in the crime. Similarly, the admission of evidence that Defendant selected the particular LaSalle Bank branch because his aunt, Ruby Parker, had worked there two years ago and would have knowledge of the armored truck delivery schedule, was also probative evidence of Defendant's involvement in the bank robbery. Defendant's Federal Rule of Evidence 403 argument is without merit because the evidence was not unduly prejudicial and, in any event, it does not warrant exclusion under either the abuse of discretion or the plain error standards of review.

3. Finally, the district court properly enhanced Defendant's sentence for obstruction of justice pursuant to Guideline § 3C1.1. Specifically, Defendant attempted to escape from custody one day after his arrest. Defendant ran down a hallway, through the doors of the police station, and made it to the parking lot before he was apprehended. The district court correctly concluded that Defendant was eligible for the two-point enhancement under Guideline § 3C.1.1 in light of Application Note 4(e), which provides that the enhancement is warranted when a defendant escapes from custody. Although Defendant likens this case to *United States v. Draves*, that case is distinguishable because here Defendant had already been in police custody for a day, and was not merely fleeing from a contemporaneous arrest.

ARGUMENT

I. This Court Should Not Review Defendant's Claims About Lopez's Identification Testimony Because Defendant Has Not Demonstrated Good Cause For His Failure To Raise the Issue In A Pre-trial Motion to Suppress.

Defendant asks this Court to review the district court's admission of bank teller Jessica Lopez's positive identification of Defendant as one of the bank robbers. Defendant did not preserve this claim for appellate review. First, Defendant failed to object to this evidence in the district court. Second, Defendant has not establish the required good cause for this failure. Defendant addresses this issue by stating, in a footnote, that unrelated trial events somehow affected his pre-trial failure to move to suppress the Lopez identification evidence. Defendant's argument is meritless and cannot cure this deficiency. The Court should decline to review Defendant's claim.

A. Standard of Review

When a defendant fails to move to suppress identification evidence before trial, the Court will only review the claim if the defendant can demonstrate good cause. *United States v. Hargrove*, 508 F.3d 445 (7th Cir. 2007). If a defendant cannot demonstrate good cause, the Court will not review the claim on appeal. *Id.*

B. Background

At trial, the government introduced evidence that bank teller Jessica Lopez

positively identified Defendant in a photo array as one of the bank robbers in this incident. Tr. 193. During discovery Defendant was provided the evidence of Lopez's identification, yet Defendant did not file with the district court a motion to suppress this identification evidence. Defendant also did not object at trial to the introduction of Lopez's photo array identification. Tr. 193.

C. Analysis

Federal Rule of Criminal Procedure 12(b)(3) and (e) requires that a defendant file motions to suppress *before* trial, or risk waiving the claim. Defendant has not demonstrated good cause for his total failure to raise his objection to Lopez's positive identification of Defendant before the district court. Indeed, Defendant had ample opportunity to raise this issue. Defendant did not file a motion to suppress this evidence. Nor did Defendant object to the government's introduction of this evidence at trial.

Defendant now asks this Court to review a claim that the district court did not have an opportunity to consider. In support, Defendant tells this Court, in a footnote, that the "factual basis for the claim only became evident at trial." Br. 17, fn.4. Defendant continues by identifying purported issues concerning bank teller Thanh Staley's and security guard Larry Williams's identification testimonies and claims that the testimonies somehow affected his failure to move to suppress *Lopez's* identification. Defendant's claim is baseless because Staley's

and William's testimony were separate and independent of Lopez's identification of Defendant as the bank robber. Indeed, Defendant has not demonstrated any link between these witnesses' identification testimony – because there is none. The record evidence shows that Williams made an in-court identification of Defendant as one of the bank robbers during trial. Tr. 293-294. Defendant did not object to this in-court identification. Tr. 293-305. Moreover, the record also shows that Staley eventually told the agent that she recognized the first person in a photo array as one of the bank robbers. Tr. 261. A law enforcement agent later testified that Defendant was the first person in a photo array. Tr. 520. On cross-examination, Staley further testified that she did not initially identify anyone when first shown the photo array, but that it was a few days later when she was able to recognize Defendant as the bank robber. Tr. 280. Defendant raised an objection at trial about not receiving discovery on this issue. Tr. 282. The government initially represented that there was no law enforcement report prepared on this matter, but later concluded that it was not produced in discovery as a result of a secretarial error, namely, the report was not uploaded into the computer system. Tr. 534. To solve this matter, the government agreed not to elicit any more testimony in this area, but notably the evidence about Staley's identification was expressly part of the trial record. Tr. 535.

Contrary to Defendant's assertion, there was no "avalanche"of undisclosed

positive identification at trial. Br. 17, n. 4. Simply put, Williams conducted an in-court identification, without objection from Defendant, and Staley testified that she made a pre-trial identification of the Defendant. There is no connection between the testimonies of Lopez, Staley, and Williams that would cause Defendant to strategically determine not to file a pre-trial motion raising purported concerns about Lopez's identification testimony. In short, Defendant's contentions lack any merit – he simply failed to preserve this issue for appeal, he has no good cause for this failure, and thus the claim is barred from appellate review.

II. The District Court Did Not Plainly Err When It Admitted Lopez's Highly Reliable, Positive Identification of Defendant.

