

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4
5 August Term, 2013

6
7 (Argued: October 25, 2013

Decided: September 2, 2014)

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9 Docket No. 12-4617
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13 UNITED STATES OF AMERICA,
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15
16 *Appellee,*
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18 v.
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20 ABDULAI FOFANAH, AKA FODAY,
21 AKA FODAY FOFANAH,
22 AKA FODAY OSMAN FOFANAH,
23

24 *Defendant-Appellant.*
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27
28 Before: KATZMANN, *Chief Judge*, LEVAL and POOLER, *Circuit Judges*.

29 Judge LEVAL concurs in a separate opinion.
30

Appeal from a November 13, 2012 judgment entered in the United States District Court for the Southern District of New York (John F. Keenan, J.), convicting defendant Abdulai Fofanah after a jury trial of conspiracy to transport stolen vehicles, transportation of stolen vehicles, and possession of stolen vehicles. Fofanah challenges on appeal the district court's issuance of a conscious avoidance jury instruction and two sentencing enhancements that the district court imposed, one for the use of sophisticated means and another for being in the business of receiving and selling stolen property. We conclude that even if the issuance of the conscious avoidance jury instruction was error, any such error was harmless. We further hold that Fofanah's challenges to his sentence must fail.

Affirmed.

Judge Leval joins in this per curiam opinion and concurs in a separate opinion.

DAVID A. LEWIS, Assistant Federal Public Defender,
Federal Defenders of New York, Inc., New York, NY,
for Defendant-Appellant.

1 IAN P. MCGINLEY, Assistant United States Attorney,
2 (Preet Bharara, United States Attorney for the Southern
3 District of New York; Brent S. Wible, Assistant United
4 States Attorney, on the brief), New York, NY, *for*
5 *Appellee*.
6

7 *Per Curiam:*

8 Defendant Abdulai Fofanah appeals from a November 13, 2012 judgment
9 entered in the United States District Court for the Southern District of New York
10 (John F. Keenan, J.). Fofanah was convicted after a jury trial of conspiracy to
11 transport stolen vehicles, in violation of 18 U.S.C. § 371; transportation of stolen
12 vehicles, in violation of 18 U.S.C. § 2312; and possession of stolen vehicles, in
13 violation of 18 U.S.C. § 2313. The district court sentenced defendant principally to
14 72 months of imprisonment and three years of supervised release.

15 On appeal, Fofanah challenges his conviction on the basis that it was
16 impermissible for the district court to instruct the jury that it could convict him
17 on the theory of conscious avoidance. Defendant also takes issue with the district
18 court's imposition of sentencing enhancements for: (1) the use of "sophisticated
19 means" under Section 2B1.1(b)(10)(C) of the Sentencing Guidelines of the United
20 States Courts; and (2) being "in the business of receiving and selling stolen
21 property" under Section 2B1.1(b)(4) of the Guidelines.

Because we conclude that any error in giving the contested jury instruction was harmless, and Fofanah's challenges to his sentence are without merit, we AFFIRM the judgment and sentence of the district court.

BACKGROUND

I. Facts

Fofanah's offense conduct consisted of his leadership role in a scheme to ship high-priced stolen cars from New York through a port in New Jersey to be sold in Guinea, Africa. Around May 2011, Fofanah called a trucker named Fousseni Traore Sahm about shipping some containers of cars to Guinea. Sahm met with Fofanah, and another man named Habib Diallo, about shipping the cars. Sahm testified that at that meeting with Habib, Fofanah told Sahm that "they was going to do some containers and it's not going to be one or two, and then the car they was going to load, you know, are no good." Trial Tr. at 319. Sahm understood Fofanah to mean that the cars were stolen. At that meeting, Habib showed Sahm the titles that they were going to use to ship the cars, and the titles did not match the cars actually being shipped.

