NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-1208

UNITED STATES OF AMERICA

v.

GUY E. URCIULI,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 07-cr-00637)
District Judge: Honorable Peter G. Sheridan

Submitted Under Third Circuit LAR 34.1(a)
February 11, 2013

Before: HARDIMAN, and ALDISERT, *Circuit Judges*
and STARK*, *District Judge*

(Filed: February 20, 2013)

OPINION OF THE COURT

* The Honorable Leonard P. Stark, District Judge for the United States District Court for the District of Delaware, sitting by designation.

HARDIMAN, *Circuit Judge*.

A jury convicted Guy Urciuoli of five counts of wire fraud and one count of obstruction of justice. The District Court sentenced him to 108 months' imprisonment and ordered $4,162,463 in restitution to twenty-nine victims. Urciuoli raises numerous issues on appeal, none of which is persuasive. Accordingly, we will affirm.

I

In 2003, InsPara Networking Technologies, Inc. (InsPara), a privately-held information technology consulting firm, hired Urciuoli as its vice president of finance to raise funds from investors. Urciuoli solicited investors by distributing written materials that pitched InsPara as the next Microsoft.

The information Urciuoli provided was false and misleading. He used various deceptive practices to conceal his affiliation with InsPara, including falsely describing himself as an independent broker-dealer, omitting himself from the management section of the investment materials, and using non-InsPara contact information in correspondence with investors. Urciuoli disclosed neither his terms of employment with InsPara—which entitled him to 20% of all investments, $150,000 in salary, and a seat on the company's board of directors—nor that he received millions of heavily-discounted, nondilutable shares. He told prospective investors that he planned to put "everything he had" into InsPara, while never paying anything for his stock. Ultimately, Urciuoli secured investments totaling $5,218,261, nearly $1.3 million of which redounded to him as commissions and salary. By the time of trial, InsPara had merged with a company called Softnet, whose shares were trading at two-thirds of a cent, far below the price InsPara's investors had paid.

II

Urciuoli challenges several of the District Court's evidentiary rulings during the testimony of his friend, Lisa Nerbonne, and InsPara's outside securities counsel, Joseph Brucchieri.

A

The Government asked Brucchieri to review the text of a "Business Summary" contained in one of Urciuoli's marketing materials and answer whether "any sections [were] problematic." While explaining his general concerns that the Summary employed imprecise language and set forth unrealistic expectations, Brucchieri opined that the document was "too misleading," created a "false sense in the investor's mind," gave investors "false hope," and contained "egregious," "preposterous," and "offensive" claims. Brucchieri said he was "outraged and shocked" that the document asserted that "[InsPara] is going to be the next Microsoft" and suggested that he "would sue the company for breach of contract" based upon that claim. Urciuoli's counsel objected, arguing that Brucchieri gave inadmissible lay opinion testimony. The next day, the District Court instructed the jury to disregard several of Brucchieri's comments.[1]

[1] The trial judge instructed the jury:

Urciuoli now contends Brucchieri's testimony was unduly prejudicial and inadmissible lay opinion testimony, in violation of Federal Rules of Evidence 403 and 701, respectively, and that the curative instruction to the jury was inadequate because it did not address all of Brucchieri's allegedly "inflammatory" language.

"[B]ecause juries are presumed to follow their instructions," *United States v. Riley*, 621 F.3d 312, 339 (3d Cir. 2010) (citation and internal quotation marks omitted), and there is no evidence that extraordinary circumstances exist, we cannot find that the portions of Brucchieri's testimony that the District Court's instruction explicitly addressed resulted in prejudice. Thus, we will consider only Urciuoli's challenges to the language that the Court did not explicitly mention in its instruction.

First, Urciuoli claims Brucchieri's comments amounted to invalid lay opinion testimony because they were neither "rationally based on the perception of the witness"

> Mr. Brucchieri was questioned about certain statements contained within the Business Summary. A portion of Mr. Brucchieri's answer was unresponsive and resulted in him offering hypothetical legal advise [sic]. He [used] words such as "outrageous" and "preposterous" and he also said he might "recommend someone to bring a legal action for breach of a contract." These are inadmissible and are being stricken from the record.
> You should disregard it as if the statement and those words were never made, and you must not consider it in making your decision regarding the final outcome of the case.
>
> Instructions concern only that portion of Mr. Bucchieri's testimony which I have noted.