Alternatively, if this Court accepts for appellate review Defendant's contentions about Lopez's identification testimony, the district court did not plainly err in admitting this evidence. At the outset, the photo array shown to Lopez contained individuals of similar physical characteristics, and thus was not unduly suggestive. Moreover, Lopez provided unequivocal testimony at trial that she had adequate time to observe Defendant, and that she was "very certain" that she had identified one of the bank robbers. Tr. 221. Finally, Lopez was only one of four witnesses who positively identified Defendant at trial, and there was other, substantial evidence of Defendant's guilt. Even if Defendant's arguments somehow past muster, Defendant cannot show that the admission of Lopez's

testimony constituted a miscarriage of justice, because Defendant admitted during sentencing that he committed the bank robbery.

A. Standard of Review

A failure to timely and specifically object to evidence limits this Court's review to the plain error standard. *United States v. Hodges*, 315 F.3d 794, 800 (7th Cir. 2003). Establishing plain error is "excruciatingly difficult." *United States v. Villarreal-Tamayo*, 467 F.3d 630, 633 (7th Cir. 2006). Under this standard, an appellate court must first find that there is error, that it is plain, and that it affects the defendant's substantial rights. *United States v. Gray*, 410 F.3d 338, 345 (7th Cir. 2005)(*citing United States v. Olano*, 507 U.S. 725, 732 (1993)). Then, a court may exercise its discretion to correct such an error if it determines that the error causes a "miscarriage of justice," *i.e.,* the conviction of an innocent person. *United States v. Wheeler*, 540 F.3d 683, 690 (7th Cir. 2008).

B. Background

At trial, bank teller Jessica Lopez testified that she was shown a six-person photo array by FBI Agent Nicole Robertson. Tr. 192. She was informed that she was under no obligation to identify anyone and that Agent Robertson told her: "if you can't pick anyone, that's fine. We would rather you not pick anyone if you are not sure." Tr. 193. Lopez testified she picked out one picture and said "it is this one. Look at the eyes. I just know it is this one." Tr. 193. She further testified

that she initialed and dated the picture, and that the picture was of the offender who hit both bank manager Stanley and security guard Williams in the face. Tr. 195. Agent Robertson later testified that she prepared the photo array using a Chicago Police Department computer program that automatically generated similar physical and racial features as the suspect. Tr. 230-31. Agent Robertson stated that Lopez selected Defendant's picture when shown the photo array. Tr. 232.

C. Analysis

Courts employ a two-step analysis in determining the admissibility of testimony concerning identification. *United States v. Harris*, 281 F.3d 667, 670 (7th Cir. 2002). First, the defendant must prove the identification procedure was unduly suggestive. *Id.* If the defendant meets his burden, then the court must determine whether the identification testimony was, under the totality of the circumstances, still reliable. *Id.*; *Neil v. Biggers*, 409 U.S. 188, 198-200 (1972). The two steps are to be taken sequentially. *McGowan v. Miller*, 109 F.3d 1168, 1173 (7th Cir. 1997). It is only where there is a "substantial likelihood of irreparable misidentification" that identification testimony violates a defendant's right to due process. *Gregory-Bey v. Hanks*, 332 F.3d 1036, 1044 (7th Cir. 2003) (quoting *Biggers*, 409 U.S. at 198).

1. The Identification Procedures Were Not Unduly Suggestive.

To meet his initial burden of establishing that the identification procedures were impermissibly suggestive, Defendant "must show that there was a substantial likelihood that [his] identification was based on an irreparable misidentification." *United States v. L'Allier*, 838 F.2d 234, 239 (7th Cir. 1988). Defendant cannot satisfy his burden. The six men pictured in the photo array, attached to this brief, are all African-American males. Govt. App. 1. They appear to be of the same approximate age. *Id.* Only the head and neck of each men are visible, and thus the pictures do not provide a basis for distinguishing the physical build of each person. *Id.* However, from the shoulders upwards, the weight of each person appears similar. *Id.* Five out of the six men have short black hair; only one (not the defendant) is bald. *Id.* All men are wearing white t-shirts and thus their clothing could not have affected the identification. *Id.* None of the men are wearing glasses or jewelry that could impact the identification. *Id.* The photos of the men contain no unusual physical or facial characteristics that allows one picture to stand out. Under these circumstances, the photo array used was reasonable. As this Court has stated, "[o]ne cannot expect a line-up to consist of five persons with identical measurements and countenances." *United States v. Funches*, 84 F.3d 249, 253 (7th Cir. 1996).

Defendant complains that the complexion of some of the men are darker than him. However, "[s]kin color is a matter of degree." *Funches*, 84 F.3d at 253. No two individuals have identical skin complexion. Thus, this Court has recognized that minimal differences in skin color do not contribute to the overall validity of a photo array. *Id.*; *see also United States v. Lawson*, 410 F.3d 735, 739 (D.C. Cir. 2005) (defendant complained that his skin complexion was lighter than others in the photo array, but the court held that it was sufficient that at least one pictured individual contained the same complexion).

