IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-2886

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM MIKULIN and DENNIS RAY QUARANTELLO,

Defendants-Appellants.

Appeal from the United States District Court for
the Southern District of Texas
CR H 90 00118

June 22, 1993

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Dennis Day Quarantello and William Mikulin appeal their convictions for credit card fraud. We find no merit in the complaint of either of them, and we affirm.

Quarantello complains of a requested jury instruction which the district court refused to give. He insists that he was entitled to have this instruction given as the theory of his

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

defense. The requested instruction, however, merely stated defendant's denial of his guilt of the material elements of the charge. The court, of course, instructed the jury on what they were required to find in order to convict. Quarantello's requested charge was substantially covered by the given charge, and his ability to fully present his defense was not at all impaired by the charge. See United States v. Stone, 960 F.2d 426, 432 (5th Cir. 1992).

Mikulin complains of the court's failure to either sever his trial from that of Quarantello or redact references to Mikulin from the text of Quarantello's interview after the latter began to cooperate with the investigating officers. This tape was one of many made during the government's sting operation which netted the five defendants originally in this prosecution. During this series of discussions Quarantello gave the government agent, pretending to be a confederate, two long lists of credit cards. The plan was to have the cardholders charged for unauthorized purchases by a merchant under the disguised agent's control.

By April 5 Quarantello had been told of the sting and had begun to cooperate. On that day he was interviewed at length on audio tape, mostly about the role of lawyers in his prior misdeeds. That tape and transcript were admitted into evidence despite the fleeting mention of Mikulin's participation in prior factoring activity with Roy Erwin and also of his obtaining advice from one of the lawyers on how to hide profits in an offshore bank.

The government concedes that Quarantello's interview was not admissible as the statement of a co-conspirator in furtherance of the conspiracy, but it argues for admissibility as a statement against penal interest of the declarant, Quarantello. That argument was made in advance of our decision in United States v. Flores, 985 F.2d 770 (5th Cir. 1993). There is no help for the admissibility of these inculpatory out-of-court statements of the cooperating, if not confessing, co-defendant. They were not admissible and should have been deleted from the evidence against Mikulin.

In this case, however, these hearsay statements were so insignificant by comparison with the evidence of guilt that it was beyond any reasonable possibility for the improperly admitted evidence to have contributed to the conviction. See Schneble v. Florida, 405 U.S. 427, 430; 92 S.Ct. 1056, 1059 (1972). Roy Erwin testified at this trial in detail about the fraudulent operation he had with Mikulin and others. And Mikulin hung himself on video, meeting as a co-conspirator and displaying knowledge of the details and source of the credit card list given by Quarantello to the agent. Mikulin there reveals his expectation, for current as well as future operations together, of putting money in his pocket while banks and credit card holders get "rookie dooed." The Bruton error was clearly harmless.

AFFIRMED.