To carry out the shipments, Fofanah would provide Sahm with a booking number that Sahm would use to go to the port to retrieve an empty shipping

1 container. Sahm would bring the container to the Bronx, New York, and it would
2 be loaded with cars in Fofanah's presence. Sahm testified that while the
3 containers were being loaded Fofanah appeared "nervous" and was "always
4 rushing us to finish the job and get out of there." *Id.* at 325.

5 Once the containers were loaded, Fofanah would pay Sahm, and Sahm or
6 his drivers would take the containers back to the port to be shipped. Fofanah also
7 provided Sahm with dock receipts, which are used to prove that the containers
8 were delivered to the port. Sahm would obtain a stamp on the dock receipts and
9 return the stamped receipts to Fofanah. During this time period that Fofanah had
10 hired Sahm to transport the containers, Sahm was working with the police and he
11 would contact the police when Fofanah wanted to load a container.

12 On June 14, 2011, Fofanah and Sahm met with a third man, who was an
13 undercover officer. At that meeting, the undercover officer told Fofanah that the
14 officer's brother (or the officer and his brother) wanted to start a car yard in
15 Senegal, and the officer was seeking information from Fofanah about how to get
16 titles for old cars. Fofanah told the undercover officer that it would be better to
17 ship the cars to Guinea because in Senegal "you have to present the real title."
18 Gov't's Add. at 4. Fofanah also advised the undercover officer about taking a

1 security system, such as LoJack, out of cars before shipping them to Africa. At
2 that meeting, Fofanah offered to sell a car to the undercover officer.

3 At the time of his arrest on June 20, 2011, Fofanah had in his possession a
4 shipping document that tied him to a container that he helped load with cars. He
5 admitted upon arrest that Habib had told him that the cars were “bad,” Trial Tr.
6 at 146, and that Fofanah had participated in loading the containers. The cars that
7 Fofanah was involved in loading into the containers were stolen.

8 **II. The District Court’s Jury Instructions**

9 At trial, the district court instructed the jury on what it means for a
10 defendant to have actual knowledge of a fact. It also instructed the jury that the
11 law “allows you to find that the defendant had knowledge of a fact when the
12 evidence shows that he was aware of a high probability of that fact, but
13 intentionally avoided confirming that fact. The law calls this ‘conscious
14 avoidance’ or ‘willful blindness.’” *Id.* at 647. The parties do not dispute that the
15 district court gave the conscious avoidance instruction over Fofanah’s objection.

16 **III. Fofanah’s Conviction and Sentence**

17 The jury found Fofanah guilty on all counts, and the district court
18 sentenced him principally to 72 months of imprisonment and three years of

1 supervised release. The district court's sentence included two enhancements
2 under the Guidelines, one for Fofanah's use of sophisticated means in the
3 execution or concealment of the offense conduct, and the other for Fofanah being
4 in the business of receiving and selling stolen property. Fofanah objected to each
5 of those enhancements.

6 With regard to the sophisticated means enhancement, the court concluded
7 that "[t]his was a very sophisticated scheme" that involved "17 stolen high-
8 priced cars that were going to be resold in Africa." Sentencing Tr. at 13. The court
9 noted that the scheme was organized, and included "substituting the stolen cars
10 for the cars on the shipping documents." *Id.*

11 The district court imposed the enhancement for Fofanah being in the
12 business of receiving and selling stolen property based on the "regularity and
13 sophistication of Mr. Fofanah's activities" and the amount of property
14 involved—17 high-priced cars. *Id.* at 7.

DISCUSSION

I. The Conscious Avoidance Jury Instruction

A. Legal Standards

“A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact.” *United States v. Kozeny*, 667 F.3d 122, 132 (2d Cir. 2011) (quoting *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000)), *cert. denied sub nom. Bourke v. United States*, 133 S. Ct. 1794 (2013). The test for when a conscious avoidance charge is permissible has two prongs. First, the defendant must “assert[] the lack of some specific aspect of knowledge required for conviction.” *Id.* (internal quotation marks omitted). Second, there must be an “appropriate factual predicate for the charge . . . , i.e., the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.” *Id.* (internal quotation marks omitted); *accord United States v. Cuti*, 720 F.3d 453, 463 (2d Cir. 2013), *petition for cert. filed*, No. 13-1493 (U.S. Apr. 14, 2014); *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003).

