PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 25-1489

UNITED STATES OF AMERICA

v.

JOSE TAVARES,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(District Court No. 3:24-cr-00025-001)
District Judge: Honorable Robert Kirsch

Submitted under Third Circuit L.A.R. 34.1(a)
March 26, 2026

Before: HARDIMAN, SCIRICA*, and AMBRO, *Circuit Judges*

(Opinion filed August 17, 2026)

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* The Honorable Anthony J. Scirica was unavailable to participate in the decision in this case after submission to the merits panel. This opinion is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d) and 3d Cir. I.O.P. 12.1(b).

OPINION OF THE COURT

AMBRO, *Circuit Judge*

A jury convicted Jose Tavares of conspiracy to obtain fraudulently COVID-19 unemployment benefits. He contends that the District Court mishandled his proffered statements and character evidence at trial and then imposed an unreasonable sentence without properly granting him a reduction. Because we perceive no error, we will affirm.

I. BACKGROUND

Between July 2020 and February 2021, Tavares participated in a conspiracy to obtain funds from temporary federal unemployment insurance programs created for the COVID-19 pandemic by using stolen identities. Recruited by his then-romantic partner, Christopher Valerio, Tavares and his co-conspirators submitted fraudulent online benefits applications to the New York Department of Labor (the "Department") in the names of about 20 victims. The agency approved those applications and mailed dozens of debit cards to addresses where the co-conspirators retrieved them. They withdrew the proceeds at ATMs throughout New Jersey and New York and used them to purchase designer goods, finance international trips, and obtain cosmetic procedures.

In December 2021, the Government filed a criminal complaint charging Tavares with participating in the scheme. He retained counsel and entered into a written proffer agreement (the "Agreement") with the Government. He consented to participate in an interview with investigators conducted under the Agreement. The Government agreed not to use his admissions against him at trial or in sentencing, except "to rebut any evidence or arguments offered on [his] behalf." App. 34. In effect, Tavares agreed that, should statements of evidence he introduces at trial contradict what he admitted by proffer, his right to object would be waived.

During a December 2022 proffer session, Tavares admitted that he knew of Valerio's scheme and became personally involved starting in July 2020. He said that he created fraudulent email addresses using victims' personal information that Valerio provided, received the debit cards at his residence, sent photos confirming their receipt to Valerio, and participated in weekly certification of the fraudulent unemployment claims with the Department. Tavares said he pretended to play the fool because he did not want any trouble. In January 2024, a federal grand jury returned a one-count indictment charging him with conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349.

At trial, defense counsel in his opening statement told the jury that Tavares had been Valerio's "sacrificial pawn," believed Valerio's money came from legitimate work as a masseuse, and that Tavares had "no idea" about the scheme. App. 159–61. The Government argued that those statements directly contradicted Tavares's proffered admissions and moved to introduce those admissions under the waiver provision in the Agreement. The District Court granted the motion.

Before Tavares testified, the Court ruled that he could not testify as to his immigration status and that he had no prior criminal record. The Court concluded that evidence would constitute inadmissible character evidence, although it later permitted limited testimony regarding Tavares's permanent residency to avoid juror speculation that he was in the U.S. illegally.

The jury found Tavares guilty. At sentencing, he sought up to a four-point reduction under U.S.S.G. § 3B1.2. He asserted that Valerio was the primary architect of the scheme by "filling out the applications, making the calls, [and] going to the ATMs." App. 708. After considering the factors in 18 U.S.C. § 3553(a), the District Court denied the request to make any downward adjustment. It sentenced Tavares to 40 months in prison and ordered restitution in the amount of $570,077. Tavares appeals.

II. JURISDICTION

The District Court had subject matter jurisdiction over Tavares's federal offense under 18 U.S.C. § 3231. We have appellate jurisdiction over his conviction and sentencing challenges under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

III. DISCUSSION

Tavares raises four challenges to his conviction and sentence. He contends that the District Court erred by (1) admitting statements from his proffer session, (2) precluding testimony that he had no prior criminal record or was a law-abiding person, (3) denying him a mitigating role reduction under U.S.S.G. § 3B1.2, and (4) imposing a procedurally and substantively unreasonable sentence. We address each argument in turn.

