

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

UNITED STATES OF AMERICA

v.

LETHU BUI a/k/a Jade Bui

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**CRIMINAL ACTION
NO. 03-257**

MEMORANDUM OPINION

RUFE, J.

January 9, 2004

On October 9, 2003, a jury convicted Defendant Lethu Bui of seven counts of misappropriation of postal funds in violation of 18 U.S.C. § 1711. Presently before the Court is Defendant's Post-Verdict Motion for a Judgment of Acquittal, for a New Trial, and/or for Arrest of Judgment. For the reasons below, Defendant's Motion is denied in all respects.

I. GOVERNMENT'S EVIDENCE PRESENTED AT TRIAL

In October and November 2000, Defendant was employed by the United States Postal Service as a window clerk at the Castle Retail Store in Philadelphia, Pennsylvania. 10/6/03 N.T. at 33. Window clerks sell stamps, packaging, money orders and other postal products, and are accountable for all sales and cash retained in their cash drawer. Id. at 32.

In November 2000, Defendant deposited personal checks for \$1,500 and \$1,450 into her cash drawer and removed a corresponding amount of Postal Service funds. Id. at 33-35; Gov't Exs. 1-2 (Check #002, dated 10/30/00, for \$1500; Check #001, dated 10/31/00, for \$1450). Defendant's supervisor, Ronald J. DeLollis, learned about the checks when the Postal Service accounting department asked him to identify the source of the checks because the bank had rejected them. 10/6/03 N.T. at 33, 36. The two personal checks were written by Defendant and made

payable to herself. Id. at 34. DeLollis explained to Defendant that she was not permitted to cash personal checks in her cash drawer. Id. at 36. At DeLollis's direction, Defendant repaid the \$2,950 amount for both checks the next day. Id. at 37.

Soon thereafter, Postal Service management discovered that Defendant cashed five additional checks under the same circumstances, and that the bank had rejected those checks as well. Id. at 37-38; Gov't Ex 3 (Check #1835, dated __-__-__, for \$3,000); Gov't Ex. 4 (Check #1841, dated 11-08-00, for \$2,450); Gov't Ex. 5 (Check #1842, dated 11-__-__, for \$3500); Gov't Ex. 6 (Check #1840, dated 11-10-00, for \$3,950); Gov't Ex. 7 (Check #1838, dated 11-13-00, for \$3,950).¹ All seven checks were drawn on HSBC Bank joint checking account no. 125-05626-5, which was shared by Defendant and her boyfriend, Michael Hung La, an HSBC Bank employee. Gov't Exs. 1-7, 28; 10/7/03 N.T. at 112-14. The joint account was funded by sums of cash Defendant gave to La for deposit. Id. at 116-17. La monitored the account to ensure there were no overdrafts. 10/7/03 N.T. at 117. Recognizing that the account had insufficient funds and that Defendant was writing checks that caused overdrafts, La stopped payment on the first two checks and later closed the account before the other five checks could clear. Id. at 118, 126, 129, 135-39; 10/8/03 N.T. at 12-14, 16, 30-31.

Defendant's co-worker, Kristy Bradford, asked Defendant why she was writing and

¹ Some handwriting on these five checks (Gov't Ex. 3-7) is illegible due to poor reproduction quality. See, e.g., N.T. 10/8/03 at 111 (witness unable to read date for check #1835). The bank account statement for 10/20/00 to 11/15/00 (Gov't Ex. 28) confirms the amount on check #1835 (Gov't Ex. 3) and check #1841 (Gov't Ex. 4). There is no date written on check #1835 (Gov't Ex. 3), as confirmed by a better copy at Gov't Ex. 15. The amount on check #1842 (Gov't Ex. 5) is clearly legible; it is also clear that only the month was written on the date line for check #1842 (Gov't Ex. 5). The amount on check #1840 (Gov't Ex. 6) is confirmed by a better copy of the same check at Gov't Ex. 19. The date and amount on check #1838 (Gov't Ex. 7) is confirmed by witness testimony, N.T. 10/8/03 at 116, and a better copy at Gov't Ex. 20. In any event, Plaintiff raises no objection based on information on the checks themselves.

cashing personal checks in the cash drawer, and Defendant told Bradford that she needed to send money to her family. Id. at 10. Defendant gave the same explanation to her supervisor. 10/6/03 N.T. at 36. Bradford told Defendant that window clerks are not allowed to cash personal checks in their cash drawer. 10/7/03 N.T. at 10.