1 “We review a claim of error in jury instructions *de novo*, reversing only
2 where, viewing the charge as a whole, there was a prejudicial error.” *United States*
3 *v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003).

4 **B. The Conscious Avoidance Jury Instruction Here Was Harmless**

5 Fofanah does not challenge the content of the district court’s conscious
6 avoidance jury instruction, but rather argues that the necessary factual predicate
7 for giving the instruction was lacking. We need not decide whether the district
8 court erred in issuing the conscious avoidance instruction in this case because, if
9 the instruction was in error, any such error was harmless.

10 “[A]n erroneously given conscious avoidance instruction constitutes
11 harmless error if the jury was charged on actual knowledge and there was
12 overwhelming evidence to support a finding that the defendant instead
13 possessed *actual* knowledge of the fact at issue.” *Ferrarini*, 219 F.3d at 154
14 (internal quotation marks omitted). In this case, the district court gave the jury an
15 instruction on actual knowledge, so the first requirement of the harmless error
16 analysis was satisfied.

17 Second, there was overwhelming evidence that Fofanah had actual
18 knowledge that the cars at issue were stolen. Fofanah told Sahm that the cars

1 were “no good,” Trial Tr. at 319, which Sahm understood to mean stolen.

2 Fofanah was present at a meeting where there was discussion of the fact that the
3 titles for the cars being shipped did not match the actual cars, and he held title to
4 one of the vehicles that appeared on a dock receipt that did not match the vehicle
5 in the corresponding container.

6 At the time of his arrest, Fofanah was in possession of a shipping
7 document that tied him to a container that he had assisted in loading with the
8 cars. He admitted to participating in loading the shipping containers, and the
9 cars that were loaded into the containers had all been stolen.

10 In addition, defendant engaged in a discussion with an undercover officer
11 about how to ship cars abroad to Guinea as opposed to Senegal because it was
12 less likely that real titles would have to be presented in Guinea. Fofanah also
13 discussed with the undercover officer the practice of taking out the security
14 system on a car before it is shipped to Africa, which is done to prevent law
15 enforcement from locating the vehicle.

16 Accordingly, we hold that if the district court erred by instructing the jury
17 on conscious avoidance in this case, any such error was harmless because the jury
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1 was instructed on actual knowledge and there was overwhelming evidence that
2 Fofanah possessed actual knowledge that the cars at issue were stolen.

3 **II. The Sentencing Enhancements**

4 **A. The Sophisticated Means Enhancement**

5 Over Fofanah's objection, the district court applied a sentencing
6 enhancement pursuant to Section 2B1.1(b)(10)(C) of the Guidelines for the
7 sophisticated means that defendant used with respect to the offense conduct.
8 Fofanah argues that the district court misapplied that Guideline because his
9 offense conduct was not sufficiently complex to merit the enhancement. We
10 disagree.

11 **1. Legal Standards**

12 Section 2B1.1(b)(10)(C) of the Guidelines provides that: "If . . . the offense
13 . . . involved sophisticated means, increase by 2 levels. If the resulting offense
14 level is less than level 12, increase to level 12." The term "sophisticated means" is
15 defined in the commentary to the Guidelines as "especially complex or especially
16 intricate offense conduct pertaining to the execution or concealment of an
17 offense." USSG § 2B1.1(b)(10), comment. (n.8(B)).
18