Furthermore, this Court has upheld identification testimony where there were multiple differences in physical characteristics among the men in a line-up or photo array. For example, in *United States v. Funches*, defendant complained that he was 3-5 inches shorter and 20-45 pounds lighter than the other participants, and was the only suspect wearing a green T-Shirt with a slight build and a dark complexion. The Court held that while individuals in the photo array had differences in height, weight and coloring, those differences were minimal and did not result in an unduly suggestive line-up. *Id.* at 253. Furthermore, in *United States v. Traeger*, 289 F.3d 461, 474 (7th Cir. 2002), defendant asserted that his line-up did not include any other individual that matched his height (6' 5") and weight (350 lbs). The Court held that the line-up was not unduly suggestive, and that "it would have been difficult to find five

other men approximating Traeger in size and physical appearance . . . [a]uthorities conducting line-ups are required only to make reasonable efforts under the circumstances to conduct a fair and balanced presentation." *Traeger*, 289 F.3d at 474. Finally, in *United States v. Moore*, 115 F.3d 1348, 1359 (7th Cir. 1997), the defendant claimed that he was the only person in the photo array with a notched eyebrow, and that eyewitnesses had previously stated the offender had distinctive eyebrows. Nevertheless, the court held that the photo array was not unduly suggestive because it showed "six African-American males, young, with some hair, and [with] 'at least some similar features.'" 115 F.3d at 1360.

Here, the differences among skin color are minimal. Not one individual is substantially darker-complexioned than the other. App. 1. Moreover, Defendant rests his entire argument on one purported difference – skin color – and he does not point to any other physical differences among the men in the photo array. In short, Defendant's contention about a 50/50 chance of getting selected is meritless because the photo array shows six African-American men of *similar* age, weight, facial features, and complexion.[3] "A lineup of clones is not required." *United States v. Arrington*, 159 F.3d 1069, 1073 (7th Cir. 1998).

[3]Defendant's citation to case authority also provides no assistance to this Court. Defendant's primary citation in support of its position, *United States v. Newman*, 144 F.3d 531, 535 (7th Cir. 1998), involved a "show-up," where a witness confronts only one suspect and makes an identification. This was not the case here since a six-person photo array was used. Even then, the Court upheld the identification in *Newman* because it found it reliable.

In addition, the pre-identification procedures were reasonable. A six-person array was used, which this Court has recognized is sufficient. *United States v. Carter*, 410 F.3d 942, 948 (7th Cir. 2005). FBI Agent Robertson told Lopez that the assailant may not be in the line-up and she need not select any picture. Tr. 285. Yet Lopez selected Defendant and stated that she was "very certain" about her selection. Tr. 221. Defendant suggests that Agent Robertson purposefully selected the array to include only two photos of purportedly medium-skinned African-American men. However, there is no evidence in the record to support this bald assertion. First, Agent Robertson testified that the photos she selected were individuals of the "same complexion." Tr. 235. Second, Agent Robertson also testified that she did not recall Lopez's description of the Defendant's skin color. Tr. 235. Third, Lopez did not focus on skin color at her trial testimony, but instead repeatedly pointed to eyes and lips as significant factors in making her identification. Tr. 221. Accordingly, there is no record evidence that skin color was a key feature in preparing the photo array or in Lopez's identification.[4] Accordingly, Defendant cannot meet his substantial

[4]Defendant also makes a sweeping claim, namely, that Lopez cannot distinguish between African-Americans. However, when read in context, the record shows that Lopez made an off-hand remark when pushed to describe the *skin color* of the bank robber. In so doing, Lopez said: "It was medium . . I'm not African-American. You know, I only have two family members that are. So to me everyone is the same." Tr. 214. Lopez certainly did not testify that she was unable to distinguish between African-American men in general.

burden of showing the identification was unduly suggestive, let alone suggestive.

2. Lopez's identification was reliable.

The Court need not address the reliability of Lopez's identification testimony because Defendant has not shown that the photo array was unduly suggestive. *United States v. Sleet*, 54 F.3d 303, 309 (7th Cir. 1995). However, even if this Court chooses to consider reliability, Lopez's identification testimony was properly admitted because the totality of circumstances establishes that the identifications were reliable. In analyzing the "totality of the circumstances," courts must examine:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199 (1972).

At the outset, Defendant concedes that the first *Biggers* factor is satisfied because Lopez had a good opportunity to view Defendant's face. Br. 24; Tr. 202. Indeed, Lopez testified unequivocally: "You could see their face [sic] clearly." Tr. 202. None of the bank robbers were wearing masks or hiding their faces that day. Tr. 201. And, unfortunately for Lopez, she was face-to-face with Defendant during the violent bank robbery.

The second *Biggers* factor is also established because Lopez had an excellent opportunity to view Defendant. Lopez testified that the assailant (later identified as Defendant) grabbed Lopez and put a gun to her head. Tr. 186. The assailant forced another teller to put additional money in his bag from teller drawers. Tr. 186-87. The teller went up and down the teller line opening drawers and putting money in the bag. Tr. 188. During that entire time, Lopez testified that the assailant was right next to her – "he was like right here on me" – with a gun on her head. Tr. 195. The assailant then forced Lopez and others to enter the bank vault to lock them inside. Tr. 191. Thus, Lopez was not hiding in a corner; she was front and center during this bank robbery and had an unobstructed view of Defendant robbing the bank. Citing a Sixth Circuit case, Defendant claims that Lopez was "unprepared for the robbery" and thus could not possibly concentrate on the bank robbers' features. Br. 25, *citing United States v. Russell*, 532 F.2d 1063, 1066 (6th Cir. 1976). Yet, Defendant does not cite this Court's own precedent in *United States v. Traeger*, 289 F.3d 461, 474 (7th Cir. 2002), where it recognized that when a witness spent time in close proximity to a bank robber, "her attention was likely sharpened by the fact that she was being robbed." Accordingly, the second *Biggers* factor weighs in favor of upholding the identification.