Postal Inspector Frank C. O'Connor interviewed Defendant on December 8, 2000 and September 24, 2001. 10/8/03 N.T. at 121-22, 140. During the first interview, Defendant admitted that she had cashed personal checks through her cash drawer and had used the money to buy a computer, to send to her family in California, and for personal expenses. Id. at 124-25.

Inspector O'Connor also investigated Defendant's wagering records and learned that Defendant had "rather significant wagering activity at the Atlantic City casinos." Id. at 127, 141. Her boyfriend testified that Defendant had a "gambling problem," and that when Defendant went to the casinos, she played craps. Id. at 9; 10/7/03 N.T. at 111. At the second interview with Inspector O'Connor, Defendant admitted that she liked to gamble, but said she played slot machines. 10/8/03 N.T. at 142. Defendant also admitted to O'Connor that she used some proceeds of the overdrafted checks for gambling. Id. at 144. Mark Walter, a casino administrator at the Trump Marina Hotel Casino, testified that Defendant's gambling losses at his casino for the year 2000 exceeded \$27,700. 10/7/03 N.T. at 85. Inspector O'Connor's investigation revealed that Defendant's total gambling losses for the year 2000 exceeded \$48,000. 10/8/03 N.T. at 149.

II. DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL

Defendant moves for a judgment of acquittal under Federal Rule of Criminal Procedure 29(c), and argues that there was insufficient evidence to convict her of violating 18 U.S.C. § 1711. In so arguing, Defendant takes up "a very heavy," "extremely high" burden. United States

v. Serafini, 233 F.3d 758, 770 (3d Cir. 2000); United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995). Because Defendant is appealing a jury verdict against her, the Court must view the evidence in the light most favorable to the Government and must sustain the jury’s verdict if a reasonable jury believing the Government’s evidence could find beyond a reasonable doubt that the Government proved all the elements of the offense. United States v. Pressler, 256 F.3d 144, 149 (3d Cir. 2001). The Court must draw all reasonable inferences in favor of the jury’s verdict. United States v. Smith, 294 F.3d 473, 476 (3d Cir. 2002). A finding of insufficiency should “be confined to cases where the prosecution’s failure is clear.” Id. at 477 (citation omitted).

Section 1711 of Title 18 of the United States Code, entitled “misappropriation of postal funds,” provides, in relevant part:

Whoever, being a Postal Service officer or employee, loans, uses, pledges, hypothecates, or converts to his own use, or deposits in any bank, or exchanges for other funds or property, except as authorized by law, any money or property coming into his hands or under his control in any manner, in the execution or under color of his office, employment, or service, whether or not the same shall be the money or property of the United States . . . is guilty of embezzlement . . .

In the context of this case, to secure a conviction under § 1711, the Government had to prove at trial that: (1) Defendant was an employee of the United States Postal Service at the time of the acts charged; (2) Defendant did knowingly and intentionally² convert to her own use money or property; and (3) such money or property came under her control in the execution or under color of her office or employment. Defendant does not dispute that she was a Postal Service employee at the time of the acts charged and that she withdrew cash from her Postal Service cash drawer. Accordingly, the

² Although the statute does not define the required mens rea, “[c]riminal intent is an element of a violation of § 1711.” United States v. Ross, 206 F.3d 896, 899 (9th Cir. 2000) (quoting United States v. Morrison, 536 F.2d 286, 287 (9th Cir. 1976)).

first and third elements of the offense are not at issue here.