Supp. App. 573.

nor "helpful to a clear understanding of [his] testimony," as required under Rule 701. *See* Fed. R. Evid. 701. Both contentions are incorrect. "Our Court has specifically held that lay opinion testimony can be based upon a witness's review of business records." *United States v. Leo*, 941 F.2d 181, 193 (3d Cir. 1991). Brucchieri reviewed the Summary and was capable of assessing the accuracy of its content because he had drafted securities materials for the company. Therefore, he had "particularized knowledge by virtue of [his] experience," *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 81 (3d Cir. 2009), as to whether the Summary contained information that was "problematic." Furthermore, Brucchieri's testimony that the Summary gave investors "false hope" and that he was "shocked" that it characterized InsPara as the next Microsoft provided context that was not evident from the face of the document. Thus, Brucchieri's unique ability to explain why the Summary was misleading was helpful to the jury, and the District Court did not abuse its discretion in finding his testimony admissible under Rule 701. *See United States v. Christie*, 624 F.3d 558, 567 (3d Cir. 2010).

Nor did the District Court abuse its discretion by failing to explicitly address all of Brucchieri's allegedly "inflammatory" language in its curative instruction. *See United States v. Zehrbach*, 47 F.3d 1252, 1264 (3d Cir. 1995) (citation omitted). The Court's instruction to disregard "words *such as* 'outrageous' and 'preposterous,'" reasonably encapsulated comparable words like "shocking," "egregious," and "offensive." Supp. App. 573 (emphasis added). Regardless, the record contains evidence of Urciuoli's guilt that is "so overwhelming that any improper inferences the jury might have drawn from the [inflammatory evidence] were marginal, at most." *United States v. Berrios*, 676 F.3d 118, 131 (3d Cir. 2012). Thus, it is "highly probable that the [alleged] error did not contribute to the judgment." *Christie*, 624 F.3d at 571 (citations and internal quotation marks omitted).[2]

B

Urciuoli argues for the first time on appeal that Nerbonne's testimony that Urciuoli exhibited "excessive paranoia" at a summer 2005 dinner violated Rule 701 because it was a "psychological/psychiatric" assessment that requires "scientific testing." *See* Fed. R. Evid. 701(c) (lay opinion testimony may not be "based on scientific, technical, or other specialized knowledge"). This mischaracterizes Nerbonne's testimony. She mentioned "paranoia" in the context of describing Urciuoli's strange behavior during the dinner, which included taking the batteries out of both his and her cell phones because "people can actually transmit . . . and listen to conversations." Courts routinely permit lay opinion

[2] Urciuoli argues for the first time on appeal that any probative value attributed to Brucchieri's testimony was "substantially outweighed by the danger of unfair prejudice." *See* Fed. R. Evid. 403. When a defendant fails to properly preserve an objection at trial, we review for plain error. *See* Fed. R. Crim. P. 52(b); *Christie*, 624 F.3d at 567. When, as here, "a trial court is not given the opportunity to exercise its discretion in striking the [Rule 403] balance, we will seldom find plain error." *United States v. Gatto*, 995 F.2d 449, 457 (3d Cir. 1993). In any event, Brucchieri's testimony was highly probative of fraud because it indicated how and why Urciuoli's investor materials were grossly misleading. The Court also issued a curative instruction to stanch any prejudice stemming from Brucchieri's more impassioned language. Therefore, we perceive no error here, much less plain error.

testimony about a party's mental state. *See, e.g.*, *Kerry Coal Co. v. United Mine Workers of Am.*, 637 F.2d 957, 967 (3d Cir. 1981) (testimony that employees were "nervous and afraid" properly admitted). Furthermore, "the definitive, clinical term 'paranoia' has taken on a less-than-definitive popular meaning, as have 'crazy' and 'nutty.'" *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 624 (D.C. Cir. 2001). The District Court did not err, much less commit plain error, in admitting Nerbonne's lay opinion testimony.

III

Eschewing the sage advice of one of our colleagues, *see* Ruggero J. Aldisert, A Judge's Advice 143–44 (2011), Urciuoli raises a grab bag of arguments that require little explication.

First, he claims that his trial counsel was ineffective because counsel incorrectly predicted during his opening statement that the Government would call two former InsPara executives to testify. We decline to address this claim now because of "the well-settled rule in this Court that [ineffective assistance of counsel] claims are 'generally not entertained on direct appeal.'" *Gov't of Virgin Islands v. Lewis*, 620 F.3d 359, 371 (3d Cir. 2010) (quoting *United States v. McLaughlin*, 386 F.3d 547, 555 (3d Cir. 2004)).