A. The District Court did not err by admitting Tavares's proffered statements.

We review the District Court's decision to admit Tavares's proffered statements for abuse of discretion. *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008). The parties do not dispute the enforceability of the Agreement. The sole question is whether, in the opening statement, Tavares's counsel triggered the Agreement's waiver provision and allowed the Government to introduce his proffered admissions during its case-in-chief. We conclude that it did.

At trial, the District Court focused on the Agreement's provision allowing the Government to introduce proffered admissions "to rebut any evidence or arguments offered on [Tavares's] behalf." App. 295. The Court found that defense counsel's opening statement—portraying Tavares as an unwitting participant—was "squarely contradicted" by his proffered admissions acknowledging knowledge of the fraudulent scheme and his active participation. App. 295–96. In response, defense counsel objected on the basis that opening statements are not "evidence" that can be rebutted under the waiver provision. App. 291. Although the Court agreed that "opening statements [are] not evidence," it held that counsel had nonetheless given the jury information that contradicted the proffered statements. App. 294, 298. As a result, the Court permitted the Government to introduce those statements at trial.

Tavares asserts this was an abuse of discretion. He alleges the opening statement presented no affirmative evidence or argument contradicting his proffered statements—and, in any event, opening statements do not constitute "evidence" that can be rebutted under the Agreement. App. 291–92. He also argues that the statement merely challenged the sufficiency of the Government's evidence of his knowledge and intent, which is not enough to trigger the waiver provision. Tavares distinguishes his case from *Hardwick*, where we affirmed admission of a proffered statement under a similar waiver provision only after defense counsel elicited testimony directly contradicting the defendant's admissions. *Hardwick*, 544 F.3d at 571. In our case, he argues, counsel merely asserted that the Government failed to prove knowledge and intent beyond a reasonable doubt.

We disagree. We have characterized waivers like the one here—forgoing objecting to the admission of proffered statements to "rebut *any* evidence or arguments offered on [the defendant's] behalf"—as "expansive." *Id.* at 570 (emphasis in original). We have also already found that this language is not limited to the defendant's own testimony, as Tavares argues, but may extend to the defense's cross-examination of other witnesses. *Id.* at 570–71. We hold that this language extends further to opening statements where defense counsel affirmatively advances factual arguments inconsistent with the defendant's proffered admissions.

Tavares is correct that opening statements are not evidence. *See United States v. DeRosa*, 548 F.2d 464, 470 (3d Cir. 1977) ("An opening statement is not designed to be an evidentiary recitation…."). The waiver provision, however, permits the Government to use Tavares's proffered statements to rebut both evidence and *arguments* advanced by the defense. Ordinarily, the purpose of an opening statement is to "state what evidence will be presented," not to argue legal issues in the case. *DeRosa*, 548 F.2d at 471 (citing *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (concurring opinion)). Yet here, defense counsel went further than outlining the evidence. He advanced a factual theory that Tavares had "no idea" about the scheme, believed Valerio's money came from legitimate work, and he was merely a "sacrificial pawn." App. 159–61. That was an argument directly contradicting the proffered admissions and sufficient to trigger the waiver provision.

Both the Second and Fifth Circuits have similarly distinguished between opening statements that merely hold the Government to its burden of proof and those that affirmatively advance a factual theory inconsistent with a defendant's proffer.[1] *See United States v. Lyle*, 919 F.3d 716, 732–33 (2d Cir. 2019); *United States v. Scott*, 70 F.4th 846, 857–58 (5th Cir. 2023). In *Lyle*, defense counsel's opening statement did not simply argue that the Government lacked credible evidence that the defendant was a drug dealer. *Lyle*, 919 F.3d at 732–33. It affirmatively disputed that he was a dealer, triggering the waiver provision. *Id.* Likewise in *Scott*, the Court held that defense counsel's opening statement went beyond a mere allusion to the Government's lack of evidence but instead

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[1] Although we have not previously addressed this question in a precedential opinion, two of our nonprecedential decisions affirmed the admission of proffered statements after defense counsel advanced a trial theory or opening statement inconsistent with the client's admissions. *See United States v. Raisley*, 466 F. App'x 125, 130 (3d Cir. 2012); *United States v. Vella*, 414 F. App'x 400, 405 (3d Cir. 2011).

