NO.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2022

JAMES M. JOHNSON

PETITIONER,

v.

UNITED STATES OF AMERICA

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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RULE 14.1(b) STATEMENT

There are no parties in addition to those listed in the caption.

QUESTION PRESENTED

I. Whether the Fourth Circuit erred by finding that the evidence was sufficient to convict Mr. Johnson of wire fraud, and conspiracy to commit money laundering, where evidence of specific intent was insufficient.

NO.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is attached hereto as Appendix I.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 22, 2022. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

A. STATEMENT OF THE CASE.

THE CASE BEFORE THE DISTRICT COURT.

On August 20, 2019, Mr. Johnson was charged along with co-defendants, Brian Michael Bridge and James Leonard Smith, in a two count Indictment with Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C. Sec. 1349, and Wire Fraud, in violation of 18 U.S.C. Secs. 1343 and 2.

On February 18, 2020, Mr. Johnson and the same two co-defendants were charged in a Superseding Indictment with: Count I- Conspiracy to Commit Wire Fraud, in violation of 18 U.S.C. Sec. 1349, Counts II-VII, Wire Fraud, in violation of 18 U.S.C. Secs. 1343 and 2; and Count VIII - Conspiracy to Launder Monetary Instruments, in violation of 18 U.S.C. Sec. 1956(h). (Another co-defendant, Stuart Jay Anderson, was charged in a separate case, 3:19CR178-HEH.)

On October 23-30, 2020, Mr. Johnson appeared for a jury trial in the Eastern District Court of Virginia, before the Honorable Henry E. Hudson. Mr. Smith was also tried in the same case. Mr. Bridge, a foreign national, was not tried in this case.

In October 30, 2020, the jury returned a verdict of guilty against Mr. Johnson on Counts 1, 3, 4, 6, 7 and 8. On March 12, 2021, the District Court sentenced Mr. Johnson to a period of incarceration of 97 months, a variance sentence below the United States Sentencing Guideline range of 135-168 months. A timely

Notice of Appeal was filed on March 15, 2021.

On September 22, 2022, the United States Court of Appeals for the Fourth Circuit issued an opinion and order affirming the trial court's decision. (*See* Fourth Circuit decision, Appendix 1.)

B. THE EVIDENCE ADDUCED AT TRIAL.

The Government alleged that Mr. Johnson, along with the co-defendants, engaged in an advanced fees scheme whereby they would entice investors seeking capital or investment gains to pay 10% of a proposed larger amount of capital, receive periodic interest payments, and eventually the 100% capital infusion.

The Government alleged that Mr. Johnson used documents like Standby Letters of Credit ("SLOC"), and/or a Blocked Funds Letter ("BFL"), to assure investors of the legitimacy of the investment, and create a sense that the investment monies were secure and would be returned.

The Government alleged that Mr. Johnson was the out-front salesman, that Mr. Anderson was the California attorney acting as the escrow agent for the funds, and that Smith and Bridge were senior executives directing and managing the worldwide investments.

The Government also identified Chimera Group, Ltd. ("Chimera") and its parent company, Ion International Holdings ("ION"), as the entities the co-defendants operated through and presented to investors.

The co-defendants also referred to a Spanish bank, Santander

Bank, and an executive there, Miguel Rubalcava, as being part of their group. According to the Government, Rubalcava was a fictitious employee, or simply didn't exist.

The Government's case was comprised of the testimony of alleged victims, related documents, and the testimony of certain Government agents.

* Todd Varon, the owner of a medical device company, testified that he had known Mr. Johnson since 2010. Needing to raise capital, he considered investing $200,000.00 through Mr. Johnson. After conducting his own due diligence, including on Santander Bank, he did not invest money with Chimera. Mr. Varon told Mr. Johnson he had doubts about the legitimacy of Chimera.

* Earnest E. Finn, Jr. actually knew Mr. Johnson from childhood in Arkansas. Meeting him later in Virginia, they become good friends. Mr. Finn received funds from the sale of his deceased mother's home - about $150,000.00. Mr. Finn received the BFL, references to Santander Bank, and assurances that his money would always be there. He did not receive his money back ($100,000.00).

Mr. Finn didn't believe that Mr. Johnson prepared the investment documents. He acknowledged that Mr. Johnson tried to get his money back to him.