Contrary to Defendant's assertion, the third *Biggers* factor (the accuracy of the prior description) does not support his claim. Lopez testified that she informed law enforcement after the incident that the men were "little older than me or a little younger" and that she was 23 years old at the time of the incident (Defendant was 18 years old). Tr. 212. Lopez also told law enforcement that the assailant was "a few more inches taller than me," and that she was 5 foot 6 inches at the time of the incident. Tr. 214. Lopez stated that the assailant was a medium-complexion African-American and further stated his skin color was "caramel." Tr. 214. Defendant claims the third *Biggers* factor weigh in his favor, but Defendant failed to introduce evidence about his own height or weight at trial. Thus, he has not established a proper appellate record and the accuracy of Lopez's description on these factors is not in the record. Indeed, Defendant's failure should weigh against him because he bears the burden in asserting his *Biggers* challenge. With respect to skin color, Defendant's photo in the array (App. 1) shows that Lopez's description of a medium skin-toned African-American to be correct. Finally, Defendant, who was eighteen at the time, takes issue with Lopez's estimate of his age, but the record evidence also shows that Lopez informed law enforcement that she believed that the men were "very young" and that, at most, the men could not be over thirty years old. Tr. 212-213.

The fourth *Bigger*s factor bolsters the reliability of Lopez's identification. Lopez was confident about her identification of Defendant as the bank robber. On several occasions, Lopez testified that she was "very certain" about her selection, further stating: "it is this one. Look at the eyes. I just know it is this one." Tr. 193. Faced with this unequivocal identification, Defendant selectively quotes from the trial transcript and claims that Lopez was "hesitant." Br. 27. When read in context, however, Lopez explained that she was hesitant at first because none of the men in the photo array were wearing any jewelry, and she distinctly remembered that the assailant was wearing an earring. Tr. 193. However, once she focused on the pictures without concern for the jewelry, she affirmatively and confidently identified Defendant. Tr. 193. Defendant also improperly focuses on Lopez's testimony that Defendant's eyes were "cold" on the day of the robbery but "sad" in the photo array. Br. 27. This is a distinction without a difference. Naturally, a criminal robbing a bank (and striking two victims in the process) would have "cold" eyes during the robbery, but "sad" eyes when caught for a crime and photographed during police booking procedures. Tr. 222. Lopez's observation does not relate to a distinction about the *physical* characteristics of the offender's eyes, but rather about the *expression* that the eyes conveyed. While Lopez noted that difference, she also affirmatively stated that she remembered the assailant's eyes during the robbery and that

Defendant's photo array matched the eyes she remembered. Tr. 221. In short, Defendant's out-of-context quotations cannot overcome Lopez's highly reliable, positive identification of Defendant as the bank robber.

Finally, on the fifth *Biggers* factor, Defendant's identification took place five weeks after the bank robbery. While not ideal, the delay was not intentional; after five weeks of investigation, law enforcement agents had developed sufficient information that indicated Defendant was one of the bank robbers. Nevertheless, this Court has upheld identification testimony when the period of time between the offense and the identification is much longer. For example, in *United States v. Fryer*, 974 F.2d 813, 823 (7th Cir. 1992), the court found that a period of two and a half months from the offense to the identification "is not so long as to cast doubt on [its] reliability." In *United States v. Moore*, 115 F.3d at 1360, the court upheld an identification made from a photo array showed six months after the incident. Moreover, similar to the instant case, in *United States v. Traeger*, 289 F.3d 461, the court found that three weeks after a robbery was a time period "when the robber's appearance was still fresh in [the witness's] memory." Under this Court's precedent, a five-week period does not substantially diminish the reliability of the identification.

Ultimately, in reviewing identification testimony, the Supreme Court has cautioned that "[t]he primary evil to be avoided . . . is a very substantial chance

of irreparable misidentification." *Biggers*, 409 U.S. at 198. Defendant's claim completely fails because the totality of circumstances demonstrate that Lopez's opportunity to view Defendant, her degree of attention to Defendant's features, and her confidence in her identification after the robbery conclusively establishes that there was no irreparable misidentification in this case.

3. Admission of Lopez's Identification Testimony is Not Plain Error.

Even if the Court finds that the forfeited identification issue gave rise to a plain error, Defendant still cannot prevail because the admission of Lopez's testimony did not result in a miscarriage of justice. *United States v. Funches*, 84 F.3d 249, 255 (7th Cir. 1996). Simply put, Defendant *admitted* to committing the bank robbery at his sentencing hearing. He expressed his remorse to the victims of the crime. He provided them with cards apologizing for his actions. Indeed, he sought to explain his participation in the robbery to the mitigation specialists by claiming he committed the bank robbery under the influence of "spiked marijuana." Sent. Tr. 9-11, 13-14. With this admission, Defendant cannot now claim a miscarriage of justice, *i.e.* the conviction of an innocent person. Put another way, there was not a misidentification by Lopez because Defendant's post-arrest confession has shown that she selected the correct person.

Furthermore, Lopez's identification was corroborated by overwhelming evidence at trial. Security guard Williams and teller Thanh Staley also positively

identified Defendant at trial. Tr. 260-261, 294. Brandon Lee identified Defendant as his accomplice in the robbery, and gave detailed testimony about how the heist was carried out that day. Tr. 340-345. Thus, three other witnesses identified Defendant in addition to Lopez. Moreover, the government introduced substantial circumstantial and corroborating evidence. A demand note left at the robbery was traced to Defendant's cousin. Tr. 539, 540-547. Defendant had discussed committing a bank robbery with his friend, Antonio Harris, shortly before the crime. Tr. 406. Defendant also went on a spending spree shortly after the robbery, buying two cars, and jewelry, *i.e.* chains and diamond earrings, while earning a maximum of $50 a week sweeping a day care facility. Tr. 408, 427.

