UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1167
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

BOB R. FRANKS,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CR3-89-185-R)

(February 24, 1993)

Before JOLLY, DUHE, BARKSDALE, Circuit Judges.

PER CURIAM:[1]

I

A

Bob Franks was convicted by a jury for bank fraud in violation of 18 U.S.C. § 1344 and sentenced to five years of probation. Franks was the president of NorthPark Savings Association (NorthPark), a Texas Savings and Loan, until 1985. He continued to

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[1] 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

serve as a member of NorthPark's Board of Directors and was a member of the board at the time of his indictment. NorthPark was insured by the Federal Savings and Loan Insurance Corporation.

B

In 1983, Franks began a joint venture, named Lakeview Joint Venture (Lakeview), with Stevan Shipp. Lakeview was formed to buy and develop real estate. Lakeview was 60% owned by S & J Land Company, Inc., a corporation of which Shipp was President and a stockholder, and 40% owned by B & F Development, Inc., a corporation of which Franks was vice-president. Under the terms of the joint venture agreement, S & J, through Shipp, was to handle the development and contracting work for the project and B & F, through Franks was to handle arranging for financing.

In 1984, Lakeview obtained a 2.95 million dollar loan from Centennial Savings Association (Centennial) to develop property it had purchased. Both Shipp and Franks were personal guarantors, jointly and severally liable, on the loan. Later that year, Franks, through his company Windfall Investment, Inc., assumed B & F 's interest and indebtedness in Lakeview. Thus, Franks effectively remained a 40% owner of Lakeview.

In 1986, Lakeview defaulted on the loan from Centennial, owing $2.95 million in principal and $138,747.74 in interest. Various officers of Centennial discussed their concerns with Franks regarding Shipp's failure to cooperate with them and failure to pay the interest payments on the loan. Shipp discussed the problem with Franks and asked him whether he had a bank that could lend them the money to pay the interest. Franks replied that he did not.

Shortly thereafter, Franks told Shipp that he "felt" NorthPark could make Shipp the loan and that Shipp should take his financial

statements to NorthPark the next day. Franks telephoned Mark Cleary, who had succeeded Franks as NorthPark's President and told Cleary that he had an acquaintance by the name of Stevan Shipp who was looking for a loan. He further stated that he would like for Shipp to apply for a loan at NorthPark and "for us to accommodate him." Franks told Cleary that the amount of the loan "would be somewhere in the vicinity of 130 to 140 thousand dollars." Cleary did not recall any other time when Franks had called him about an individual borrower.

Franks also called Scott Smith, a loan officer at NorthPark. Smith was hired during Franks's tenure as president of NorthPark. Franks identified Shipp as someone who was seeking a loan and asked him to meet with Shipp. Smith testified that it was the only time that Franks had called him about a borrower.

Shipp met with Smith and provided him with the necessary loan information. Franks was not listed on the loan application as a co-applicant or a beneficiary of the loan. Cleary denied the loan because Shipp's financial statement showed that he did not have sufficient liquidity to support the making of the loan without some form of collateral. Franks called Cleary the following day and expressed his frustration and annoyance that the loan was not made. Cleary explained that he denied the loan because of Shipp's lack of liquidity. Franks then contacted Shipp and told him that he would have to bring additional collateral to NorthPark for the loan. When Shipp responded that he had no collateral other than his stock in S & J, Franks said that was fine. Shipp also asked Franks to sign the note for the loan, but Franks stated that he could not

because he was on the Northpark board of directors. The loan was approved shortly thereafter.

On the same day that the loan was approved, Karen Stanbery, who worked with Franks at NorthPark, called Richard Tharp, a vice-president at Centennial, to inform him that Shipp was going to NorthPark that day to finalize the loan. Tharp went to NorthPark to pick up the interest payment. While at NorthPark, Tharp met with Franks and talked with him about the situation. Shipp arrived at NorthPark and was given a NorthPark check, made payable to himself, in the amount of $138,000. Shipp endorsed the check, but left it at NorthPark after he was told by a Northpark secretary that Tharp was in Franks's office and would pick up the check himself.

Franks made no mention of his involvement in the loan at any time, including at the next regular meeting of the NorthPark board of directors. The loan was never paid. In 1987, Smith began working for Centennial. He discovered that the loan had been used to pay off Lakeview's unpaid interest payment.

Upon this evidence, Franks was indicted and later convicted by a jury for bank fraud in violation of 18 USC Section 1344.

