

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

UNITED STATES OF AMERICA : CIVIL ACTION
: NO. 04-382
v. :
: :
CHRISTOPHER MILLER :
:

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

DECEMBER 29, 2005

I. INTRODUCTION

On May 23, 2005, a jury convicted defendant Christopher Miller of sixteen counts of embezzlement of funds by a bank employee, in violation of 18 U.S.C. § 656. Defendant moved for a judgment of acquittal notwithstanding verdict and/or for a new trial,¹ based on eight grounds:

¹ Federal Rule of Criminal Procedure 29 provides that after a jury verdict, "a defendant may move for a judgment of acquittal." Fed. R. Crim. P. 29(c)(1). "In ruling on a motion for judgment of acquittal made pursuant to Fed. R. Crim. P. 29, a district court must review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005). "A finding of insufficiency should be confined to cases where the prosecution's failure is clear." Id. Courts must be ever vigilant in the context of Fed. R. Crim. P. 29 not to usurp the role of the jury by weighing credibility and assigning weight to the evidence, or by substituting its judgment for that of the jury." Id.

Federal Rule of Criminal Procedure 33 allows a court, upon motion of a defendant, to grant a new trial to that defendant if required in the interest of justice. Fed. R. Crim. P. 33 (2005). "A district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the

- (1) The trial court erred in permitting testimony to be introduced by the government regarding bank policies without the introduction of written policies;
- (2) The trial court erred in permitting a government witness [Cindy Wessner] to testify as an expert;
- (3) The jury verdict was a result of impermissible coercion;
- (4) The trial court erred in denying defendant's motion for judgment of acquittal pursuant to Rule 29;
- (5) The government engaged in prosecutorial misconduct in its closing statement;
- (6) The trial court erred in denying defendant's request for a failure of the government to produce evidence instruction;
- (7) The trial court erred in permitting the government to introduce impeachment evidence that the defendant had used misstatements on employment applications; and
- (8) The trial court erred in denying defendant's request for the phrase "absence of evidence" to be included in the reasonable doubt section of its jury instructions.

On December 12, 2005, the Court held a hearing on this motion and denied it from the bench as to all eight grounds. This memorandum further amplifies the Court's reasoning as to: (1) the introduction of testimony regarding bank policies without the introduction of the written policies; and (2) the testimony of government witness, Cindy Wessner.

II. FACTS

In June 2004, defendant, Christopher Miller, was charged with 16 counts of embezzlement from personal and business

evidence only if it believes that there is a serious danger that a miscarriage of justice has occurred--that is, that an innocent person has been convicted." United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002) (citations and internal quotations omitted). "Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." Id. (citations omitted).

accounts while working as a teller at the Manoa branch of Sovereign Bank. The Manoa branch was a small branch inside a supermarket in a shopping mall,² staffed by a total of four individuals. Mr. Miller was hired to work at the Manoa branch on approximately September 20, 1999. Sovereign began its investigation into fraud in late 1999, after receiving two customer complaints about unauthorized withdrawals.

To perpetrate all of the thefts, an individual logged into the bank's computer system, using the same teller log-in number each time, and caused the unauthorized withdrawal of funds. Supporting documentation was then forged. The teller log-in number used was 005, that of defendant. The money was then physically removed from the teller's cash drawer.

Defendant went to trial on May 17, 2005. The Government put forward evidence that: (1) of the four workers at the Manoa branch, Miller was the only one working every day and time the fraudulent withdrawals were made; (2) according to bank surveillance images, there were no customers at Miller's teller station at the time nine of the fraudulent withdrawals were processed; (3) at the time of four of the fraudulent transactions, Miller's co-workers working on those dates were accounted for by the bank surveillance images; and (4) when Miller was interviewed by two internal investigators, he admitted

² The branch has since closed.

that he had processed the fraudulent withdrawals,³ and left before the interview was completed.