* Stuart Harlow was a sales representative, and a long-time friend of Mr. Johnson. Mr. Johnson told him about Chimera and investment opportunities. Mr. Harlow invested $105,000.00. He

didn't receive quarterly payments or his money back. He may have received one interim payment of $5,500.00.

* Sharon Hill operated a self-storage service. She had known Mr. Johnson, and made previous investments through him. He informed her about Chimera and investment opportunities. She invested $100,000.00. She received no interim payments, and her investment was not returned. In March 2019, she spoke with Mr. Johnson in a call recorded by the FBI, wherein Mr. Johnson spoke to her about going to Santander Bank to get her money.

* Ramon E. Torres-Oquenbo of the U.S. Customs Office testified that their records showed that Mr. Johnson had not traveled to London over many years. One of the investors testified that Mr. Johnson had told them they he had traveled to London to conduct due diligence.

* Pamela Lewis of Exmore, Virginia testified that she had known Mr. Johnson since 2012. She had substantial funds to invest for the Exmore Fire Department. After hearing Mr. Johnson's presentation about investment opportunities with Chimera, she invested $100,000.00. She received no interim payments and no monies.

She was shown various e-mails and documents about the investment. She was not repaid.

* Raymond Cawaling, a businessman from Canada, testified about his investment in Chimera through Mr. Bridge. He had no

contact with Mr. Johnson.

* Susan Johnson of Richmond. Virginia testified that she met Mr. Johnson at a tennis club. She operated a data modeling platform business. She need capital for her business. After meeting with Mr. Johnson, she invested $50,000.00 via a payment to Mr. Anderson. In fact, she got her money back.

* Matthew J. Diedzik operated an oil business. After meeting with Mr. Johnson and reviewing documents, he invested $150,000.00 through Chimera. He reviewed various documents, including a Letter of Credit, about the investment.

He did not receive his investment back, except for $21,000.00.

* Edward Friesen, a businessman from Canada, testified that he made a substantial investment in Chimera, through Mr. Bridge. He never met Mr. Johnson.

* Jerome Rifino testified that he had a healthcare company, and he was looking for financing in 2017. He met with Mr. Johnson, who told him about Chimera. Mr. Johnson showed him a SLOC, and other documents and information. Mr. Rifino conducted his own due diligence, and decided not to invest in Chimera. He told Mr. Johnson that he had doubts about the validity of the SLOC. Mr. Johnson stood by it.

* Charles F. Kruse testified that he was a fundraiser. He learned about Chimera, Ion and investment opportunities through Mr. Johnson. He invested $500,000.00 with Chimera. Mr. Johnson never

told him about the problems other investors had with not being paid. Eventually, his business was destroyed. He was unsure of who prepared the Chimera paperwork.

* U.S. Postal Inspector Jan Kostka testified. He reviewed various documents and e-mails, including an e-mail between Smith and Bridge. Smith called Mr. Johnson a "team player" based on his attempts to answer investors inquiries about their funds. He suggested to Bridge that Mr. Johnson should get a bonus for his efforts. On cross-examination. Mr. Kotska conceded he reviewed certain e-mails where Mr. Johnson was not copied.

* Matthew Alicona, an investigator for the Virginia State Corporations Commission, testified and gave an overview of the case. He identified Chimera and Ion, investors/victims, Santander Bank and the fictitious Mr. Rubalcava. By 2017, all the investors wanted their money back.

On October 16, 2017, Mr. Alicona and Agent Leah Wynn interviewed Mr. Johnson at his home. Agent Wynn informed Mr. Johnson that Chimera, etc. was a scam.

Mr. Alicona identified payments to Mr. Johnson, Smith and Bridge, our of investors funds. He also testified about Mr. Johnson's attempt to sell a Chimera investment to an entity called 66 Oilfields, after he had been informed that it was a scam on October 16, 2017.

* The parties stipulated that the e-mail communications

charged in the Second Superseding Indictment traveled in interstate commerce.

SUMMARY OF ARGUMENT

The evidence was insufficient on the issue of specific intent to convict Mr. Johnson of wire fraud and conspiracy to commit wire fraud. The evidence was insufficient to convict Mr. Johnson of conspiracy to launder monetary instruments.

C. ARGUMENT

THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO CONVICT MR. JOHNSON OF WIRE FRAUD AND MONEY LAUNDERING.