As the Court has noted, establishing plain error is "excruciatingly difficult." *Villarreal-Tamayo*, 467 F.3d at 633. Moreover, the Court has also recognized that the testimony of a single eye-witness (such as security guard Williams) or a co-conspirator (such as Brandon Lee) is sufficient for the jury to return a conviction. *See Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005) (testimony of single eyewitness sufficient to convict); *United States v. Payton*, 328 F.3d 910, 911 (7th Cir. 2003)(testimony of co-conspirator alone was sufficient to convict). Here, defendant's guilt "was so clear that he would have been convicted" even without Lopez's identification testimony. *Funches*, 84 F.3d at 255 (*quoting United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988). Defendant only offers

this Court speculation in his plain error argument, such as his claim that the jury had doubts about Defendant's involvement during its deliberation. Nothing in the trial transcript suggests this fact. The jury's claim that it was deadlocked after just one day of deliberation is inscrutable; we simply do not know the reason for such an early 'deadlock.' The judge then instructed the jury as follows :"reexamine your own views and change your opinion if you come to believe you are wrong." Tr. 758. Notably, once the district court gave this additional instruction, the jury returned a verdict of guilty on all counts the next day. Tr. 771.

Accordingly, even if the district court committed error in admitting Lopez's testimony, the error was not plain because Defendant would have been convicted without Lopez's testimony. Moreover, Defendant's confession during the sentencing hearing that he committed the bank robbery demonstrates that the right person was convicted for this crime and there was no miscarriage of justice.

III. The District Court Properly Admitted the Testimony of Cheri Avery And Evidence Concerning Ruby Parker That Further Proved Defendant Committed the Bank Robbery.

At trial, the government introduced evidence that Defendant had expressed an interest in committing a bank robbery to his friend, Antonio Harris. The government also presented evidence that Defendant's aunt, Ruby Parker, had worked at the particular LaSalle Bank branch several years ago and would have

knowledge of the armored truck delivery schedule. Both pieces of evidence were relevant under Federal Rule of Evidence 401 because they provided probative evidence that Defendant committed the bank robbery and helped explain why Defendant selected the particular bank that was robbed. Defendant now makes a meritless Federal Rule of Evidence 403 argument claiming these pieces of highly relevant, circumstantial evidence somehow demonstrates guilt-by-association. Even if the evidence had Rule 403 concerns (which it does not), Defendant cannot demonstrate that admission of the Ruby Parker evidence was *both* an abuse of discretion by the district court and caused more than just harmless error. With respect to Avery's testimony, because Defendant forfeited the claim by failing to object in the district court, Defendant's claim is subject to plain error review, and as previously mentioned, there is no miscarriage of justice in this case because Defendant has admitted to robbing the bank.

A. Standard of Review

This Court reviews a district court's evidentiary rulings for an abuse of discretion, and will reverse an evidentiary ruling only where no reasonable person would agree with the decision made by the trial court. *United States v. Thomas,* 453 F.3d 838, 844-45 (7th Cir. 2006). Even if there was a mistake, this Court will not reverse if the error was harmless, *United States v. Bonty,* 383 F.3d 575, 579 (7th Cir. 2004), and so the Court evaluates challenges to the admission

of evidence in light of all of the evidence that was before the jury. *United States v. Holt,* 460 F.3d 934, 936 (7th Cir. 2006). The district court's admission of evidence under Rule 403 is entitled to special deference because such rulings are necessarily context-sensitive, and such rulings will only be reversed when no reasonable person could take the view adopted by the trial court. *United States v. LeShore,* 543 F.3d 935, 939 (7th Cir. 2008).

Furthermore, when a defendant fails to object to the admission of evidence in the trial court, the claim is forfeited and the plan error standard applies. *Id*. Thus, a Defendant must now show the purported error was "such a serious abuse of discretion" and that the "evidence was so obviously and egregiously prejudicial that the trial court should have excluded it even without any request from the defense, and that no reasonable person could argue for its admissibility." *Id.*

B. Background

At trial, Cheri Avery testified that she witnessed a dice game between Defendant and Antonio Harris where Harris bragged about committing a bank robbery. Tr. 405-406. She testified that Defendant stated in response: "Sound like something I want to do." Tr. 406. She further stated that the word "lick" was used to describe the bank robbery in that conversation. Tr. 404, 406. Cooperating co-defendant Brandon Lee later testified that the Defendant used the same word – "lick" – when the bank heist was described to him. Tr. 336.

During Avery's testimony, Defendant raised an objection to hearsay, but did not object under Rule 403. Tr. 400.

The government also showed that Defendant had an aunt named Ruby Parker, who used to work at the bank several years ago. Tr. 507. Through the testimony of LaSalle Bank employee George Quiroga, the government showed that Defendant's aunt would have knowledge of the armored truck delivery schedule in the position she held at the bank. Tr. 507. The government contended that this evidence helped explain why Defendant selected the LaSalle Bank branch for his heist. Defendant objected to the admission of this evidence in a pre-trial motion under Rule 403, but the district court properly denied it, and stated:

> [T]his seems to be relevant evidence. It is one of these things that, yes, it is prejudicial in the sense, but is it unfairly prejudicial? I don't think so. It does tie him in one possible way to – or one reasonable way to why that particular bank was selected, so I'll deny this motion.

