

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES)
)
 v.) Criminal Action
)
 DEBBIE HITCHENS) No. 00-654-2
)

MEMORANDUM

Padova, J. **October , 2001**

I. Background

Defendant Debbie Hitchens was convicted by a jury on two counts of mail fraud and three counts of wire fraud (Counts 3, 4, 8, 9, 11) in connection with a mortgage fraud scheme.¹ Defendant moves for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c), or, in the alternative, for a new trial on the basis of purportedly erroneous jury instructions. For the reasons that follow, the Court denies said Motions in all respects.

II. Legal Standard

A. Sufficiency of the Evidence

In deciding a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29 on the basis of insufficiency of the evidence, the district court must determine whether the Government has adduced sufficient evidence respecting each element of the offense charged to permit jury consideration. United States v.

¹The jury hung on seven additional counts (Counts 5, 6, 7, 10, 12, 13, 14).

Giampa, 758 F.2d 928, 934 (3d Cir. 1985). The district court cannot and should not weigh the evidence. Id. Nor is the court permitted to make credibility determinations. Id. at 935.

A defendant bears a very heavy burden when challenging the sufficiency of the evidence supporting a jury's verdict. United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998). The evidence must be weighed in the light most favorable to the government and the verdict upheld so long as "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Voigt, 89 F.3d 1050, 1080 (3d Cir. 1996). The defendant cannot "simply reargue [his] defense." United States v. Smith, 186 F.3d 290, 294 (3d Cir. 1999). The Court must find there is no evidence in the record, regardless of how it is weighed, from which the jury could have found the defendant guilty. United States v. McNeill, 887 F.2d 448, 450 (3d Cir. 1989), cert. denied, 943 U.S. 1087 (1990). The defendant must overcome the jury's special province in matters involving witness credibility, conflicting testimony, and drawing factual inferences from circumstantial evidence. United States v. McGlory, 968 F.2d 309, 321 (3d Cir. 1992).

B. New trial

"On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require." Fed. R. Crim. P. 33. A new trial should be granted sparingly and only to

remedy a miscarriage of justice. United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994).

III. Discussion

A. Motion for Judgment of Acquittal

Defendant moves for judgment of acquittal on Counts 3, 4, 8, 9, and 11.² Defendant contends that the evidence presented at trial was insufficient to support any rational trier of fact from finding beyond a reasonable doubt that the Defendant was guilty. The Court will consider Defendant's arguments in turn.

1. Specific Use of Mails (Counts 3 and 4)

In Counts 3 and 4, Defendant was charged with mail fraud relating to the purchase of 504 N. Queen Street, Lancaster, PA, and the purchase of 516 N. Queen Street, Lancaster, PA, respectively. The federal mail fraud statute provides, in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting to do so . . . knowingly causes to be delivered by mail . . . any such matter or thing, shall be [guilty of the offense].

18 U.S.C.A. § 1341 (West 2000).

Defendant challenges the evidence with respect to the third element, and contends that the evidence at trial was insufficient to establish that the mails were used in carrying out the fraud.

²At the conclusion of the Government's case, Defendant moved for judgment of acquittal. N.T. 3/30/01 at 237. The Court denied the motion. N.T. 3/30/01 at 248.

Specifically, Defendant argues that, at best, the Government's evidence established that the companies in question used the common carrier, Federal Express, to send packages to mortgage lenders, but that there was no evidence relating to the specific transactions at issue in Counts 3 and 4. (Def.'s Mem. at 3.) Defendant contends that the loan application packages were not offered into evidence, that no witness testified as to the contents of those packages, and that no one from the carrier, Federal Express, testified at trial.

"It is well-established that evidence of business practice or office custom supports a finding of the mailing element of § 1341." United States v. Hannigan, 27 F.3d 890, 892 (3d Cir. 1994). Once evidence concerning office custom of mailing is presented, the prosecution need not affirmatively disprove every conceivable alternative theory as to how the specific correspondence was delivered. Id. at 892-93 (citing United States v. Matzker, 473 F.2d 408, 411 (8th Cir. 1973)). Notwithstanding the sufficiency of such evidence of custom to establish the fact of mailing, in order to convict under § 1341, some reference to the correspondence in question is required. Id. at 893 (citing United States v. Burks, 867 F.2d 795, 797 (3d Cir. 1989) ("Although circumstantial evidence may be used to prove the element of mailing . . . under § 1341, reliance upon inferences drawn from evidence of standard business practice without specific reference to the mailing in question is insufficient.")).