1. The Standard Of Review.

This Court reviews challenges to the sufficiency of the evidence *de novo*. *See United States v. Kelly*, 510 F.3d 433, 440 (4th Cir. 2007). In so doing, "we review the evidence on appeal in the light most favorable to the government in determining whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt." *United States v. Cone*, 714 F.3d 197, 212 (4th Cir. 2013) (citing *United States v. Collins*, 412 F.3d 515, 519 (4th Cir. 2005)).

This Court does not weigh the evidence or review the credibility of the trial witnesses, and this Court assumes that the jury resolved all discrepancies in testimony in favor of the government. *See id.* "We will uphold the jury's verdict if substantial evidence supports it and will reverse only in those

rare cases of clear failure by the prosecution." *Id.*

2. There Was Insufficient Evidence To Convict Mr. Johnson Of Wire Fraud Or Conspiracy To Commit Wire Fraud.

18 U.S.C. Sec. 1343 punishes anyone who "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means false or fraudulent pretenses, representations, or promises", uses electronic wires "for the purpose of executing such scheme or artifice."

Therefore, to convict a person or wire fraud, the Government must show that the defendant: (1) devised or intended to devise a scheme to defraud; and (2) used wire communications in furtherance of the scheme. *See United States v. Wynn*, 684 F.3d 473, 477 (4th Cir. 2012), *United States v. Jefferson*, 674 F.3d 332, 366 (4th Cir. 2012).

The element of "to defraud" has "the common understanding of wronging one in his property rights by dishonest methods or schemes and usually signify[ing] the deprivation or something of value by trick, deceit, chicane, or overreaching." *Wynn*, 684 F.3d at 478 (quoting *Carpenter v. United States*, 484 U.S. 19, 27 (1987)).

To establish a scheme to defraud, "the government must prove that the defendant[] acted with the *specific intent to defraud.*" *Wynn*, 684 F.3d at 478 (quoting *United States v. Godwin*, 272 F.3d 659, 666 (4th Cir. 2001)) (emphasis added).

The wire fraud statute has as an element the *specific intent*

to deprive one of something of value through a misrepresentation or other similar dishonest method, which would cause harm. In *Wynn*, this Court stated that "Wynn is correct to assume that to convict a person of defrauding another, more must be shown than simply an intent to lie to the victim or to make a false statement to him ... To be convicted of mail fraud or wire fraud, a defendant must specifically intend to lie or cheat or misrepresent with the design of depriving the victim of something of value. This specific intent to defraud is the only mens rea requirement for mail fraud or wire fraud." *Wynn*, 684 F.3d at 478-479.

First, the Record contains substantial evidence that Mr. Johnson did not act with a design to deprive victims of something of value.

* Many of the alleged victims were old friends and customers of Mr. Johnson, such as Earnest Finn, Stuart Harlow, Sharon Hill and Pamela Lewis.

* Mr. Johnson acted only as a salesman for Chimera. He did not prepare any papers, he did not communicate with Santander Bank, and he did not handle the various investments of the investment funds.

* Mr. Johnson worked very hard to get the investors their funds back.

* Mr. Johnson did not create Chimera or Ion, did not create the SLOCs or BFLs, and was not the contact person with Santander Bank. He relied on his friend, Jay Smith's information and

direction, regarding Chimera and the investment opportunities.

* To the extent that the record contains misleading statements from Mr. Johnson, any such statements, by themselves, are not enough for conviction of wire fraud or conspiracy to commit wire fraud. *See Wynn*, 684 F.3d at 478.

To put it another way, Mike Johnson did not seek to deprive investors of anything of value. He wanted them to make money and receive their capital. When they didn't, he worked furiously to get them their money back.

Further, all of Mr. Johnson's convictions required the Government to prove, *inter alia*, that Mr. Johnson knew about the unlawful activity. However, the evidence was insufficient to establish Mr. Johnson knowingly participated in a conspiracy to commit wire fraud. *See United States v. Burfoot*, 899 F.3d 326, 335 (4th Cir. 2018) (conspiracy to commit wire fraud under 18 U.S.C. Sec. 1349 requires proof that "the defendant willfully joined the conspiracy with the intent to further its unlawful purpose").

Moreover, the District Court's jury instruction on this issue was deficient. In *Wynn*, this Court found the following instruction for mail/wire fraud proper. "The intent to defraud is *the specific intent* to deceive or cheat someone, usually for personal financial gain or to cause financial loss to someone else." *See Wynn*, 684 F.3d at 478. (Emphasis added.)