asserted a new factual theory—that missing cell phones may have been in the police department's lost-and-found rather than thrown into a swamp, as the defendant had admitted during his proffer. *Scott*, 70 F.4th at 857–58. The Court held that the opening statement therefore triggered the waiver provision. *Id.*

We do not suggest that every opening statement can trigger a proffer waiver. Defense counsel may remind the jury that the Government bears the burden of proof that its evidence is sufficient. But where, as here, a defendant's counsel affirmatively advances a factual narrative that materially contradicts his client's admissions at a proffer session, rebuttal "evidence or arguments" become proper. The District Court therefore did not abuse its discretion by admitting Tavares's proffered statements.

B. The District Court properly excluded evidence of Tavares's character.

Tavares argues he should have been allowed to testify that he had no criminal record under Federal Rule of Evidence 405 to prove his good character. Because he never objected to the District Court's exclusion of such testimony, we review this issue for plain error. *United States v. Christie*, 624 F.3d 558, 567 (3d Cir. 2010). This requires an error that was plain, affected a defendant's rights substantially enough to influence the outcome, and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (citation modified).

We conclude there was no error here, let alone a plain one. Rule 405 provides that character evidence, if admissible, must be proved through reputation or opinion testimony. Fed.

R. Evid. 405(a). Evidence of “specific instances of conduct” may be introduced only when character is an essential element of a charge, claim, or defense. Fed. R. Evid. 405(b). Here, Tavares asserts that testimony should have been admitted because it bears on the pertinent character trait of “honesty” directly implicated by the conspiracy charge against him. Appellant’s Br. 19–20. However, he never sought to introduce reputation or opinion testimony by other witnesses, only his own testimony. The Court therefore addressed only whether Tavares could testify about his lack of a criminal record. It properly prevented him from doing so because, as we have previously held, “testimony as to an absence of prior arrests does not, standing alone, constitute evidence of good character admissible as such under Rule 405(a).” *Gov’t of V.I. v. Grant*, 775 F.2d 508, 512 (3d Cir. 1985).

Tavares also suggests that testimony concerning his lack of a criminal record was admissible under Rule 405(b). However, honesty or lack thereof is not an essential element of the wire fraud conspiracy charge or its defense. *See* Fed. R. Evid. 405 advisory committee’s note (explaining that evidence of specific instances of conduct is reserved for cases “in which character is, in the strict sense, in issue and hence deserving of a searching inquiry”). To prove conspiracy to commit wire fraud, the Government had to show that Tavares shared a unity of purpose with his co-conspirators, intended to achieve a common illegal goal, and agreed to work toward that goal. *See United States v. Boria*, 592 F.3d 476, 481 (3d Cir. 2010). Whether he was generally an honest person did not establish or negate any of those elements. The Court therefore did not plainly err in excluding the proposed testimony.

C. The District Court did not err by denying Tavares a mitigating role reduction.

Tavares's challenge to the District Court's denial of a mitigating role reduction of two to four levels in his offense level is primarily factual and therefore reviewed for clear error. *United States v. Womack*, 55 F.4th 219, 243 (3d Cir. 2022) (quoting *United States v. Carr*, 25 F.3d 1194, 1207 (3d. Cir. 1994) (citations omitted)).

A mitigating role adjustment is appropriate only where the defendant is "substantially less culpable than the average participant in the criminal activity." U.S.S.G. § 3B1.2 cmt. n.3(A). "[D]istrict courts are allowed broad discretion in applying [section 3B1.2], and their rulings are left largely undisturbed by the courts of appeal." *United States v. Isaza-Zapata*, 148 F.3d 236, 238 (3d Cir. 1998). In making that determination, they consider, among other factors, the defendant's awareness of the scope of the enterprise, relationship to other participants, and importance to the venture's success. *United States v. Brown*, 250 F.3d 811, 819 (3d Cir. 2001).