1 The parties disagree about the standard of review that we should employ
2 with respect to the district court's application of the enhancement for
3 sophisticated means under Section 2B1.1(b)(10)(C). Relying on a case involving
4 the application of an enhancement under Section 2T1.1 of the Guidelines, which
5 concerns the use of sophisticated means in tax-evasion offenses, Fofanah argues
6 that the standard of review is de novo, with due deference to the sentencing
7 court's application of the Guideline. *See United States v. Lewis*, 93 F.3d 1075, 1080
8 (2d Cir. 1996); *see also United States v. Ojemen*, 465 F. App'x 69, 71 (2d Cir. 2012)
9 (summary order) (applying the standard of review in *Lewis* to the use of
10 sophisticated means under Section 2B1.1). The government contends that we
11 should review the application of this enhancement for clear error because the
12 district court's determination of the issue was primarily factual. *See United States*
13 *v. Gotti*, 459 F.3d 296, 349 (2d Cir. 2006); *United States v. Vasquez*, 389 F.3d 65,
14 74–75 (2d Cir. 2004).

15 We need not wade into the nuances of the different standards of review
16 because even on de novo review the sophisticated means enhancement was
17 warranted in this case.¹

¹ In other cases where the government has argued that the clear error standard governs a sophisticated means enhancement, we have taken a similar

2. The Sophisticated Means Sentencing Enhancement Was Proper

We have recognized that the creation and use of false documents, and other tactics to conceal offense conduct, are indicia of the sophistication of an offense. *Cf. United States v. Amico*, 416 F.3d 163, 169 (2d Cir. 2005) (applying the former Section 2F1.1 enhancement for sophisticated means).² Here, Fofanah was involved in the use of fraudulent titles to ship the cars at issue from the United States to Guinea, and he was listed as the owner of one of the cars on a fraudulent dock receipt. He also recommended the practice of disabling a car security system, such as LoJack, before shipping cars to Africa, which is done to prevent law enforcement from recovering the vehicle. He showed that he had developed a sophisticated knowledge of the respective means of shipping stolen cars to different African countries, explaining to the undercover officer that it was preferable to ship to Guinea rather than Senegal because in Senegal one needs to present real titles.

approach to the one we take here. *See Ojemen*, 465 F. App'x at 71 n.2; *United States v. Elia*, 392 F. App'x 883, 886 n.3 (2d Cir. 2010) (summary order); *United States v. Regensberg*, 381 F. App'x 60, 61 n.1 (2d Cir. 2010) (summary order).

² Section 2F1.1 of the Guidelines was deleted by consolidation with Section 2B1.1, effective November 1, 2001. *See* USSG § 2F1.1.

1 The repetitive and coordinated nature of Fofanah's conduct further reveal
2 the sophistication of the means he employed. *See United States v. Finck*, 407 F.3d
3 908, 915 (8th Cir. 2005). Fofanah's offense conduct was repetitive, as it involved
4 17 stolen cars that were to be resold in Africa. Moreover, the scheme in which
5 Fofanah participated involved coordination between Fofanah and Sahm to load
6 vehicles into containers that were driven to a port where customs would have to
7 be cleared. The fact that the scheme involved moving the cars across jurisdictions
8 and then abroad is also some evidence of the scheme's sophistication.

9 Accordingly, the district court was correct to impose the sentencing
10 enhancement based on the sophisticated means of Fofanah's conduct in this case.

11 **B. The Enhancement for Being "in the Business of Receiving and**
12 **Selling Stolen Property"**

13 Again over Fofanah's objection, the district court imposed a sentencing
14 enhancement for defendant being in the business of receiving and selling stolen
15 property under Section 2B1.1(b)(4) of the Guidelines. On appeal, defendant
16 argues that the enhancement was not warranted because the evidence failed to
17 show the requisite sophistication and regularity of his actions to substantiate the
18 conclusion that he was "in the business," and there was no evidence that he was
19 personally involved in the sale of stolen cars. We again disagree.

1. Legal Standards

Section 2B1.1(b)(4) of the Guidelines provides that: “If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.” The commentary to that section of the Guidelines provides a non-exhaustive list of factors for the sentencing court to consider: “(A) The regularity and sophistication of the defendant’s activities. [¶] (B) The value and size of the inventory of stolen property maintained by the defendant. [¶] (C) The extent to which the defendant’s activities encouraged or facilitated other crimes. [¶] (D) The defendant’s past activities involving stolen property.” USSG § 2B1.1(b)(4), comment. (n.5).