C

Franks then filed a timely motion for a new trial, arguing that the jurors considered extraneous prejudicial information in reaching their verdict. In support of the motion, he submitted affidavits of four jurors. The affidavits recounted statements made by two jurors during juror deliberations. Juror Clayton stated that people like Bob Franks use their positions of power to

intimidate or manipulate people to get them to do what they want and this type of behavior occurred all the time. Clayton further stated that the employees of the banks comply with such requests for loan approval for fear of losing their jobs. Clayton also insinuated that her educational training in psychology and position with the Internal Revenue Service made her particularly able to evaluate this problem. Finally, Clayton stated that the savings and loan problem started in 1985 or 1986 and was caused by fraudulent loans which were never repaid and that the taxpayers are now having to pay the costs. Juror Nuckles stated that she had fifteen years of experience in banking and agreed with Clayton's conclusion that Franks abused his power and Clayton's assessment of the savings and loan scandal. According to one juror's affidavit, Nuckles also stated that in her experience in banking, it was the usual practice that checks for loan proceeds, like the one in this case, were left out to be picked up.

D

The district court denied Franks's motion for a new trial without an evidentiary hearing. The court concluded that the jurors' statements were barred by Fed. R. Evid. 606(b). The court explained that "The type of things stated in the affidavit are simply not sufficient to rise to the level of me having an evidentiary hearing, calling in all twelve members of the jury and subject[ing] them to examination and cross-examination by the lawyers, and by myself in open court."

II

Franks argues that there is insufficient evidence to uphold his conviction. He argues that, as a director of NorthPark, he had an affirmative duty to suggest NorthPark as a potential lender. He contends that his suggestion of NorthPark as a lender was nothing more than a ministerial act.

18 U.S.C. § 1344 (1988) provides that:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice--
> (1) to defraud a federally chartered or insured financial institution; or
> (2) to obtain any of the monies, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

The standard of review for challenges to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. U.S. v. Pineda-Ortuno, 952 F.2d 98, 102 (5th Cir.), cert. denied, 112 S.Ct. 1990 (1992).

The term "scheme to defraud" includes any false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value, such as money. U.S. v. Saks, 964 F.2d 1514, 1518 (5th Cir. 1992). A representation may be false by virtue of concealment of material facts or omission of material information. See U.S. v. Cordell, 912 F.2d 769, 773 (5th Cir. 1990).

Franks failed to disclose that the loan proceeds would be used to pay an outstanding debt that was 40% his own. Under the regulations governing financially insured institutions, Franks would have had to disclose to the board any direct or indirect benefit on the proceeds of the loan. See 12 C.F.R. § 563.43(b)(2). He would have also been barred from receiving a loan for more than $100,000. See 12 C.F.R. § 563.43(b)(5).

The requisite intent to defraud is established if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself. Saks, 964 F.2d at 1518. The record is replete with evidence that Franks knew that the loan was to be used to pay-off Lakeview's late interest payments. Franks told Cleary that the amount of the loan would be approximately 130 to 140 thousand dollars. Lakeview owed $138,747.74 in interest to Centennial. Franks met with Tharp and talked with him about the loan being used to pay Centennial. If a borrower obtains funds at the insistence of and for the benefit of a bank officer, without disclosing the officer's interest on the loan documents, thereby knowingly flouting banking rules and regulations designed to protect the financial integrity of the bank, a jury can conclude that the officer acted with intent to defraud the bank. Saks, 964 F.2d at 1519. The jury could have reasonably concluded that Franks had the requisite intent to defraud to be convicted under § 1344.

Franks argues that in order to establish an intent to defraud, there must be a causal connection between advocacy in promoting a

loan and the loan being made as a result of it (citing U.S. v. McCright, 821 F.2d 226, 229 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988)). In McCright, 821 F.2d at 230, the defendant was convicted for "misapplying" bank funds under 18 U.S.C. § 656 even though he was not the loan officer who approved or made the loans in question. Thus in order to "misapply" bank funds through the banks loan procedures, the defendant must, we held, have influenced the grant of the loan. Here, Franks was convicted under a different statute and for a different crime - - - for engaging in an artifice or scheme to defraud the bank; unlike Section 656, which pertains to bank crimes committed by persons under color of their authority with the bank (officers, directors, employees, etc.), Section 1334 may apply to bank crimes committed by persons with no power to influence the grant of a loan. Therefore, the McCright type causation between "advocacy and result" is not required as an element under § 1344.[2]

In U.S. v. Church, 888 F.2d 20, 24 (5th Cir, 1989), this Court stated that the sheer ineffectuality of the defendant's actions "gives us pause in finding a scheme or artifice to defraud." However, this Court expressed reluctance "to cabin the reach of the bank fraud statute by our view of the implausibility of a particular scheme to defraud." Id. "That a particular scheme is impracticable, or ultimately unsuccessful, is not necessarily inconsistent with its being fraudulent." Id. Franks's argument that his actions must have actually caused the loan to be made is

[2] Perhaps the jury recognized this distinction, as it acquitted Franks of misapplication of bank funds under § 656, yet convicted him of bank fraud under § 1344.

erroneous.