Tavares argued that he qualified for a reduction because he was a mere pawn in a conspiracy in which Valerio played the orchestral role of applying for unemployment benefits, making phone calls, and withdrawing proceeds from ATMs. The District Court rejected that characterization, finding that Tavares knowingly participated in the scheme by creating fraudulent email accounts, receiving correspondence and debit cards tied to fraudulent claims, completing weekly unemployment certifications, and sharing in the conspiracy's proceeds. It described him as "an active, integral participant" in the conspiracy and stated that the "fraud would not have been consummated in the way that it was without [him]." App. 710; *see also* App. 724–25, 729–30.

Those findings are well supported by the record. That Valerio may have exercised a greater role in the conspiracy does not establish that Tavares was "substantially less culpable than the average participant." U.S.S.G. § 3B1.2 cmt. n.3(A). Accordingly, the District Court did not clearly err in denying the requested reduction.

D. The District Court Properly Sentenced Tavares.

Federal sentencing involves a three-step process. The District Court must calculate the advisory Guidelines range, rule on any departure motions, and then determine an appropriate sentence after considering the factors set forth in 18 U.S.C. § 3553(a). *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006). We review first for procedural error and then for substantive reasonableness. *United States v. Tomko*, 562 F.3d 558, 567 (3d Cir. 2009) (en banc). In general, "[t]he abuse-of-discretion standard applies to both . . . inquiries." *Id.* But where, as here, challenges to the reasonableness of a sentence were not preserved, we review for plain error. *United States v. Valentin*, 118 F.4th 579, 590 n. 19 (3d Cir. 2024). And "the party challenging the sentence has the burden of demonstrating unreasonableness" at both stages of our analysis. *Tomko*, 562 F.3d at 567. Because Tavares did not do so, we will affirm.

1. The District Court imposed a procedurally reasonable sentence.

Our first task on appeal is to "ensure that the [D]istrict [C]ourt committed no significant procedural error." *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). Examples of error include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Id.*

Tavares tells us that the District Court failed to give sufficient weight to his history of childhood abuse and how Valerio manipulated him as a "career con-artist." App. 728–29; Appellant's Br. at 23. The record demonstrates otherwise. The Court considered Tavares's background and relationship with Valerio before concluding that the seriousness of the offense, Tavares's knowing participation in the conspiracy, his lack of genuine remorse, and the need for deterrence warranted a within-Guidelines sentence. Because the Court adequately considered the parties' arguments and explained the basis for the sentence it imposed, Tavares has not shown plain procedural error.

2. The District Court imposed a substantively reasonable sentence.

Absent a procedural error, we turn to whether the District Court imposed a substantively reasonable sentence. *United States v. Wise*, 515 F.3d 207, 218 (3d Cir. 2008) (citing *Gall*, 552 U.S. at 597). "Ultimately, '[t]he touchstone of "reasonableness" is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a).'" *Tomko*, 562 F.3d at 568 (quoting *United States v. Grier*, 475 F.3d 556, 571 (3d Cir. 2007) (en banc)). However, "'we must give due deference to the district court's determination that the § 3553(a) factors, on a whole,' justify the sentence." *Id.* (quoting *Gall*, 552 U.S. at 597). And "the abuse-of-discretion standard by which [reasonableness] must be judged . . . gives district courts broad latitude in sentencing." *Id.* (quoting *United States v. Levinson*, 543 F.3d 190, 195 (3d Cir. 2008)). Thus, "if the … court's sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence." *Id.*

In our case, the District Court imposed a 40-month sentence within the advisory Guidelines range of 37 to 46 months. It explained at length why that sentence appropriately reflected the seriousness of the offense, promoted respect for the law, provided just punishment, and served the goals of deterrence. Indeed, the Court noted that the 40-month sentence was the "exact appropriate sentence, guidelines or no guidelines." App. 759. As the District Court is entitled to substantial deference under our precedents, we perceive no error in the sentence it imposed.

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A proffer waiver reaching evidence or arguments offered on a defendant's behalf at trial extends to an opening statement that affirmatively advances a factual theory contradicting admissions at the proffer session. Tavares identifies no error in the exclusion of his character testimony, the denial of a mitigating-role reduction, or the sentence imposed. We will affirm.