Next, Urciuoli complains that the Government made several prejudicial remarks during its summation, including the suggestion that defense counsel's strategy amounted to "side shows and distractions" designed "to trick the jury," and that Urciuoli was a "chameleon." This argument ignores the fact that "attacks on the opposing advocate's arguments and tactics are acceptable." *United States v. Rivas*, 493 F.3d 131, 139 (3d Cir. 2007) (citation omitted). Furthermore, the Government's characterization of Urciuoli was consistent with the evidence. *Cf. Greer v. Mitchell*, 264 F.3d 663, 683 (6th Cir. 2001) (prosecutor's characterization of defendant, who changed his testimony during trial, as a "'chameleon' . . . fell within the bounds of permissible comment").

Third, Urciuoli provides a litany of arguments for why the District Court's jury instructions were an abuse of discretion. He cites no authority to support any of his claims. Urciuoli's most colorable arguments are that the District Court: (1) erred in declining to issue a good faith charge; and (2) confused the jury into thinking it could not consider the conduct of other InsPara executives who were not named in the indictment and who did not testify. "It is well settled that a trial judge has substantial discretion to select the language to be used in instructing the jury on the law so long as the judge's instructions are correct and do not omit essentials." *United States v. Tiller*, 302 F.3d 98, 105 (3d Cir. 2002). A good faith defense charge was not required because "the District Court's instructions, taken as a whole, adequately defined the elements of the crime, including the intent requirement, thereby making a good faith instruction unnecessary and redundant." *United States v. Leahy*, 445 F.3d 634, 651 (3d Cir. 2006). Moreover, the Court properly instructed the jury that it "may not draw any inference, favorable or unfavorable" from the fact that other InsPara executives were not named in the indictment and that their absence as witnesses "should not affect [the jury's] judgment in any way."

Supp. App. 980–81. There is no indication that the instruction confused the jury into believing that it could not consider the executives' alleged participation in the fraud while determining Urciuoli's guilt or innocence.

Finally, Urciuoli raises a claim—already rejected by the District Court and a motions panel of this Court—that he is entitled to a new trial because the jury selection was not transcribed and the transcript of the jury instructions reflects the written, rather than oral, instructions. We reject this claim for the third time because the record is sufficient for appellate review and there is no evidence of prejudice. *See United States v. Sierra*, 981 F.2d 123, 125 (3d Cir. 1992).

IV

At last we turn to Urciuoli's challenges to the substantive reasonableness of his sentence and to the order of restitution.

Urciuoli claims the District Court failed to "give the proper weight" to his various mitigating arguments and thus incorrectly applied the 18 U.S.C. § 3553(a) factors. Urciuoli argues that the District Court adequately considered neither the connection between his prior convictions and personal history of drug and alcohol addiction nor the length of the sentences that other members of the InsPara scheme received. In fact, the District Court reduced Urciuoli's criminal history category from III to I, in part because it found that the Presentence Investigation Report "substantially over represent[ed] the seriousness of the defendants [sic] criminal history . . . i[n] that the defendant has had a very serious drug and alcohol problem but since 2005, he has seemed to have got himself on track." This downward departure reduced Urciuoli's Guidelines range from 135–168 months to 108–135 months. Urciuoli's bottom-of-the-Guidelines sentence of 108 months' imprisonment was plainly not an abuse of discretion. *See United States v. Tomko*, 562 F.3d 558, 567 (3d Cir. 2009) (citation omitted).

As to the restitution order, Urciuoli raises two points: (1) he objects to the fact that the District Court ordered restitution for all twenty-nine victims when only seven of them were named in the indictment and testified at trial; and (2) he complains that the value of the victims' stock should have been deducted. The fact that twenty-two victims were not named in the indictment and did not testify at trial does not change the fact that they were victimized by Urciuoli's scheme. The District Court correctly concluded that all twenty-nine investors were victims eligible for restitution under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A *et seq*. In addition, the Softnet stock was essentially worthless. For these reasons, Urciuoli cannot show the District Court's restitution order was "completely devoid of a credible evidentiary basis or bears no rational relationship to the supporting data." *United States v. Vitillo*, 490 F.3d 314, 330 (3d Cir. 2007) (quoting *United States v. Haut*, 107 F.3d 213, 218 (3d Cir. 1997)) (internal quotation marks omitted). Accordingly, we will affirm Urciuoli's judgment of conviction and sentence.