In the instant case, the district court did not define

"specific intent", as required. "To act with an 'intent to defraud' means to act knowingly and with the intention or purpose to deceive or cheat ... An intent to defraud is accompanied, ordinarily, by a a desire or a purpose to bring about some gain or benefit to oneself or some other person or by a desire or a purpose to cause some loss to some person. (JA 934.)

By failing to define and use the words "specific intent", the district court erred in its jury instruction on this crucial specific intent issue.

2. There Was Insufficient Evidence To Convict Mr. Johnson Of Conspiracy To Launder Monetary Instruments.

There is no dispute in the record that Mr. Johnson did not handle actual money from investors. All money was channeled to Mr. Anderson. The record was insufficient to convict Mr. Johnson of conspiracy to launder monetary instruments under 18 U.S.C. Sec. 1956(h). *See United States v. Singh*, 518 F.3d 236, 248 (4th Cir. 2008) (conspiracy to commit money laundering under Sec. 1956(h) requires proof that "the defendant knew that the money laundering proceeds had been derived from an illegal activity").

D. CONCLUSION.

Mr. Johnson respectfully requests that this Court reverse the judgment of the District Court, and return this case to the district court with instructions to follow this Court's decision.

Respectfully submitted,

/S/

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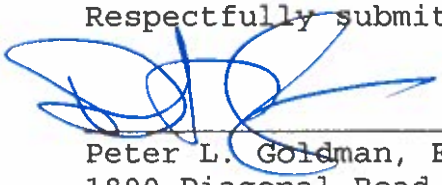
Respectfully submitted,



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APPENDIX I

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4126

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES MICHAEL JOHNSON,

Defendant - Appellant.

No. 21-4484

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES LEONARD SMITH,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:19-cr-00117-HEH-2; 3:19-cr-00117-HEH-3)

Submitted: August 26, 2022 Decided: September 22, 2022

Before NIEMEYER and DIAZ, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Peter L. Goldman, SABOURA, GOLDMAN & COLOMBO, P.C., Alexandria, Virginia; Elliott M. Harding, HARDING COUNSEL, PLLC, Charlottesville, Virginia, for Appellants. Kenneth A. Polite, Jr., Assistant Attorney General, Lisa H. Miller, Deputy Assistant Attorney General, Javier A. Sinha, Vasanth Sridharan, Christopher D. Jackson, Acting Assistant Chief, Fraud Section, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Jessica D. Aber, United States Attorney, Michael C. Moore, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

James Michael Johnson and James Leonard Smith appeal from their convictions for conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). Johnson and Smith additionally appeal their convictions for multiple counts of wire fraud, in violation of 18 U.S.C. § 1343. On appeal, Johnson challenges the sufficiency of the evidence supporting his convictions, and Smith argues that evidence was improperly admitted under Fed. R. Evid. 404(b). We affirm.

Johnson first contends that the evidence did not support his wire fraud and wire fraud conspiracy convictions. We review the sufficiency of the evidence de novo but view the evidence and reasonable inferences that may be drawn from it in the light most favorable to the Government. We will uphold a guilty verdict as long as a rational factfinder could have found the elements of the crime established beyond a reasonable doubt. *United States v. Palin*, 874 F.3d 418, 424 (4th Cir. 2017).

To convict Johnson of conspiracy to commit wire fraud under 18 U.S.C. § 1349, the Government had to establish that (1) two or more people agreed to commit wire fraud, and that (2) Johnson willfully joined the conspiracy intending to further its unlawful purpose. *See United States v. Burfoot*, 899 F.3d 326, 335 (4th Cir. 2018). Wire fraud, the underlying offense, required evidence that Johnson (1) devised or intended to devise a scheme to defraud, and (2) used or caused the use of wire communications to further the scheme. *See id.* at 335. We have explained that, "[t]o establish a scheme to defraud, the government must prove that the defendant[s] acted with the specific intent to defraud." *United States v.*

Wynn, 684 F.3d 473, 478 (2012) (cleaned up). "Thus, the . . . wire fraud statute[] ha[s] as an element the specific intent to deprive one of something of value through a misrepresentation or other similar dishonest method, which indeed would cause him harm." *Id.* Therefore, "to convict a person of defrauding another, more must be shown than simply an intent to lie to the victim or to make a false statement to him." *Id.* As the Supreme Court has explained, a scheme to defraud "must be one to deceive the [victim] *and* deprive [him or her] of something of value." *Shaw v. United States*, 580 U.S. 63, 72 (2016). However, specific intent may be "inferred from the totality of the circumstances and need not be proven by direct evidence." *United States v. Godwin,* 272 F.3d 659, 666 (4th Cir. 2001).