Defendant argues that she lacked the requisite intent to convert the money to her own use because she expected the checks would clear. She argues that the bank rejected the checks not because she deposited them in her cash drawer, but because La stopped payment on two checks and closed the account before the other five checks could clear. La took these actions without Defendant's knowledge or permission. 10/8/03 N.T. at 12-14, 16. Therefore, she contends, because she was ignorant of the stop-payment and account closure, the Government cannot show she had the requisite intent to convert postal funds to her personal use. See United States v. Cianciulli, 482 F. Supp. 585, 620 (E.D. Pa. 1979) (“[I]f a person acts inadvertently, accidentally or by good faith mistake, (s)he is not acting ‘knowingly or willfully’”. . . .). This argument is unpersuasive.

The Government presented sufficient evidence from which a reasonable jury could conclude beyond a reasonable doubt that Defendant knew she was converting postal funds to her own use. It is true that when La stopped payment on the first two checks, his actions were the cause-in-fact of the checks being returned to the Postal Service. Nonetheless, the Government presented evidence that even if La had not stopped payment on these checks, they would have caused an overdraft. See 10/7/03 N.T. at 139. According to the bank statement, the balance was \$665.25 on November 1, 2000. On November 2, 2000, there was a deposit of \$500; assuming this check cleared with the issuing bank, the balance would have been \$1150.25. That same day, La stopped payment on two checks for \$1,500 and \$1,450, respectively. See Bank Statement for 10/20/00 to 11/15/00 (Gov't Ex. 28). Because these amounts each exceeded the available balance, a reasonable jury could conclude that these checks would have caused an overdraft on the account if La had not stopped payment.

Defendant's argument as to the five other checks is similarly unavailing. Defendant contends that all five checks did not clear because La closed the account. This is partly erroneous. One of these checks, #1835 for \$3,000, was returned for insufficient funds on November 8, 2000, which was before La closed the account. See id.; Gov't Ex. 3; 10/8/03 N.T. at 111. In any event, the Government presented sufficient evidence from which a reasonable jury could conclude that even though La closed the account, the account contained insufficient funds to cover Defendant's checks.

La closed the account on November 10, 2000 by removing the remaining balance of \$1,375.25. See id. at 116; Gov't Ex. 28. That same day, check #1841 for \$2,450 posted to the account and was rejected for insufficient funds. See id., Gov't Ex. 4. The remaining three checks, totaling \$11,400, were still in the banking system at this time. See Gov't Exs. 5-7 (check #1842 for \$3500; check #1840 for \$3,950; and check #1838 for \$3,950). Accordingly, a reasonable jury could conclude that even if La had not removed the remaining balance of \$1,375.25, the account contained insufficient funds to cover Defendant's checks.³ While there is no *direct* evidence that Defendant knew the checks would not clear, it is well settled that a defendant's knowledge may be proven with circumstantial evidence. See, e.g., Serafini, 233 F.3d at 770 ("intent and knowledge may be proven via circumstantial evidence"); United States v. Greer, 137 F.3d 247, 250 (5th Cir. 1998) (same).

Even assuming Defendant believed her checks would clear, such belief does not

³ Defendant makes a related argument that is without merit for substantially the same reasons. She contends that La's actions achieved the harm that 18 U.S.C. § 1711 is intended to prevent, *i.e.*, misappropriation of postal funds. Conversely, she argues, this harm cannot be linked to her actions. As the discussion above demonstrates, the Government presented sufficient evidence from which a jury could (and apparently did) hold her accountable for causing this harm. If Defendant means to argue that 18 U.S.C. § 1711 is intended to deter and punish actors like La, she is wrong. It is clear from the text of 18 U.S.C. § 1711 that the statute governs Postal Service officers and employees only, not their significant others. See 18 U.S.C. § 1711 ("Whoever, *being a Postal Service officer or employee*, loans, uses . . .") (emphasis added).

negate the Government's showing of criminal intent. Defendant readily admits she took postal funds for her own use and essentially argues that she planned to repay these monies. This is not a defense against charges of misappropriation of postal funds. Ross, 206 F.3d at 899 (holding "intent to repay is not a defense to misappropriation of postal funds under 18 U.S.C. 1711"); Withrow v. United States, 420 F.2d 1220, 1224 (5th Cir. 1969) ("[I]t is no defense that Withrow intended to return the money."). Nor is it a defense if Defendant was simply mistaken about her account balance. See United States v. Berges, 170 F. Supp. 517, 518 (E.D.N.Y. 1959).⁴ There is certainly no evidence that Defendant took the money from her cash drawer unwittingly. Moreover, two co-workers testified that they told Defendant that what she was doing was impermissible.