In this case, the Court concludes that the evidence submitted at trial was sufficient for any rational jury to find that the documents in question were sent by Federal Express. At trial, the Government presented evidence by Earth Mortgage employees establishing the business practice of preparing packages of financial information for lenders and sending those packages via Federal Express. See N.T. 3/27/01 at 175 (testimony of Amy Weinstein); N.T. 3/28/01, at 171-72 (testimony of Amanda McCoy). The Government also presented evidence specific to the two properties involved in Counts 3 and 4 establishing that the lending companies, Option One and ContiMortgage, had received information from Earth Mortgage relating to the loan application that was relied upon in deciding the loan applications. See N.T. 3/28/01 at 9-13 (testimony of Mark Thalheimer); Gov't App. 7 ("Gov't Ex. 69") (bank statement); Gov't App. 8 ("Gov't Ex. 70") (pay stub); Gov't App. 9 ("Gov't Ex. 71") (W-2); Gov't App. 10 ("Gov't Ex. 72") (W-2); N.T. 3/29/01 at 75 (testimony of Robert Murphy); Gov't App. 12 (Gov't Ex. 17") (bank statement); Gov't App. 13 ("Gov't Ex. 13") (pay stubs); Gov't App. 14 ("Gov't Ex. 129") (W-2); Gov't App. 15 ("Gov't Ex. 130") (W-2).

The evidence provided sufficient basis to establish not only a regular business practice by Earth Mortgage of mailing these loan application documents to the lenders by Federal Express, but also that specific information originating from Earth Mortgage

pertaining to the loan applications in question was received by the lenders. This evidence was sufficient for a reasonable jury to find that the mailings were made as charged in Counts 3 and 4. See Hannigan, 27 F.3d at 892-93. Accordingly, Defendant's Motion for Judgment of Acquittal on Counts 3 and 4 is denied.

2. Specific Use of the Wires (Counts 8, 9, 11)

Defendant presents a similar argument with respect to the use of the wires in Counts 8, 9, and 11. Counts 8 and 9 charged that the mortgage lender, Amresco Residential Mortgage Company, wire transferred funds from Bankers Trust Company to the account of Lancaster Title Abstract, the closing agent for the properties. Count 8 related to the property at 17 E. Filbert Street, Lancaster, Pennsylvania. Count 9 related to the property at 465 Beaver Street, Lancaster, Pennsylvania. Count 11 related to the property at 426 Manor Street, Lancaster, Pennsylvania.

The Court concludes that the evidence was sufficient for a rational jury to find that the wire transfers in Counts 8, 9, and 11 took place. At trial, the Government presented testimony of the mortgage lenders regarding the use of wire transmissions to transfer the loan funds, both as a standard business practice and in connection with the particular transactions at in these Counts. See N.T. 3/29/01 at 47-48 (testimony of Nancy Swanson of Amresco Residential Mortgage Corp.); N.T. 3/29/01 at 76-79 (testimony of Gerald Nolan of Chapel Mortgage Corp.). The title agents for these

properties also testified as to the disbursement of funds. See N.T. 3/30/01 at 13, 23-27 (testimony of Karen Umlauf); N.T. 3/30/01 at 62-66. The Government also admitted certain documentary evidence relating to the transactions. See Def.'s Supp. Mem. Ex. G ("Gov't Ex. 157") (loan disbursement instructions); Gov't App. 18 ("Gov't Ex. 49") (receipt/check disbursement statement). This evidence, viewed in the light most favorable to the Government, was sufficient such that any rational jury could have found, beyond a reasonable doubt, that the wire transactions took place as charged in Counts 8, 9, and 11. Accordingly, the Defendant's Motion for Judgment of Acquittal on Counts 8, 9, and 11 is denied.