In challenging his conspiracy conviction, Johnson contends that the Government did not prove the specific intent required. Specifically, Johnson avers that the evidence supported the conclusion that he did not intend to deprive the victims of anything of value and instead wanted them to make money and receive their capital. However, to the contrary, the evidence showed that, in order to induce investments, Johnson made a series of promises to investors that their loans would be "risk free," guaranteed, and would earn high rates of interest. However, none of these promises were fulfilled. Johnson was aware that previous promises and representations were not honored, yet he continued to induce new investments with identical promises. Regardless of whether Johnson hoped that the investors he recruited would be made whole, he was still aware that their investments had been disbursed to the Defendants and others and could only be returned with money from new, equally fraudulent investments. This evidence was sufficient to show Johnson's

specific intent. *See id.* at 666-67 (holding that evidence that defendants repeatedly appropriated investors' money, even in the face of promises to past investors not fulfilled, was sufficient to show specific intent to defraud). Accordingly, there was sufficient evidence to support Johnson's wire fraud and conspiracy to commit wire fraud convictions.[1]

Next, Johnson challenges the sufficiency of the evidence supporting his conviction for conspiracy to commit money laundering. To prove Johnson participated in a conspiracy to launder money, the Government must "prove that (1) a conspiracy to commit . . . money laundering was in existence, and (2) that during the conspiracy, the defendant knew that the proceeds . . . had been derived from an illegal activity, and knowingly joined in the conspiracy." *United States v. Alerre*, 430 F.3d 681, 693-94 (4th Cir. 2005). On appeal, Johnson argues only that there was no evidence that he personally handled any money. However, such is not an element of the crime. In any event, contrary to Johnson's contention, the record contains evidence that Johnson personally accepted checks from

[1] Johnson very briefly raises two related claims. First, he asserts that the evidence was insufficient to show that he knew about the unlawful activity and that he knowingly joined the conspiracy. However, as discussed above, there was more than sufficient evidence that Johnson was aware that investors were being defrauded and that, even after promises were not fulfilled to current investors, he continued to recruit new investors by providing false information. As such, the Government provided sufficient evidence of Johnson's knowledge of and participation in the scheme. Second, he asserts that the district court did not properly define and use the words "specific intent" in its instructions. However, the district court did use the words "specific intent to defraud." (J.A. 952). Moreover, our review of the record reveals that there was no plain error in the intent instruction.

victims of the scheme and forwarded them to codefendants. As such, this claim is without merit.

Before trial, the Government moved to admit evidence of Smith's other acts under Fed. R. Evid. 404(b). In particular, the Government sought to introduce evidence that, in 2008, Smith was involved in two financial operations. First, Smith worked with a company that, according to Smith during his interview with law enforcement, he later learned was "a 'Ponzi scheme.'" (J.A. 65).[2] Second, Smith had operated a company that traded "'[m]edium [t]erm [n]otes'" and promised investors "'risk-less principal' transactions" and a high rate of return (5% per month, which would eventually increase to 8% per month). (J.A. 63). The Government also sought to introduce evidence that Smith had been interviewed by the FBI in 2013 regarding his involvement in these two financial operations and that an FBI agent at that time warned Smith "that any investment program purporting to provide low- or no-risk returns that are above normal rates (such as 3% per month) is, in all likelihood, a fraudulent investment." (J.A. 65). In response, Smith informed the agent that he was not responsible for the investments and also stated that he believed the investors received all their funds. The district court granted the motion, permitting the evidence to be submitted to the jury and ruling that the evidence was relevant to Smith's knowledge and intent.

We review a district court's determination of the admissibility of evidence under Rule 404(b) for abuse of discretion. *United States v. Queen*, 132 F.3d 991, 995 (4th Cir.

[2] This opinion cites to the electronic page number of the joint appendix.