Defendant proceeds from an erroneous premise and misunderstands criminal intent as it applies to this statute. After all, she was not convicted of stealing; it is her *use* of the United States' money that constitutes the crime. See id. As one court explained:

[T]he gravamen of the offense is the personal use of the money or property by the employee. It cannot be doubted that criminal intent must be present; but that need not be an intent permanently to deprive the United States of the money or property in question. It may be, as it was here, simply the intent to do that which the statute denounces as a crime, namely, to use the money or property for the employee's own purposes. Whether or not the employee hopes, expects or intends to return the money or property to the United States is not material in deciding the question of guilt or innocence.

United States v. Friend, 95 F. Supp. 580, 582 (S.D. W. Va. 1951).

In sum, the Government presented evidence that Defendant wrote overdraft checks, deposited them in her cash drawer at the post office, took the money from her drawer, and admitted

⁴ Unlike the case at bar, the defendant in Berges admitted that she knew the approximate account balance when she exchanged an overdraft personal check for postal funds. 170 F. Supp. at 518. This is a distinction without a difference. Defendant cannot erect a defense "by deliberately ignoring what is obvious or close [her] eyes to the facts that are true to a high probability." Cianciulli, 482 F. Supp. at 621 (footnote omitted). Because Defendant was a joint owner of the HSBC account, the jury could have inferred that Defendant had access to the account balance.

to investigators that she made personal use of the money. On these facts, there was adequate evidence from which a reasonable jury could find beyond a reasonable doubt that Defendant committed the charged offenses. Accordingly, Defendant's Motion for a Judgment of Acquittal is denied.

III. DEFENDANT'S MOTION FOR A NEW TRIAL

Defendant also moves for a new trial under Federal Rule of Criminal Procedure 33, but presents no separate argument in support. Under Rule 33, the Court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a); see also United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002) (court may order a new trial to avoid a "miscarriage of justice"), cert. denied, 537 U.S. 1140 (2003). Motions for new trials are disfavored and should only be granted sparingly and with great caution. United States v. Brennan, 326 F.3d 176, 189 (3d Cir. 2003); United States v. Allen, 554 F.2d 398, 403 (10th Cir. 1977). Based on the evidence presented at trial, the Court cannot conclude that a new trial is warranted. Defendant presented her theory of the case: that she was unaware that her checks would cause overdrafts. The jury had an opportunity to consider her argument but rejected it. As outlined above, the Government presented adequate evidence to support the conviction. Accordingly, in the opinion of the Court, a new trial is not in the interest of justice. The Motion is denied.

IV. DEFENDANT'S MOTION FOR ARREST OF JUDGMENT

Under Federal Rule of Criminal Procedure 34(a), the Court "must arrest judgment if (1) the indictment or information does not charge an offense; or (2) the court does not have jurisdiction." Fed. R. Crim. P. 34(a). Defendant offers no argument whatsoever in support of this motion, and neither precondition to an arrest of judgment is satisfied. The indictment properly

charges the elements of 18 U.S.C. § 1711, and this Court has original jurisdiction over all offenses against the laws of the United States. See 18 U.S.C. § 3231. Accordingly, the Motion is denied.

An appropriate Order follows.

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ORDER

AND NOW, this 9th day of January, 2004, upon consideration of Defendant's Post-Verdict Motion [Doc. # 36], the Government's Opposition thereto [Doc. # 41], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Defendant's Motion is **DENIED**.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.