Tr. 12.

C. Analysis

Because all probative evidence is prejudicial to the party against whom it is introduced, such evidence should only be excluded if the prejudice is *unfair*. *United States v. Adames,* 56 F.3d 737, 742 (7th Cir. 1995). Evidence fails the Rule 403 test "only if it will induce the jury to decide the case on an improper

basis, commonly an emotional one, rather than on the evidence presented." *United States v. Wantuch,* 525 F.3d 505, 518 (7th Cir. 2008). Put another way, the probative value "must be insignificant compared to its inflammatory nature so that the evidence *unfairly* prejudices the defendant. *United States v. Gougis*, 432 F.3d 735, 743 (7th Cir. 2005)(emphasis in original) (*quoting United States v. Rutledge*, 40 F.3d 879, 885 (7th Cir. 1994)).

1. Defendant Forfeited His Appellate Claim About Antonio Harris' Conversation with Defendant.

Similar to Defendant's claim about Lopez's identification, Defendant again raises before this Court a claim that was not preserved for appellate review. Defendant now claims that he objected, pursuant to Rule 403, to the introduction of Cheri Avery's testimony and provides this Court certain quotations from the record. However, when Defendant's objection is read in context, it is clear that Defendant only objected based on hearsay grounds. (Govt. App. 3, attached).

Specifically, when the government introduced evidence concerning the conversation between Antonio Harris and Defendant, Defendant stated: "I'm going to object to the extent that these are non-conspiratorial discussions." Tr. 400. The government responded: "They are not being offered for the truth, Your Honor." Tr. 400. The district court recognized that Defendant's statements were "an admission by the defendant" under Rule 801(d)(2), but Defendant asserted that Harris' statements were offered for the truth: "you are suggesting that

because of what he [Harris] said this motivated or caused my client to commit the bank robbery." Tr. 401. The government argued that Harris's statements were offered to show "defendant's knowledge and to give context for the defendant's statement that he thinks it is a good idea." *Id.* Again, Defendant objected: "That would be fine if the person who said that was a co-conspirator, but he is not. It is hearsay." Tr. 402. The district court ruled that the evidence was admissible and that the debate about whether or not the conversation instigated Defendant to commit the bank robbery was a question of weight, not admissibility. Tr. 402.

Significantly, not once did the parties or the Court refer to Rule 403, to the question of whether the evidence was unfairly prejudicial, or whether the probative value outweighed the prejudicial effect of this testimony. The objection and subsequent colloquy concerned hearsay only, and whether the statements were offered for the truth of the matter asserted. Defendant claims that he made a second objection under Rule 403. There was no second objection, let alone any objection under Rule 403. Accordingly, the claim was forfeited and is subject to plain error review only.

2. Admission of Cheri Avery's Testimony Was Not Plain Error.

As the Court recently noted in *LeShore*, a defendant raising a forfeited claim, normally entitled to an abuse of discretion standard, now faces a nearly insurmountable hurdle. Defendant must show that no reasonable person could

argue for its admissibility and that admission of the evidence "affects the fairness, integrity, or public reputation of judicial proceedings." 543 F.3d at 939. "[T]his is an extremely difficult showing to make." *Id.*

Here, Cheri Avery's testimony provided evidence about a prior admission by Defendant expressing an interest in committing a bank robbery. That evidence is highly probative and plainly relevant under Federal Rule of Evidence 401 in a trial where the defendant is charged with a bank robbery. Defendant raises a guilt-by-association argument, but also notes that this Court has not applied Rule 403 to general associational evidence. Br. 34. Undeterred, Defendant draws an analogy from the gang context, but in so doing misapplies the Court's holding. The Court's precedent in this area applies where evidence is introduced that Defendant is a *member* of a gang, not that he merely knows individuals who are in gangs. *United States v. Irvin*, 87 F.3d 860, 864 (7th Cir. 1996); *United States v. Thomas*, 86 F.3d 647, 653 (7th Cir. 1996). In short, Defendant has no provided no support in this Court's precedent for his novel proposition.

Regardless, the evidence itself was not unfairly prejudicial. There was no testimony about Antonio Harris' background, his criminal history, or details about any prior bank robbery, such as the banks that he robbed, the amounts stolen, or his accomplices. Nor was their evidence about Defendant and Harris's

past encounters, and the nature and extent of their relationship. The *only* evidence that was admitted, purely for context for Defendant's admission, was Cheri Avery's testimony that Harris was "bragging about a bank robbery" and that he stated "you have to be in and out quick." Tr. 404. No further details or elaboration was provided. Indeed, the focus of Avery's testimony was Defendant's response to Harris, where Defendant stated: "Sound like something I want to do." Tr. 406. The government, in closing argument, did not argue that Defendant's association with Harris showed he was guilty; the government only contended that Defendant's prior admission was probative evidence that he committed the bank robbery. Tr. 695, 735-736. With this limited detail and emphasis placed on Harris's prior acts, it is inconceivable that the jury convicted Defendant merely because he was at a dice game with Harris. This same jury heard from four witnesses who positively identified Defendant as the bank robber.[5]

In sum, Defendant cannot even meet the basic standard of showing that the evidence was unfairly prejudicial. Compounding the hurdle is the discretion this Court gives to the evidentiary rulings of the district court with the abuse of

[5]Defendant's primary authority in support, *United States v. Romo*, 669 F.2d 285 (5th Cir. 1982), provides no assistance. In *Romo*, the government introduced evidence that two acquaintances of the defendant had multiple convictions for drug-related offenses. The Fifth Circuit held that the information was highly prejudicial and was not probative that defendant committed a drug offense. Here, only minimal information was introduced about Antonio Harris, no prior convictions were discussed, and the evidence only provided context for Defendant's prior statements.

discretion standard. When combined with his failure to raise a Rule 403 objection at trial, under *LeShore*, Defendant has failed to show that no reasonable person would have admitted Avery's testimony, that the district court should have excluded it without a motion, or even that the evidence affected the fairness and integrity of the proceedings. Defendant's claim must fail.

3. The District Court Did Not Abuse Its Discretion By Admitting Evidence About Ruby Parker's Prior Employment At The Bank.

The district court properly admitted evidence that Defendant's aunt, Ruby Parker, was a former employee of the same LaSalle Bank that Defendant was charged with robbing and would know about the armored truck delivery schedule that delivered the bank's money. As the district court recognized in its pre-trial ruling, the testimony was probative evidence on why Defendant selected the particular LaSalle Bank branch for the robbery, instead of one of the other hundreds of banks in the Chicagoland area.

Defendant has not shown that the admission of the evidence was an abuse of the trial court's discretion. Indeed, Defendant has not even coherently explained to this Court why the evidence was unfairly prejudicial. Br. 39. Defendant lumps the Ruby Parker evidence into his guilt-by-association argument, but claims prejudice because "Parker breached her employer's trust by disclosing this information to others outside the workplace." Br. 39. There

was no evidence presented that Parker had a criminal history or was an accomplice to the crime. Indeed, Defendant essentially claims that the jury convicted him for the bank robbery merely because he associated with a person who breached her employer's trust. Defendant's contention is meritless. Defendant has not pointed to any unduly prejudicial impact from this testimony, let alone overcome the harmless error standard afforded to a trial court's decisions on the admission of evidence.

IV. The District Court Did Not Clearly Err By Enhancing Defendant's Sentence Under Guideline § 3C1.1 Because He Escaped From Custody After His Arrest for Bank Robbery.

Defendant was convicted for attempted escape in violation of 18 U.S.C. § 751(a) when, one day after his arrest, he ran out of a Chicago Police Department police station on foot when the FBI agent was taking custody of Defendant. The district court properly enhanced Defendant's sentence under the Obstruction of Justice provision of Guideline § 3C.1.1. Contrary to Defendant's assertions, this Court's holding in *United States v. Draves*, 103 F.3d 1328 (7th Cir. 1997) does not warrant a different conclusion because Defendant escaped from custody, not from a contemporaneous arrest. Accordingly, the district court's calculation of the guidelines range was not clear error.

A. Standard of Review

The Court reviews the district court's factual findings in the sentencing

context for clear error. *United States v. Bothun,* 424 F.3d 582, 586 (7th Cir. 2005); *United States v. Turner,* 400 F.3d 491, 500 (7th Cir. 2005); *United States v. Hart,* 226 F.3d 602, 608 (7th Cir. 2000). A finding of fact is clearly erroneous only when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake had been committed." *United States v. McEntire*, 153 F.3d 424, 431 (7th Cir. 1998) (internal quotations omitted). The Court gives "due deference to the district court's application of the guidelines to the facts." *Draves*, 103 F.3d at 1337.

B. Background

At the sentencing hearing, the government asserted that Defendant's attempt to escape from custody, one day after his arrest, warranted a 2-level enhancement under Guideline § 3C.1.1. Sent. Tr. 27. Indeed, the evidence introduced at trial showed that Defendant was at a CPD police station waiting to be transferred from state to federal custody, and that he ran (while handcuffed) down a hallway, out the doors, and into the CPD parking lot before he was captured by law enforcement. Tr. 510-519. The government further noted that Defendant was convicted for the crime of attempted escape pursuant to 18 U.S.C. § 751(a) for that conduct. Defendant countered that he ran because he was young and was upset because a law enforcement agent had cussed at him. Sent. Tr. 29. The district court found that Defendant's conduct and his conviction

for attempted escape was a "clear enhancement" under § 3C.1.1. Sent. Tr. 31.

The district also properly considered the sentencing factors under 18 U.S.C. § 3553(a) at the hearing. Sent. Tr. 59-60. Ultimately, the district court sentenced Defendant to sixty months on Count One and Four, and ninety-seven months on Count Two, to run concurrently. The sentence was near the low-end of the Guidelines range. In addition, the district court imposed the mandatory seven-year consecutive sentence for a violation of 18 U.S.C. § 924(c) for Defendant's conviction on Count Three. Sent. Tr. 63.