With respect to the standard of review governing this enhancement, the parties again disagree. Fofanah argues that our review should be de novo. *See United States v. Carson*, 125 F.3d 845, 1997 WL 609134, at *1 (2d Cir. 1997) (unpublished) (in the context of an enhancement under Section 2B6.1(b)(2) for being in the business of receiving and selling stolen property in crimes related to the alteration or removal of vehicle identification numbers, we review “factual findings for clear error, and [the] determination that those findings support the

1 challenged enhancement *de novo*"). The government argues for a clear error
2 standard of review, as discussed earlier.

3 Again, we need not resolve this question because even under the *de novo*
4 standard the district court correctly imposed the Section 2B1.1(b)(4) enhancement
5 in this case.

6 **2. The Enhancement for Being "in the Business" Was Warranted**

7 With regard to whether Fofanah was in the business of receiving and
8 selling stolen cars, the sophistication of Fofanah's offenses, which is discussed
9 earlier, weighs in favor of the enhancement under Section 2B1.1(b)(4). *See* USSG
10 § 2B1.1(b)(4), comment. (n.5(A)) (recognizing sophistication as a relevant factor).

11 The regularity of Fofanah's activities with respect to receiving and selling
12 stolen vehicles also supports the enhancement at issue here. *See id.* (recognizing
13 regularity as a relevant factor). Fofanah's knowledge about the practices of
14 Senegal versus Guinea with regard to how rigorous each country is in
15 demanding "real" titles for cars that are shipped to those countries suggests that
16 he is a repeat player. Gov't's Add. at 5. In addition, Fofanah was involved in the
17 process of shipping 17 stolen cars in various containers over the course of about
18

1 six weeks, which supports the district court's conclusion that this was not a "one-
2 shot deal." Sentencing Tr. at 7.

3 The value of the stolen cars is another factor that weighs in favor of the
4 enhancement. *See* USSG § 2B1.1(b)(4), comment. (n.5(B)) (recognizing the value of
5 the stolen property as a relevant factor). Many of the stolen cars in this case were
6 luxury vehicles, such as Range Rovers, Porsches, and BMWs, and the total value
7 of the cars was over \$500,000.

8 Fofanah also showed an interest in helping others engage in the type of
9 car-shipping operation that he was involved in, which supports the
10 enhancement. *See id.* § 2B1.1(b)(4), comment. (n.5(C)) (recognizing as a relevant
11 factor the extent to which the defendant's activities encouraged other crimes). As
12 noted earlier, Fofanah advised the undercover officer about shipping cars with
13 bad titles to Guinea as opposed to Senegal, which showed that he had acquired a
14 refined knowledge of the techniques for avoiding detection.

15 To the extent that Fofanah argues that there was insufficient evidence that
16 he actually sold stolen vehicles, his contention is without merit. During the
17 conversation that Fofanah had with Sahm and the undercover officer about
18 removing a car security system and shipping cars to Guinea as opposed to

1 Senegal, Fofanah concedes that he stated he could sell the officer a Dodge
2 Charger. At that meeting, Fofanah also discussed obtaining various cars for the
3 officer to sell, and revealed his knowledge of how much could be made from
4 those sales. Thus, even if we were to hold that an enhancement under Section
5 2B1.1(b)(4) would only be permissible where a defendant personally receives and
6 sells stolen property — an issue we need not reach today — the enhancement
7 would apply to Fofanah in this case.

8 Accordingly, the district court was correct to impose the sentencing
9 enhancement for Fofanah being in the business of receiving and selling stolen
10 property.

11 CONCLUSION

12 For the foregoing reasons, we AFFIRM the judgment and sentence of the
13 district court.
14