During trial, the Government relied on the testimony of Cindy Wessner, currently the Vice President and Corporate Internal Investigations Manager for Sovereign Bank. In 1999, Ms. Wessner was an investigator at Sovereign, and she became a senior investigator in early 2000. From December 29, 1999 through the trial, Ms. Wessner was the investigator assigned to Mr. Miller's case. Ms. Wessner testified she was familiar with Sovereign's procedures during the relevant time frame regarding the assignment of passwords and teller numbers, Sovereign's paperwork involved in customer cash withdrawals, the procedures involved when tellers removed cash from their drawers, and Sovereign's bank surveillance images. She testified that she was familiar with researching banking transactions through the bank's computer system, and interpreted the bank surveillance images for the jury. She also testified that Mr. Miller had been assigned teller number 005, the number associated with all of the fraudulent transactions.

Mr. Miller was convicted of all 16 counts by a unanimous jury on May 23, 2005. The defense then filed its motion for a judgment of acquittal notwithstanding verdict and/or

³ At the interview, Mr. Miller asserted the transactions had been made pursuant to legitimate customer requests.

for a new trial. This motion challenged the admission of Ms. Wessner's testimony on two grounds: (1) her testimony violated Federal Rule of Evidence 1002, in that the written policies of the bank should have been produced by the government; and (2) her testimony violated Federal Rule of Evidence 701, in that she was permitted to testify as a lay person while putting forward an expert opinion.

III. DISCUSSION

A. Introduction of Testimony Regarding Bank Policies

The defendant submits that the Court erred by permitting Ms. Wessner to testify about bank policies and procedures without introducing the written policies, in violation of Rule 1002.⁴ Rule 1002, sometimes known as the "best evidence rule," provides, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress."

At the time of the transactions at issue, Ms. Wessner was an internal investigator at Sovereign. From December 29, 1999 through the trial, Ms. Wessner was the investigator assigned to Mr. Miller's case. Ms. Wessner's trial testimony described

⁴ The Court overruled defendant's contemporaneous objections to the testimony.

the policies and procedures in place at the Manoa branch at the time of the alleged defalcations. She testified as to Sovereign policies regarding passwords, keys, combinations, dual control procedures, replenishment of cash at teller stations, and limitations on access to customer accounts. (Trial Tr. 54, 58, 60, 61, 90, May 18, 2005.) Regarding Sovereign's policies regarding passwords, she explained that a bank teller's password, which is necessary to access the bank's computer system, was unique and known only to the individual teller.

These policies were memorialized in writing, but the government did not introduce the writing in evidence at trial. Ms. Wessner's testimony was based upon her personal knowledge and experience with the policies and procedures in place at the time of the alleged offenses. "[A]ny witness with knowledge of facts that exist independent of the contents of a writing, recording, or photograph may testify without raising an issue under Rule 1002." 31 Wright and Miller, Federal Practice and Procedure § 7184 (2000).

Ms. Wessner's testimony did not go to prove the contents of the writing. Rather, it went to show that under the policies and procedures in place at the Manoa branch during the relevant time period, an individual bank teller was the only person with access to his or her password.

On point is Allstate Insurance Co. v. Swann, 27 F.3d 1539 (11th Cir. 1994). In Allstate, the district court excluded the testimony of an underwriter that the insurance company would not have issued the insurance policy if it had known the applicant derived a certain portion of his income from gambling on the basis that the testimony was barred by Rule 1002. The Eleventh Circuit reversed. The court found that the "question posed to [the underwriter] did not seek to elicit the content of any writing; therefore, Rule 1002 was not implicated." 27 F.3d 1539, 1543. To answer the question, the manager did not need to state the contents of the underwriting guidelines, even though his answer may have been based on the guidelines. The Rule "does not ... 'require production of a document simply because the document contains facts that are also testified to by a witness.'" Id. (quoting United States v. Finkielstain, 718 F. Supp. 1187, 1192 (S.D.N.Y. 1989)).⁵

