In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1191

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CRAIG KLUND,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Wisconsin.
No. 3:20-cr-00140-JDP-1 — **James D. Peterson**, *Chief Judge*.

ARGUED OCTOBER 27, 2022 — DECIDED FEBRUARY 7, 2023

Before EASTERBROOK, RIPPLE, and WOOD, *Circuit Judges*.

WOOD, *Circuit Judge*. Craig Klund is a serial fraudster who specializes in deceiving the U.S. Department of Defense. His *modus operandi* is to obtain contracts with the Department based on false representations, and then to fail to deliver the promised goods. In this case, he pleaded guilty to wire fraud, aggravated identity theft, and money laundering, and the district court sentenced him to 120 months' imprisonment. On appeal, Klund challenges his sentence, arguing that the

district court improperly calculated the loss he intended to inflict. Finding no reversible error, we affirm.

I

Klund purports to be a supplier of electrical parts, and sometimes he actually carries through with a contract. The present case, however, was not his first effort to defraud the U.S. government. In 1991 and then again in 1993, he was convicted for fraudulent misrepresentations involving defense contracts. His system during that earlier round began with the submission of false documents to defense agencies. The documents showed shipments of materials under various contracts; and Klund would then request payment for the goods. The only problem was that the items had been neither manufactured nor shipped. Similarly, Klund solicited and received progress payments intended for subcontractors, but he pocketed most of the money, inflicting a loss on the government in the hundreds of thousands of dollars. He was sentenced to 59 months in prison and was released in 1996. Based on those convictions, the Department put him on its Excluded Parties List and disqualified him from the award of government contracts.

Undeterred, Klund decided to defraud the government once more. From 2011 to 2019, he bid on defense contracts using 15 shell corporations, aliases, and the names of employees and relatives. Appropriating the identities of two women, he certified on the government's database that one of his shell companies, Rogue Applied Sciences Corporation, was a woman-owned business and thus eligible for special consideration. In total, Klund bid on 5,760 defense contracts, and the relevant agencies awarded 1,928 contracts worth $7.4 million to eight of his shell entities.

Through these shell entities, including Rogue, Klund satisfactorily performed a portion of his contracts; the Department paid $2.9 million for these goods. But he knowingly shipped and requested payment for 2,816 nonconforming electrical parts. Under the Department's zero-defect policy, defense agencies are not permitted to pay an invoice until they verify that the products conform to the contract specifications. Klund's repeated failures to comply with contract requirements prompted the Department (once again) to debar four Klund aliases and shell entities in 2015. And Klund did not always partially perform his contracts; he also submitted invoices to the Department for parts that he had not shipped, just as he had done in the 1990s.

When the government discovered his scheme, Klund still had several outstanding contracts to fulfill. In 2021, he pleaded guilty to one count of wire fraud, one count of aggravated identity theft, and one count of money laundering. Because these are offenses involving fraud, his advisory sentencing guideline offense level had to be increased based on the amount of the loss. See U.S.S.G. § 2B1.1(b). The upward adjustment is a function of the greater of actual loss or intended loss. *Id.* § 2B1.1 cmt. n.3(A). In addition, the loss amount must be reduced by "the fair market value of the property returned and the services rendered … to the victim before the offense was detected." *Id.* § 2B1.1 cmt. n.3(E)(i).

Before the sentencing hearing, the Probation Office prepared its customary Presentencing Report, which included the writer's loss computations. According to the PSR, the actual loss flowing from Klund's offenses came to $2.9 million, representing the amount that the Department actually paid

Klund for conforming parts he delivered. The PSR calculated the intended loss at $5.7 million on the following basis:

- The profit on the contracts performed by non-Rogue shell entities. Since loss must exclude the "fair market value of the property returned and the services rendered," the PSR offset the *cost* of the goods that non-Rogue entities delivered from the price of those contracts. (Although the cover cost would have been a more appropriate measure of "the fair market value of property" than profit is, the parties did not raise this argument before the district court and so we do not explore the point further.)
- The bid price of the non-performed contracts awarded to non-Rogue entities. The PSR did not deduct the cost of the non-delivered goods under the outstanding contracts, finding irrelevant Klund's alleged plan to ship them had he not been caught.
- The bid price of the contracts awarded to Rogue. As before, the PSR did not deduct the cost of the goods listed in non-performed Rogue contracts. It also declined to deduct the cost of the goods Rogue did deliver, because the guidelines do not permit credit for items provided under contracts involving government benefits or where regulatory approval is obtained by fraud. See *id.* § 2B1.1 cmt. n.3(F). Since Klund fraudulently obtained contracts intended for woman-owned businesses, the PSR reasoned that no offset should apply.

Klund objected to the PSR's intended loss amount only on the basis that he should have received credit for the cost of the parts Rogue delivered. At the sentencing hearing, the district court denied Klund's objection and adopted the loss calculation presented in the PSR. Given that the intended loss ($5.7 million) was greater than the actual loss ($2.9 million), the court used $5.7 million as the applicable loss amount. This led to an 18-level increase in Klund's offense level because the loss was more than $3,500,000 but not more than $9,500,000, *id.* § 2B1.1(b)(1)(J). With this and other adjustments not challenged here, for purposes of Counts 3 (wire fraud) and 18 (money laundering) Klund had an offense level of 28 and a criminal history of II, for an advisory range of 87 to 108 months. For Count 15 (aggravated identity theft), he faced a mandatory consecutive sentence of 24 months. The court imposed concurrent sentences of 96 months' imprisonment for Counts 3 and 18, and the consecutive sentence of 24 months on Count 15, for a total sentence of 120 months.

II

"We review *de novo* the district court's definition of loss, the method it uses to measure the loss, and the sentencing procedure." *United States v. Yihao Pu*, 814 F.3d 818, 823 (7th Cir. 2016) (citing *United States v. Domnenko*, 763 F.3d 768, 775 (7th Cir. 2014)). "We review the district court's loss calculation for clear error." *Id.* Klund is fighting an uphill battle because "he must 'show that the district court's loss calculations were not only inaccurate but outside the realm of permissible computations.'" See *United States v. Collins*, 949 F.3d 1049, 1053 (7th Cir. 2020) (quoting *United States v. White*, 737 F.3d 1121, 1142 (7th Cir. 2013)).

Klund challenges the district court's calculation of the intended loss amount on two grounds. First, he contends that he is entitled to an offset for the cost of the goods he did not ship but intended to deliver. Second, he argues that he is entitled to an offset for the cost of the goods that Rogue delivered.

A

For the first time on appeal, Klund argues that the district court should have given him credit for the cost of the unshipped goods that he insists he would have delivered had he not been caught. At the sentencing hearing, Klund's counsel may have started to raise this claim, but he did not follow through with a formal objection. Instead, he said only that "it doesn't make sense to me that there's an offset for goods [actually delivered] and then, you know … for the purchase orders or contracts that never actually … got off the ground … [it does not make sense] that all [of it] becomes intended loss." Sentencing Hearing Tr. 16. He continued with the comment that "[Klund] would not have just gotten the money up front and the government hoping that they get some stuff later; you got to send the stuff before you ever get paid … that's a pretty absurd way to look at it." *Id.* at 17. The government argues that these statements were not enough to avoid a waiver of Klund's argument about the unshipped goods. If there was a waiver, then the argument is off the table for appellate review. See *United States v. Brodie*, 507 F.3d 527, 530 (7th Cir. 2007). But we think that is too crabbed a reading of counsel's remarks. Those statements do not strike us as a "targeted strategy" to relinquish this argument intentionally. See *United States v. Dodds*, 947 F.3d 473, 476 (7th Cir. 2020) (quoting *United States*

v. Barnes, 883 F.3d 955, 957–58 (7th Cir. 2018)). Instead, this is at most an accidental or negligent failure to object coherently.

Such a failure is not costless: it leads to forfeiture of the argument, and forfeited arguments are reviewed only for plain error. *United States v. Haddad*, 462 F.3d 783, 793 (7th Cir. 2006); see also *Puckett v. United States*, 556 U.S. 129, 135 (2009). The first inquiry under plain error is whether there was an error at all. *Puckett*, 556 U.S. at 135. Here, we conclude, there was not, and so there is no need for us to explore the other plain-error elements.

Klund contends that we must credit him with the cost of non-delivered goods that he intended to ship to the government at the time he was caught. Those goods, he argues, did not lead either to actual loss or to intended loss for purposes of U.S.S.G. § 2B1.1 cmt. n.3. We can set actual loss to one side right away, since the government never paid for goods it did not receive. But what about intended loss? That term is defined in the commentary to section 2B1.1 as "the pecuniary harm that the defendant purposely sought to inflict," and it "includes intended pecuniary harm that would have been impossible or unlikely to occur [without the offense conduct]." U.S.S.G. § 2B1.1 cmt. n.3(A)(ii). As a general rule, we calculate the amount of intended loss by considering the amount the defendant placed at risk with the fraudulent scheme. *United States v. Durham*, 766 F.3d 672, 687 (7th Cir. 2014) (collecting cases).

But the question whether certain monies have been placed at risk is analytically different from the question whether that risk is assessed as an objective matter, or if instead we must ask whether the defendant subjectively intended to inflict that risk. Klund directs our attention to the decision in *United*

States v. Schneider, which calls for a focus on the defendant's subjective intent to perform fraudulently procured contracts. 930 F.2d 555, 558 (7th Cir. 1991); *see also Yihao Pu*, 814 F.3d at 824 ("[I]ntended loss analysis, as the name suggests, turns upon how much loss the defendant actually intended to impose." (quoting *United States v. Higgins*, 270 F.3d 1070, 1075 (7th Cir. 2001))); *United States v. Middlebrook*, 553 F.3d 572, 578 (7th Cir. 2009) ("[T]he district court must consider the defendant's subjective intent."); *United States v. Fearman*, 297 F.3d 660, 662 (7th Cir. 2002) (holding that the true measure of the intended loss is "in the defendant's mind."); see also *United States v. Manatau*, 647 F.3d 1048, 1056 (10th Cir. 2011) (Gorsuch, J.) (expressly approved in U.S.S.G., Supp. to App. C, Amend. 792 at 104 (eff. Nov. 1, 2015)).

In *Schneider*, a building contractor fraudulently procured a government contract. 930 F.2d at 556–57. The government canceled the contract on the ground of misrepresentation before performance began or any payment was made. *Id.* at 557. When Schneider was caught, he had some 50 outstanding government contracts to perform. *Id.* at 558. Until then, he had performed all prior contracts satisfactorily, and there was no reason to believe he would not do so again. *Id.*

We held that "[t]he amount bid for a contract procured by fraud is not a reasonable estimate of the loss to the other party to the contract … where the contract is terminated before that other party—the intended victim of the fraud—has paid a dime." *Id.* at 557. Rather, if there is no evidence that the fraudster was unwilling and unable to perform the contract satisfactorily, the intended loss is only the profit he intended to receive. *Id.* at 558. We rooted our holding in an important distinction between two types of fraudsters:

> [The] true con artist … does not intend to perform his undertaking, the contract or whatever; he means to pocket the entire contract price without rendering any service in return. In such a case the contract price is a reasonable estimate of what we are calling the expected loss … The other type of fraud is committed to obtain a contract that the defendant might otherwise not obtain, but he means to perform the contract (and is able to do so) and to pocket, as the profit from the fraud, only the difference between the contract price and his costs.

Id. *Schneider* makes the point that intended loss for fraudulently procured contracts amounts to "what the defendant probably would have 'taken' had the fraud been realized," considering the defendant's course of conduct as key evidence of subjective intent. See *United States v. Johnson*, 16 F.3d 166, 172 n.6 (7th Cir. 1994) (discussing *Schneider*, 930 F.2d at 558–59).

As applied here, the inquiry is whether Klund was willing and able to perform the contracts he procured by fraud. If so, the loss he purposely sought to inflict was the profit he would have received. Klund contends that he intended to deliver conforming parts under his outstanding contracts. Had he been able to continue his scheme, he represents, he would have performed his contracts satisfactorily, as he allegedly had done in the past. To bolster his position, Klund argues that it would have been illogical for him to expect payment of undelivered goods because agencies pay only for conforming products actually received. Hence, he concludes, the district court should have offset the cost of the goods he intended to deliver and considered only his profit as the intended loss.

The record, however, does not support Klund's contentions (or at the least, the district court did not commit clear error by finding the facts adversely to Klund). The PSR states that Klund "failed to deliver parts that he contracted with [the Department] to provide but submitted invoices to [the Department] seeking payment for parts that were never shipped." That is, rather than satisfactorily performing all prior contracts, he sought payments without delivering goods, as a "true con artist" would.

To be sure, another factfinder might have drawn different conclusions from this record. That Klund sought payments for non-delivered goods was mentioned in a single paragraph without any further context. The PSR did not provide a detailed breakdown of the unfulfilled contracts for which Klund allegedly submitted invoices. Neither did it list witnesses ready to testify about this specific part of Klund's scheme. Likewise, the PSR did not include these invoices as part of the actual loss inflicted on the Department. It seems likely that the relevant agencies discovered at least some of Klund's false invoices in time to avert injury, just as they did with his scheme in the 1990s. The PSR makes no mention of this, nor does it explain why the Department did not debar or sanction Klund's entities in the face of such a blatant attempt at stealing from its coffers. (Although, to be fair, Klund himself was already under a debarment order, which he was evading through the use of shell corporations and stolen identities. And it did debar some of the entities. There were quite a few moving pieces for it to watch.)

But none of these flaws is enough to overcome the clear-error standard. Most importantly, these are arguments that Klund could and should have raised before the district court.

His failure to object on that basis means that he accepted the facts set forth in the PSR—and so do we.

Furthermore, Klund's contention that it would not make sense to submit invoices and expect payment for non-delivered goods falls flat in light of his criminal history. He already had been convicted in the 1990s for doing exactly what he now argues is illogical—submitting false invoices and seeking payment for items not yet manufactured. Since "[t]he rules of evidence do not apply to sentencing," *United States v. Richardson*, 812 F.3d 604, 606 (7th Cir. 2016), the district court was free to consider Klund's prior convictions as evidence of his intent to seek payment for unshipped goods under the outstanding contracts.

That is not all. The PSR specified that Klund knowingly shipped and requested payment for 2,816 nonconforming electrical parts. That led the Department to debar four of his shell entities and aliases. Klund objected on grounds that the number of nonconforming parts lacked context; since some of the contracts concerned two or more parts, the number of *contracts* he failed to perform satisfactorily was not as high. This argument does nothing for him, however, because it proves only that he knowingly shipped defective goods.

This record supports the conclusion that Klund systematically sought payment for parts that he never shipped, as well as for shipped, nonconforming parts. His prior convictions for nearly identical crimes lend further credence to the district court's conclusion that he intended to do the same in the future. And even if it was unlikely that the government would have paid invoices for unshipped goods, intended loss "includes intended pecuniary harm that would have been

impossible or unlikely to occur." See U.S.S.G. § 2B1.1 cmt. n.3(A)(ii).

Klund's attempt to rely on *Schneider* backfires; unlike the *Schneider* defendant, who satisfactorily performed all contracts, Klund is more akin to a "true con artist" who intended "to pocket the entire contract price" without delivering conforming parts. 930 F.2d at 558. Indeed, central to *Schneider*'s holding was that the defendant's "willingness and ability … to perform the contracts [were] not questioned." *Id.* at 558. In contrast, the Department did not want to contract with Klund because it already knew he was a fraudster, which is why he was on the Excluded Parties List. The record supports the conclusion that Klund was neither willing nor able to fulfill his contractual obligations, which evidences his subjective intent not to perform his outstanding contracts.

Thus, the district court did not clearly err in calculating the intended loss by including the bid price of Klund's outstanding contracts.

B

Klund finally argues that the district court erred when it failed to offset the value of the conforming goods delivered by his shell entity, Rogue. Even assuming that Klund is right, offsetting Rogue's delivered goods would place Klund's intended loss at $4.9 million. This figure still requires an 18-level increase because the loss amounts to more than $3,500,000 but not more than $9,500,000. *Id.* § 2B1.1(b)(1)(J). Because the offset would not affect his guidelines range, we need not address the merits of these contentions.

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We AFFIRM the judgment of the district court.