1997). A district court will not be found to have abused its discretion unless its decision to admit evidence under Rule 404(b) was arbitrary or irrational. *See United States v. Haney*, 914 F.2d 602, 607 (4th Cir. 1990). Evidence of prior acts is admissible under Rule 404(b) if the evidence is: (1) relevant to an issue other than the general character of the defendant; (2) necessary, in that it is probative of an element of the offense; and (3) reliable. Further, the probative value of the evidence must not be substantially outweighed by its prejudicial value. Fed. R. Evid. 403; *Queen*, 132 F.3d at 995. Limiting jury instructions explaining the purpose for admitting evidence of prior acts and advance notice of the intent to introduce prior act evidence provide additional protection to defendants. *Queen*, 132 F.3d at 998.

Smith first argues that his actions in 2008 were not probative of his intent because the evidence failed to show that the 2008 acts were illegal or, if they were, that Smith was aware of this fact at the time. However, such evidence was not necessary, and the Government recognized that it was possible that "the evidence does not constitute a crime or wrong on Smith's part." (J.A. 62). The prior acts evidence at issue showed that Smith had previously worked with or for companies that offered investments that had the hallmarks of fraud and that Smith was specifically warned about these hallmarks. This evidence was probative in that it made it more likely that Smith knew that the similar charged conduct was a part of a fraudulent scheme, that Smith knew that the investment terms were suspicious, and that Smith had the intent to join an unlawful scheme. *See United States v. Agramonte-Quezada,* 30 F.4th 1, 15 (1st Cir. 2022) (admitting evidence of prior canine alert, where current and prior alert were "highly factually similar," because

prior alert was relevant to show opportunity, intent, common plan, and knowledge, even though prior alert did not result in recovery of drugs or arrest).

Next, Smith asserts that the other acts evidence was not reliable because the agent's testimony regarding the hallmarks of a fraudulent scheme was erroneous. Specifically, he asserts that a riskless principal transaction can be a legitimate transaction. Smith misunderstands the reliability requirement. "Evidence is reliable for purposes of Rule 404(b) unless it is so preposterous that it could not be believed by a rational and properly instructed juror." *United States v. Siegel,* 536 F.3d 306, 319 (4th Cir. 2006) (internal quotation marks omitted). Thus, the question is not whether the agent correctly identified the hallmarks of a fraudulent scheme but rather whether the agent's recounting of his interactions with Smith was "preposterous." Smith does not dispute that the agent's testimony recounting their conversation was believable. Smith was free to cross-examine the agent regarding his knowledge of investments, and in fact, Smith himself testified on this issue.

Finally, Smith asserts that the admission of the agent's testimony was unduly prejudicial because "riskless principal transactions" can be legitimate and, therefore, would not give Smith reason to suspect fraud either in 2008 or in the instant case. Smith contends that the jury might have concluded that he must have known the charged scheme was fraudulent based on the agent's erroneous testimony that Smith was involved in a fraudulent scheme earlier. Again, Smith misunderstands the requirements of evidentiary rules. Evidence which is prejudicial only because it is highly probative is not the type of prejudice that Rule 403 seeks to prevent. *See Queen,* 132 F.3d at 998. Instead, prejudice

in this sense refers to evidence that "would invoke emotion in place of reason" or cause confusion. *Id.*

Here, any prejudice was handily outweighed by the probative value of the evidence. Moreover, the district court mitigated the risk of prejudice with its repeated limiting instructions. *See United States v. White*, 405 F.3d 208, 213 (4th Cir. 2005) ("[A]ny risk of such prejudice was mitigated by a limiting instruction from the district court clarifying the issues for which the jury could properly consider [Rule 404(b)] evidence."). Further, the evidence "did not involve conduct any more sensational or disturbing than the crimes with which [the defendant] was charged." *United States v. Byers*, 649 F.3d 197, 210 (4th Cir. 2011) (internal quotation marks omitted). Finally, Smith testified at trial, explaining his understanding of no-risk investments and of the agent's warning in that regard. Thus, Smith presented evidence contradicting the agent's testimony and further mitigated any prejudice. The district court therefore did not abuse its discretion under Rule 404(b).

Accordingly, we affirm Johnson's and Smith's convictions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

FILED: September 22, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4126 (L)
(3:19-cr-00117-HEH-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAMES MICHAEL JOHNSON

Defendant - Appellant

No. 21-4484
(3:19-cr-00117-HEH-3)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAMES LEONARD SMITH

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgments of the district court are affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK