

At the conclusion of the government's evidence, and again at the conclusion of the trial, the defendant Freebery sought dismissal under Rule 29, on the ground that the evidence was insufficient to warrant a finding of guilty by a rational jury. That motion must now be decided.

In order to render a verdict of guilty on either of the two counts against Ms. Freebery, the jury had to be convinced beyond a reasonable doubt (1) that Ms. Freebery was attempting to defraud the lending institution into granting her the mortgages and refinancings involved, and (2) that interstate wire facilities were used in carrying out the scheme. The Indictment specifically charged that Ms. Freebery lied to the lending institution when, in answer to a specific question on the loan application, she answered "No" to the question, "Are you the co-maker or endorser of any note?" The Indictment also, however, charged her with failure to disclose the existence of a large debt allegedly owed by her at the time.

In the course of the trial, I ruled that the specific question about being a "co-maker or endorser" was answered truthfully, as a matter of law, since the evidence did not establish that Ms. Freebery ever was a co-maker or endorser of a note. The case was presented to the jury on the issue of whether Ms. Freebery had, with fraudulent intent, knowingly failed to disclose the alleged debt in question.

The evidence at trial permitted a defense argument that the loan application was filled out by someone other than Ms. Freebery, that she signed it (after the loan had been approved) without carefully reading the entire document, and that she may not have been asked any questions about her outstanding debts.

Another line of defense at trial was that Ms. Freebery did not owe any substantial amount of money to anyone. A wealthy friend had, indeed, provided the defendant with \$2.3 million in cash, but, as between the two ladies, the deal was considered to be a gift. A lawyer representing the donor later concluded that, for tax reasons at least, the transaction should be structured as a loan, and Ms. Freebery should sign a promissory note. She did so. At trial, her benefactress testified that, although the transaction was structured as a loan, she never intended to require Ms. Freebery to repay the money; she had no intention of calling the note at any time; and she did not intend for anyone after her death to be able to demand payment of the note.

The government countered with the argument that the defendant had signed the note, it was a legally binding obligation and could be enforced at any time, and, moreover, that the defendant had made a couple of substantial interest payments on the note.

In short, the evidence as a whole presented many opportunities for a rational juror to entertain a reasonable

doubt as to whether the defendant acted with fraudulent intent. I cannot, however, rule as a matter of law that the jury was bound to believe the testimony of the benefactress - even though the government did not challenge that testimony at trial. The evidence presented by the government, without regard to the defense testimony, made out a prima facie case, which, at least arguably, was sufficient to persuade a rational juror.

Although the issue is not free from doubt, I conclude that the Rule 29 motion must be denied. The matter is, it appears, somewhat academic, since, after the mistrial was declared, the government promptly proceeded to obtain a superseding indictment which re-casts the two counts of the original Indictment, and adds several more counts involving different transactions. It seems clear that the final outcome of the case which resulted in a mistrial must await further developments.

An Order follows.