2. Lack of Foreseeability

Defendant next claims that the evidence was insufficient to establish that she could reasonably have foreseen that the mortgage broker would send the loan application documents through the mails. She makes the same argument with respect to the wire transfers. The defendant must cause the mails to be used "for the purpose of executing" the scheme of fraud. 18 U.S.C.A. § 1341; United States v. Tiller, 142 F. Supp. 2d 638, 642 (E.D. Pa. 2001). The federal mail fraud statute reaches "only those limited instances in which the use of the mails is part of the execution of the fraud." Tiller, 142 F. Supp. 2d at 642 (citing Kann v. United States, 323 U.S. 88, 95 (1944)). Causation is satisfied "where one does an act with knowledge that the use of the mails will follow in the

ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." Tiller, 142 F. Supp. 2d at 642 (citing Pereira v. United States, 347 U.S. 1, 8-9 (1954)). The mailing element is satisfied if: (1) the mailings were part of the execution of the fraud; and (2) either (a) the defendant had knowledge that use of the mails would follow in the ordinary course of business or (b) it was reasonably foreseeable that the mails would be used. Tiller, 142 F. Supp. 2d at 642.

The use of the mails need not be an essential element of the scheme of fraud. Pereira, 347 U.S. at 8. It is sufficient for the mailing to be "incident to an essential part of the scheme," or "a step in [the] plot." Schmuck v. United States, 489 U.S. 705, 710-11 (1989) (citing Badders v. United States, 240 U.S. 391, 394 (1916)). The mailings must be "sufficiently closely related to the scheme to bring the conduct within the ambit of the mail fraud statute." United States v. Coyle, 63 F.3d 1239, 1244 (3d Cir. 1995). The completion of the scheme must in some way depend on the charged mailings. Id. The relevant question is whether the mailing is part of the scheme as conceived by the perpetrator at the time. Schmuck, 489 U.S. at 715.

Defendant relies principally on two cases decided by the United States Courts of Appeals for the Seventh and the Eleventh Circuits, in which the courts overturned mail fraud convictions on the basis that the evidence was insufficient to establish that the

schemes depended on the use of the mails or that the use of the mails was known or foreseeable. In United States v. Walters, 997 F.2d 1219 (7th Cir. 1993), the defendant was a novice sports agent convicted of multiple counts of mail fraud in connection with a scheme to sign college football players to professional representation contracts while they were still playing college football. Id. at 1221. Because students who sign contracts with an agent become ineligible to play on collegiate teams, the defendant post-dated the contracts, locked them in his safe, and promised the players he would lie to the universities in response to any inquiries. Id. Defendant was charged with mail fraud for causing the universities to pay scholarship funds to athletes who had become ineligible as a result of the agency contracts. Id. The mail fraud statute was invoked because each university required its athletes to verify their eligibility to play NCAA football, then sent copies by mail to the athletic conferences like the Big Ten. Id. The court concluded, however, that the scheme conceived of by the defendant was not one in which the mailings played a role. Id. at 1222. The court concluded that success of the plan lay in the athletes' willingness to conceal their contracts from their schools, and not on the forms verifying eligibility that were mailed by the universities to the conferences. Id.

In United States v. Smith, 934 F.2d 270 (11th Cir. 1991), the defendant was convicted of several counts of mail fraud in

connection with an insurance fraud scheme involving the staging of an accident, the feigning of an injury, and the collection of \$450 from the auto insurance company. Id. at 271. Although the Defendant came to the insurance company office in person to collect the insurance check, the mail fraud statute was triggered when the local insurance agent mailed an "accounting copy" of the draft to the regional headquarters office. Id. The court determined that the Government failed to show that the defendant knew or should have foreseen that the mails would be used. Id. at 272. The appellate court concluded that the Government had not proven that the defendant coordinated any part of the scheme, and thus rejected the district court's conclusion that the defendant was sophisticated enough in the workings of the insurance industry that he understood the workings of the insurance business. Id. at 273.