C. Analysis

In *United States v. Draves*, the Court considered whether § 3C.1.1 applied where a defendant, who had just been *arrested* and placed in the back of a police car, made an attempt to escape. 103 F.3d at 1337. The defendant was apprehended three houses a way. The Court held that the defendant "was panicked by the arrival of the officers, and when the opportunity arose during the arrest, spontaneously and without deliberation fled the car on foot." *Id.* The Court recognized that Application Note 4(d) to § 3C1.1 provided that fleeing from "arrest" did not warrant a 2-point enhancement but, according to Application Note 3(e), escape from "custody" did merit the enhancement.[6] *Id.* The Court held

[6]At the time of the Court's decision in *Draves*, the relevant provisions were numbered Notes 3 and 4 but the language remains identical in the applicable November 2007 Guidelines version, which are now numbered Application Note 4(e) for escaping from custody, and Note 5(d) for fleeing arrest.

that, under the particular circumstances presented in *Draves*, Application Notes 3 and 4 overlapped and it was difficult to discern whether the defendant fled while he was under arrest or, instead, willfully attempted to evade custody. Accordingly, the Court stated that the proper inquiry was "whether defendant's departure from *the scene of arrest* was spontaneous or calculated." *Id.* at 1338. (emphasis added). Giving deference to the district court's factual findings, the Court held that Defendant's actions were spontaneous and not subject to the enhancement.

Subsequent cases by the Court have applied this holding to other factual circumstances to determine whether the enhancement applied. *See United States v. Arceo*, 535 F.3d 679 (7th Cir. 2008) (applying enhancement where defendant knew he was to be charged with a crime and fled to Mexico for several years before returning to the United States under a false identity); *United States v. Porter*, 145 F.3d 897 (7th Cir. 1998) (applying enhancement where defendant knew indictment was imminent and fled the jurisdiction and changed his identity). However, the Fourth, Fifth, Sixth, Ninth, and District of Columbia Circuits have cautioned that the distinction between "spontaneous" and "calculated" conduct discussed in *Draves* goes too far when applied to defendants firmly in *custody* because it is inconsistent with the plain language of Application Notes 4 and 5. *United States v. Huerta*, 182 F.3d 361, 365 (5th Cir. 1999); *United*

States v. McDonald, 165 F.3d 1032,1035 (6th Cir. 1999), *abrogated on other gds*, *United States v. Jackson-Randolph*, 282 F.3d 369, 389 (6th Cir. 2002); *United States v. Williams*, 152 F.3d 294, 304 (4th Cir. 1998); *United States v. Maccado*, 225 F.3d 766, 770 (D.C. Cir. 2000).[7] This is because the Application Notes clearly distinguish between "escape from arrest" and "escape from custody," where the former does not merit the enhancement but the latter does.

Extending *Draves* to Defendant's escape here is not warranted. The Court's original concern in *Draves* was directed towards a situation where the arrest was "a bit further along" and where Application Notes 4 and 5 overlapped. *Draves*, 103 F.3d 1338. In that "unusual set of factual circumstances," the Court recognized that further analysis was required to determine whether the defendant acted willfully to escape custody, or merely spontaneously to evade an arrest as many offenders do upon confrontation with police officers. *Id.* The Court did not seek to discard the textually-based distinction between "arrest" and "custody." Rather, the Court expressly limited its test to situations when "a defendant runs from arresting officers . . . from the scene of arrest." *Id.* at 1338.

[7]The Third Circuit has also declined to adopt an extension of *Draves*, and in an unpublished case with facts similar to this one, found the enhancement warranted where Defendant had been in "a state of legal custody" for five hours and attempted to escape as the police van pulled up to a county prison. *United States v. Abdunafi*, 2008 WL 5007393, at *4 (3d Cir. 2008).

Here, Defendant attempted his escape *one full day* after he was arrested for the bank robbery and already in custody. While he was being transferred from state to federal custody, Defendant attempted to escape from the police station. Tr. 512. Defendant successfully made it to the parking lot before he was apprehended. Tr. 514-515. By doing so, Defendant intended to obstruct the federal prosecution of his crime. Accordingly, the facts presented here do not involve an intersection between arrest and custody as it did in *Draves,* and did not occur at the scene of arrest. Hence, *Draves* is inapplicable.

The district court properly considered Defendant's argument at the sentencing hearing, specifically that he bolted because an FBI agent cussed at him. However, the district court rejected this version of the facts. Sent. Tr. 31. In light of the deferential standard the Court gives to the district court's factual findings at sentencing, the district court did not commit clear error in applying the enhancement. Accordingly, Defendant's sentence of imprisonment on the bank robbery conviction should be affirmed.[8]

[8]If this Court finds that there was clear error on this point, the government does not argue that the error was harmless, as there is nothing in the district court's remarks that indicates it would have given the same sentence even if § 3C1.1 did not apply.

CONCLUSION

For these reasons, the United States respectfully requests that this Court affirm Defendant McRay Bright's conviction and sentence.

Respectfully submitted,

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CIRCUIT RULE 31(e) CERTIFICATION

Pursuant to Circuit Rule 31(e), I hereby certify that I have filed electronically versions of our brief and all available appendix items in nonscanned PDF format.

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RULE 32 CERTIFICATION

I hereby certify that:

1. This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 11,137 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the WordPerfect X3 proportionally-spaced typeface of Century Schoolbook with 13-point font in the text and 12-point font in the footnotes.

_____

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APPENDIX

APPENDIX TABLE OF CONTENTS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 08-1770
	)	
Plaintiff-Appellee,	)	Appeal from the United States
	)	District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
McRay Bright,	)	Case No. 06 CR 342
	)	
Defendant-Appellant.	)	Honorable Joan H. Lefkow

CERTIFICATE OF SERVICE

I, Sunil R. Harjani, hereby certify that on February 19, 2009, I caused a copy of the foregoing "Brief and Appendix of the United States", and a computer disk containing an electronic copy of the same in PDF format, to be served upon the following by first-class, postage paid mail:

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