Finally, § 1344 requires proof that the financial institution was federally-insured at the time of the offense. The president of NorthPark, Cleary, testified that Northpark was insured by the Federal Savings and Loan Insurance Corporation at the time of Franks's offense.

Viewed cumulatively and in the light most favorable to the prosecution, a reasonable trier of fact could have found all of the elements necessary to convict Franks of bank fraud under § 1344.

III

Franks next argues that the district court erred in denying him an evidentiary hearing to consider whether the statements made by the two jurors during deliberations prevented him from receiving a trial by an impartial jury. He contends that the district court incorrectly concluded that the jurors' affidavits were inadmissible under Fed. R. Evid. 606(b) and that neither a hearing, nor a new trial was warranted.

Fed. R. Evid. 606(b) states that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, <u>except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.</u> Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Fed. R. Evid. 606(b)(emphasis added).

Under Rule 33 of the Federal Rules of Criminal Procedure, the court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. This Court reviews a district court's denial of a defendant's motion for a new trial "for a clear abuse of discretion." U.S. v. Webster, 960 F.2d 1301, 1305 (5th Cir.)(quoting U.S. v. Fowler, 735 F.2d 823, 830 (5th Cir. 1984), cert. denied, 113 S.Ct. 355 (1992)). As a general rule, a trial judge has discretion to deny a motion for a new trial without an evidentiary hearing. U.S. v. M.M.R. Corp., 954 F.2d 1040, 1046 (5th Cir. 1992).

Franks contends that the affidavits fall under the exception of Rule 606(b), as they detail "extraneous prejudicial information" brought before the jury. The Government asserts that the statements were not "extraneous prejudicial information," but mere recognitions of human behavior and fall squarely within the prohibitions of Rule 606(b).

In analyzing whether testimony is prohibited by Rule 606(b), a distinction is created between internal and external influences; juror testimony about internal effects is prohibited by the rule, while testimony regarding external influences may be heard. Webster, 960 F.2d at 1306. If a juror's past experiences are directly related to the litigation at hand, the jury's discussion of those experiences would constitute extraneous information that could be used to impeach a verdict. Hard v. Burlington Northern

R.R., 870 F.2d 1454, 1462 (5th Cir. 1990).[3] Similarly, a juror's introduction of specific facts about the defendant then on trial constitutes extraneous prejudicial information. See U.S. v. Howard, 506 F.2d 865, 867 (5th Cir. 1975)(statement that the defendant "had been in trouble two or three times" was extraneous prejudicial information).

While the jury may not leaven its deliberation with extra-record prejudicial facts, it "may leaven its deliberations with its wisdom and experience[.]" U.S. v. McKinney, 429 F.2d 1019, 1023 (5th Cir. 1970), cert. denied, 401 U.S. 922 (1971).[4] The subjective opinions of jurors, their attitudinal expositions, or their philosophies, may not be expunged from jury deliberations. Id. at 1022-23.

The statements made by Jurors Clayton and Nuckles were largely their own subjective opinions. Their statement that men like Franks use their position to get what they want and that the employees do what they are told for fear of losing their jobs was also merely the subjective opinions of the jurors. Further, as we have earlier noted, it is not necessary to prove that a defendant caused the loan in question to have been made in order to find a defendant guilty of bank fraud under § 1344[5]; therefore, the jurors need not have concluded that the employees were pressured by Franks

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[3] Although Hard is a civil-law decision, its reasoning is pertinent here.

[4] The Federal Rules of Evidence were not enacted until January 2, 1975; however, Rule 606(b) embodies long-accepted federal law. See Tanner v. U.S., 483 U.S. 107, 121, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987).

[5] See U.S. v. Church, 888 F.2d 20, 24 (5th Cir. 1989).

in order to convict him. Thus, there is no reasonable possibility that the statements prejudiced Franks.

The statement made by Juror Nuckles regarding the usual practice of delivering such loans is arguably more extraneous than the other statements - - - especially given that Nuckles also stated that she had 15 years of banking experience. Nevertheless, the statement was nothing more than Nuckles's theory as to why the loan was left at the desk. The statement thus was properly excluded under Rule 606(b).

Long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry. Tanner v. U. S., 483 U.S. 107, 127, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). The district court recognized these concerns in denying Franks's motion, stating that the court "simply cannot engage at this point in a lengthy inquiry as to what went through the minds of the jury in reaching the verdict." The district court's denial of Franks's motion for a new trial without a hearing was not an abuse of discretion.[6]

IV

For the reasons stated in this opinion the conviction of Bob R. Franks is

A F F I R M E D.

[6] Franks has filed a motion to make corrections in his reply brief. The corrections proposed by Franks are semantic and do not alter the substance of the reply brief. The motion is granted.