⁵ The cases cited by defendant are distinguishable. In these cases, the content of the writing was crucial to the factual determinations in the case. In Railroad Management, L.L.C. v. CFS Louisiana Midstream Co., the central factual issue in the case concerned the assignment of interests. The court affirmed the district court's exclusion of oral testimony regarding the actual assignment agreement when the agreement itself was not introduced. 2005 WL 2471037 (5th Cir. 2005). In Time Share Vacation Club v. Atlantic Resorts, Ltd., the court affirmed the district court's dismissal of the complaint in this case based on the lack of in personam jurisdiction. 735 F.2d 61 (3d Cir. 1984). The plaintiff relied on its contract with the defendants to prove personal jurisdiction, but failed to produce the actual contract. The district court barred introduction of an affidavit stating the terms of the contract pursuant to Rule

Similarly, here, Ms. Wessner's testimony went to prove the existence of a policy, not the content of a writing. She had personal and independent knowledge of the existence of the bank's policies and procedures, and the application of these policies and procedures at the Manoa branch. Under these circumstances, Rule 1002 does not require the production of the written policy.

B. Witness Testimony

Defendant also argues that Ms. Wessner was permitted to testify as a lay person while putting forward an expert opinion, in violation of Federal Rule of Evidence 701. Specifically, defendant contends that Ms. Wessner's testimony regarding defendant's password and the removal of \$4000 from defendant's teller station cash drawer contained impermissible opinion testimony and was therefore improper.

Federal Rule of Evidence 701 reads:

1002. See also Dugan v. R.J. Corman Railroad Co., 344 F.3d 662 (7th Cir. 2003) (to prove payments were due, production of actual agreement allegedly requiring payments after expiration of collective bargaining agreement necessary); United States v. Bennett, 363 F.3d 947 (9th Cir. 2004) (actual Global Positioning System ("GPS") records were best evidence to prove defendant had imported marijuana; testimony regarding GPS evidence introduced to show defendant had crossed border impermissible).

The factual determination here did not turn on the content of the writing, unlike in the cases cited above. It was the existence of the policies, of which Ms. Wessner had independent knowledge and experience, that was important to the jury's assessment of the evidence.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

A court's determination of whether lay testimony has violated Rule 701 hinges on whether the ultimate conclusion regarding the guilty knowledge of the defendant was left to the fact finder.

See United States v. Polishan, 336 F.3d 234 (3d Cir. 2003);

United States v. Anderskow, 88 F.3d 245, 249 (3d Cir. 1996).

Here, Ms. Wessner did not draw impermissible conclusions, but testified as to her personal knowledge and experience regarding the policies and procedures of the bank, as well as to the facts she uncovered in her investigation. The jury was free to make an ultimate determination as to the defendant's guilt from her testimony.

In United States v. Polishan, the Third Circuit found it was not plain error to admit lay testimony because the witnesses had only testified as to their own perceptions of the knowledge of the defendant, and did not make statements constituting opinions on the defendant's knowledge.⁶ 336 F.3d at

⁶ For example, testimony that the defendant "knew about anything and everything that went on in our company," and that he was "incredibly ... knowledgeable about ... all financial aspects of the business and intimately knew all the details," was acceptable under Rule 701. The witnesses had never directly put

243. While the court noted that it was difficult to admit lay opinion evidence regarding the knowledge of a third party, “[s]tatements that ‘furnished the basis for an inference, based on circumstantial evidence, that [defendant] had guilty knowledge’ did not implicate ... Rule 701.” Id. (quoting U.S. v. Anderskow, 88 F.3d 245, 249 (3d Cir. 1996)). The most important factor for a court to consider, according to the Polishan court, is whether the testimony of the witness left the ultimate conclusion about the knowledge of the defendant to the fact finder. Id.

In United States v. Anderskow, the Third Circuit affirmed the district court’s admission of lay testimony because the witness “provided several reasons to support the unstated conclusion that [defendant] had guilty knowledge,” but “never explicitly opined on direct examination that [defendant] possessed guilty knowledge.” 88 F.3d at 249. The Anderskow court, however, found lay testimony as to a second defendant to have been improperly admitted when the witness opined that the defendant “must have known” about the fraudulent scheme. Id. at

forward an opinion that the defendant had guilty knowledge. Polishan, 336 F.3d at 243.