The facts of the instant case distinguish it from the cases relied upon by the Defendant. In this case, the Government presented testimony and evidence at trial showing that the use of the mails and wires was a necessary part of the scheme to defraud the mortgage lenders. The Defendant was an experienced real estate agent who knew the workings of mortgage companies and lenders and the process for obtaining mortgage loans. The Government presented evidence showing that Defendant was heavily involved in the creation and operation of the acquisitions company. See, e.g., N.T. 3/27/01 at 63-71 (testimony of Natalie Koh); N.T. 3/28/01 at

108, 118-33 (testimony of Philomena Rodriguez); N.T. 3/30/01 at 107, 131-32, 159-70, 197 (testimony of Dan Holsinger). The Court concludes that the evidence was sufficient such that a rational trier of fact could determine that the use of the mails and wires was part of the execution of the fraudulent scheme, and that the use of the mails was foreseeable as part of the fraudulent plan conceived of by the Defendant. Accordingly, Defendant's motion for judgment of acquittal on the ground of lack of foreseeability is denied.

B. Motion for New Trial

Defendant next seeks a new trial on the ground that the Court erroneously charged the jury and failed to include an instruction requested by Defense counsel. Specifically, the Court instructed the jury that it "must determine what the facts are in this case." N.T. 4/03/01 at 43. Defense counsel asked for a supplement to the charge to tell the jurors that if they "cannot find the facts, if they do not know what the facts are, they must acquit." N.T. 4/03/01 at 80. The Court refused this request and instructed the jury as follows:

[T]he other thing is that as you know, as part of the government's burden of proof, and as part of your job, you have to determine the facts; what happened, how it happened, why it happened, if you are able to do so . . . and if you are not able to determine what happened, or how it happened, or why it happened, based on the evidence, then it may very well be that you haven't been able to reach sufficient factual conclusions upon which to determine a verdict of guilty or not guilty, depending on what the circumstances are.

N.T. 4/03/01 at 81-82. Defendant argues that this instruction waters down the government's burden of proof. The Court disagrees. The Court very clearly and repeatedly instructed the jury as the Government's burden of proof:

Now, in a criminal case such as this, the burden is always upon the Government to prove guilt beyond a reasonable doubt. The burden is never on a defendant to prove that she is not guilty. The Government has the burden of proving each of the elements of the crimes charged beyond a reasonable doubt. The law never imposes upon a defendant the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to produce any evidence by cross-examining the Government's witnesses.

N.T. 4/03/01 at 45. Near the conclusion of the charge, the Court again instructed the jury as follows:

Members of the jury, I want to kind of end where I began. I caution you once again that the burden of proof as to each and every necessary element of the crime charged in the indictment must be borne by the Government. From the beginning of the trial, and it remains with the Government throughout the trial, and never shifts to the defendant.

N.T. 4/03/01 at 76.

The instructions as they were given made clear to the jury that the burden of proof is on the Government, and that the jurors should acquit if they unanimously agreed that the evidence was inadequate for them to determine the facts necessary to establish the elements of the crimes charged beyond a reasonable doubt.³

³The Government also points out that the instruction ran the risk of confusing the jury, because it could be construed to mean that the jurors should acquit if they could not agree on what facts the evidence showed. If, however, the jurors could not agree on

Nothing in the supplemental instruction diluted the Government's burden of proof. The Court, therefore, denies the motion for a new trial.

C. Additional Grounds for Relief

Defendant's original Omnibus Post-Trial Motions set forth several additional grounds for a new trial, including unspecified prosecutorial misconduct and error with respect to certain evidentiary rulings. Defendant also moved for arrest of judgment pursuant to Rule 34 on the grounds the indictment did not charge a federal offense. Defendant, however, has not briefed or otherwise addressed these additional arguments, and has limited her post-trial supplemental submission to the grounds already addressed above. Because Defendant has provided no authority or argument supporting her position or otherwise demonstrating that she is entitled to the relief requested, the Court denies the motions for relief on the additional grounds.

An appropriate Order follows.

the facts, and some agreed that the evidence established guilt beyond a reasonable doubt and others that the evidence established reasonable doubt, then the appropriate course of action would be for the jury to inform the Court that it was unable to reach a unanimous verdict.

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DEBBIE HITCHENS)

ORDER

AND NOW, this day of October, 2001, upon consideration of Defendant's Motion for Judgment of Acquittal, Motion for Arrest of Judgment, and Motion for a New Trial (Doc. No. 40), Defendant's Supplemental Submissions, the Government's Response, and the Trial Record, **IT IS HEREBY ORDERED** that said Motions are **DENIED** in all respects.

BY THE COURT:

John R. Padova, J.