

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Thurgood Marshall United
3 States Courthouse, 40 Foley Square, in the City of New York,
4 on the 18th day of November, two thousand fifteen.

5
6 **PRESENT: DENNIS JACOBS,**
7 **PIERRE N. LEVAL,**
8 **GERARD E. LYNCH,**
9 **Circuit Judges.**

10
11 - - - - -X

12 **UNITED STATES OF AMERICA,**
13 **Appellee,**

14
15 **-v.-**

14-2394

16
17 **MICHAEL BALBOA,**
18 **Defendant-Appellant.**

19 - - - - -X

20
21 **FOR APPELLANT:** Malvina Nathanson, New York, New
22 York.

23
24 **FOR APPELLEE:** Jason H. Cowley (with Michael A.
25 Levy on the brief) for Preet
26 Bharara, United States Attorney
27 for the Southern District of New
28 York, New York, New York.

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2 Appeal from a judgment of the United States District
3 Court for the Southern District of New York (Crotty, J.).
4

5 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
6 **AND DECREED** that the judgment of the district court be
7 **AFFIRMED.**
8

9 Michael Balboa appeals from the judgment of the United
10 States District Court for the Southern District of New York
11 (Crotty, J.), convicting and sentencing Balboa to 48 months'
12 imprisonment for conspiracy to commit securities fraud,
13 securities fraud, conspiracy to commit wire fraud, wire
14 fraud, and investment advisor fraud. We assume the parties'
15 familiarity with the underlying facts, the procedural
16 history, and the issues presented for review.
17

18 **1.** Balboa challenges the sufficiency of the evidence
19 supporting the conspiracy counts. "A defendant challenging
20 the sufficiency of the evidence bears a heavy burden,
21 because the reviewing court is required to draw all
22 permissible inferences in favor of the government and
23 resolve all issues of credibility in favor of the jury
24 verdict." United States v. Kozeny, 667 F.3d 122, 139 (2d
25 Cir. 2011). "The traditional deference accorded to a jury's
26 verdict 'is especially important when reviewing a conviction
27 for conspiracy . . . because a conspiracy by its very nature
28 is a secretive operation, and it is a rare case where all
29 aspects of a conspiracy can be laid bare in court with the
30 precision of a surgeon's scalpel.'" United States v.
31 Jackson, 335 F.3d 170, 180 (2d Cir. 2003) (quoting United
32 States v. Pitre, 960 F.2d 1112, 1121 (2d Cir. 1992)).
33 Balboa concedes that, because he did not raise this argument
34 below, we review his challenge for plain error, which
35 requires that there be error, the error be plain, the error
36 prejudicially affect Balboa's substantial rights, and the
37 error seriously affect the fairness, integrity, or public
38 reputation of judicial proceedings. See United States v.
39 Thomas, 274 F.3d 655, 667 (2d Cir. 2001).
40

41 "[T]he conspiratorial agreement itself may be
42 established by proof of a tacit understanding among the
43 participants, rather than by proof of an explicit agreement
44" United States v. Desimone, 119 F.3d 217, 223 (2d
45 Cir. 1997). Drawing all reasonable inferences in favor of
46 the government, no plain error was committed as the evidence
47 adduced at trial was sufficient to show that DeCharsonville

1 and Pratt had such a tacit understanding with Balboa and
2 engaged in "purposeful behavior aimed at furthering the
3 goals of the conspiracy." Id.
4

5 **2.** Balboa challenges the loss determination, which was
6 based on the total sum of money that victims of Balboa's
7 scheme were fraudulently induced to invest in the Hedge
8 Fund. "We review the district court's factual findings with
9 respect to the loss amount . . . for clear error and its
10 conclusions of law *de novo*." United States v. Desnoyers,
11 708 F.3d 378, 385 (2d Cir. 2013). And the Sentencing
12 Guidelines "do not require that the sentencing court
13 calculate the amount of loss with certainty or precision."
14 United States v. Bryant, 128 F.3d 74, 75 (2d Cir. 1997).
15

16 Balboa argues that the global economic downturn, rather
17 than his fraudulent scheme, was the ultimate cause of the
18 victims' loss and therefore, the actual loss attributable to
19 the fraud was \$0. Balboa's argument is foreclosed by United
20 States v. Hsu, 669 F.3d 112, 121 (2d Cir. 2012), which held
21 that "[t]he guidelines provide that when an investor puts
22 money into a fraudster's hands, and ultimately receives
23 nothing of value in return, his loss is measured by the
24 amount of principal invested" See also United
25 States v. Stitsky, 536 F. App'x 98, 112 (2d Cir. 2013)
26 ("[T]he district court reasonably determined that no offset
27 was warranted for losses resulting from changed economic
28 circumstances because . . . investors would not have been
29 exposed to such risks had defendants not fraudulently
30 induced them to invest in the first instance.").
31

32 **3.** Balboa's supplemental brief challenges the
33 forfeiture calculation. "When a forfeiture award is
34 challenged on appeal, this Court reviews the district
35 court's legal conclusions *de novo* and its factual findings
36 for clear error." United States v. Treacy, 639 F.3d 32, 47
37 (2d Cir. 2011). On this record, no clear error appears in
38 the district court's forfeiture determination.
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