250. This opinion turned the witness into a "thirteenth juror."⁷
Id.

Here, Ms. Wessner provided the jury with reasons to support the conclusion that the defendant was guilty, but did not testify to such a conclusion herself. First, regarding the fact that defendant would have been assigned a particular teller number and would have had a unique password, Ms. Wessner explained the process by which each employee is assigned a unique teller number, and then uses that number in conjunction with a password chosen by the teller to sign in to his or her station. (Tr. 39-42, 56.) While interpreting surveillance tapes, Ms. Wessner stated that "Teller Number 5," as seen on the screen, "represents the teller that processed the transaction and at this branch, it's Christopher Miller." (Tr. 35.) From these statements the jury could infer that defendant was assigned teller number five, had chosen a password that, following bank policy, was known only to himself, and to draw a reasonable conclusion regarding the defendant's guilt based on the evidence.

Second, Ms. Wessner interpreted the validation imprinted by the bank on a withdrawal ticket and explained that it indicated that \$4000 in cash had been removed from Teller Number 5's station. (Tr. 43.) She also interpreted a

⁷ Although the court found this testimony to have been improperly admitted, it found the error to be harmless. 88 F.3d at 251.

transaction journal from the Manoa branch that showed the transaction number, the date, the account number, the amount withdrawn, which in this case was \$4000, and that the withdrawal had been processed by Teller Number 5. (Tr. 78.) Ms. Wessner commented that Teller Number 5 was "identified as Mr. Miller," and that in order for the teller to balance at the end of the night, \$4000 would have to physically be taken from the teller's drawer to match the recorded withdrawal. This testimony was to facts within Ms. Wessner's knowledge, and could "furnish the basis for an inference, based on circumstantial evidence," that the defendant was guilty of the crimes with which he was charged. Polishan, 336 F.3d at 243.

Ms. Wessner did not opine as to the guilt of the defendant. As pointed out by the Court during sidebar, the defense had the opportunity during cross-examination to demonstrate that the teller number associated with a transaction only indicated that someone was using that number, and the transaction was not necessarily made by the defendant. (Tr. 38.) The ultimate determination, however, was left to the jury, and the testimony was properly admitted.⁸

⁸ In addition, any errors made in violation of Rules 701 or 1002 were harmless. According to Federal Rule of Evidence 103(a), an evidentiary ruling is not reversible error "unless a substantial right of a party is affected." When reviewing whether an erroneous evidentiary ruling was harmless, the Third Circuit will affirm the district court if it is "highly probable that the error did not contribute to the judgment." Renda v.

III. CONCLUSION

For the foregoing reasons, as well as the reasons stated on the record, defendant's motion for a judgment of acquittal notwithstanding verdict and/or for a new trial is denied.

King, 347 F.3d 550, 556 (3d Cir. 2003) (quoting McQueeney v. Wilmington Trust Co., 779 F.2d 916, 924 (3d Cir. 1985)).

Here, the evidence against defendant was weighty. This evidence included information that, at the time of the fraudulent transactions, only defendant was working, bank surveillance images that showed that there were no customers at the teller station at the time the fraudulent transactions were processed, and the testimony of Ms. Wessner regarding an interview with defendant at which he admitted processing the transactions, but asserted the withdrawals had been made pursuant to customer requests.

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O R D E R

AND NOW, this **29th** day of **December 2005**, upon consideration of Defendant's Motion for Judgment of Acquittal and/or For New Trial (doc. nos. 80, 99) and the Government's Response (doc. nos. 84, 100), and after a hearing at which counsel for both parties participated, it is hereby **ORDERED** that Defendant's Motion for Judgment of Acquittal and/or For New Trial (doc. nos. 80, 99) is **DENIED**.⁹

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.

⁹ This motion was denied from the bench on December 13, 2005 (doc. no. 102). This written order memorializes the Court's ruling.