IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1641
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DWIGHT LYNN BOOKOUT,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
CR3 91 412 R

(May 12, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

There are two questions presented in this appeal: First, whether there is sufficient evidence to support the convictions of the appellant for mail fraud; and second, whether the district court erred in applying the vulnerable-victim sentencing guidelines enhancement when sentencing the appellant.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

Dwight L. Bookout was found guilty of five counts of mail fraud, five counts of aiding and abetting mail fraud, seven counts of money laundering, and two counts of aiding and abetting money laundering and sentenced to a term of 150 months.

The evidence establishes that Bookout was a customer over a period of several years at a jewelry store belonging to Dwight Wallace. In 1986, Wallace purchased the de Linde quartz mine in Arkansas for $75,000. Subsequently, Wallace incorporated a business in Texas called Arkansas Quartz Mines, Inc. (AQM). AQM became owner of the de Linde quartz mine.

In August 1987, Wallace formed a partnership to sell approximately 40 percent of the de Linde quartz mine, broken down into 40 units at $5,000 a unit to friends, family, acquaintances, and customers at his retail store. Wallace wrote a prospectus, including a proposal, geological reports, financial information, a history of the corporation, and resumes of key employees of the corporation to distribute to potential investors. Wallace also delivered a subscription agreement and partnership agreement to each of the prospective investors.

Wallace testified that Bookout was one of a hundred different individuals who was given a prospectus as a potential investor. Wallace invited Bookout to invest in the corporation directly and offered him a ten percent finder's fee for each investor he referred to him. Wallace testified that Bookout did not have

authority to enroll people as limited partners. He testified that Bookout was never an employee of the corporation. Although Bookout mailed a $9,000 check to Wallace to purchase units in the partnership, the check did not clear because of insufficient funds.

Michael Diehl, Bookout's co-defendant, testified for the government pursuant to a plea agreement. Diehl stated that Bookout, whom he also knew as Miles Perot, and he were acquaintances in Texas. Bookout hired Diehl to work as a telemarketing sales representative at a company he had formed called American Quartz Corporation (AQC). Bookout told Diehl that he would be selling shares in a mine over the phone to potential investors. Diehl understood Bookout to be the owner and operator of the company. According to Diehl, after a telemarketer located a prospective investor, Bookout mailed him a prospectus and was the main person in the operation who would try to close the deal over the phone. Bookout also mailed out a geological report and a photograph of the area where the mine was located.

Wallace testified that the prospectus Bookout distributed promoted the de Linde mine belonging to AQM and was modeled on his prospectus. Bookout's prospectus stated that AQC was the sole owner of the quartz mine. Bookout did not mention that Wallace and a partner each owned 50 percent of the mine. Wallace's prospectus described how he met de Linde and purchased the mine from him. Bookout's prospectus described a similar meeting and agreement that supposedly took place between de Linde and AQC. Wallace's

documents explained that he was selling a 40 percent interest in the mine at $5,000 a unit for a total of $200,000. Bookout, by contrast, was selling $7,500 units for a total of $300,000. Bookout claimed that AQC purchased the mine for $200,000 when Wallace actually bought it for $75,000. Wallace's prospectus projected $250,000 in gross revenues at the end of the first year of operation and a 12.48 to 1 return on investment at the end of the fifth year of operation. Bookout's prospectus projected $325,000 in gross revenues and a 9.48 to 1 return on investment. Bookout, without any authority from AQM, sent a limited partnership agreement between the investor and AQC to potential investors.

Bookout hired three other telemarketers, in addition to Diehl, to locate prospective investors. Diehl worked for Bookout for about five or six months; the other telemarketers worked for Bookout for between one month, and several months.

In the fall of 1987, Bookout, using the name Miles Perot, contacted Pi Jo Tang about investing in AQC. Bookout mailed Tang a prospectus, a geological report, and a partnership agreement. Tang invested $7,500 in the bogus company. Tang received no return on her investment and was subsequently unable to locate Bookout to inquire about her investment. Bookout also contacted Leo Epp in the fall of 1987. Epp also invested $7,500 in AQC. Epp received a $227 return on his investment. Epp was also unable to locate Bookout.

Bookout's testimony offered a conflicting version of his relationship with Wallace compared to Wallace's testimony. According to Bookout, he declined to refer investors to Wallace for a finder's fee as proposed by Wallace and instead offered to start his own operation under a different name as a general partner to AMC. Bookout testified that he told Wallace that he was going to use a different company name and change the "economics" of the offers that he would be making on behalf of Wallace. He stated that he showed Wallace one of the prospectuses that he had put together. Bookout explained that he initially forgot to incorporate his company because it started growing so quickly and that he was not initially licensed to sell securities. According to Bookout, Wallace understood the exact nature of his operation. Bookout testified that he submitted a list of the names of the people whom he signed up as investors to Wallace and sent Wallace a check for $9,000 representing nine $1,000 units. He stated that his agreement with Wallace was never put in writing. After Bookout closed down his company, he never contacted the investors and told them of his change of address.

Wallace denied allowing Bookout to change the prospectus; denied having any agreement with him to submit lists of investors; or receiving a list of names of investors.

II

Bookout was convicted of five counts of mail fraud and five counts of aiding and abetting mail fraud among other charges. Count one of the indictment alleged mail fraud committed against Leo Epp; count two alleged mail fraud against Tang; and count three alleged mail fraud and aiding and abetting against Minnie L. Summers.

Bookout's defense counsel moved for a judgment of acquittal on all counts at the close of the government's evidence and renewed this motion at the close of all the evidence. Defense counsel argued that there was insufficient evidence to convict Bookout of mail fraud against Summers because there was no evidence that Summers mailed the check that formed the basis of the count three through the United States mail. Additionally, defense counsel asked for a judgment of acquittal on count two because Tang could not remember whether she used the U.S. mail or Federal Express to mail her investment check. The district court denied both motions. At sentencing Bookout objected to a recommendation in the presentence report (PSR) that Bookout's base offense level be increased by two levels because he targeted vulnerable victims. See U.S.S.G. § 3A1.1. The district court overruled his objection. Bookout appeals.

III

Bookout first argues that the evidence is insufficient to support his convictions on counts one and two of the indictment.

To convict for mail fraud, the government must prove (1) a scheme or artifice to defraud, (2) specific intent to defraud, and (3) the use of the mails for the purpose of executing the scheme. U.S. v. Shively, 927 F.2d 804, 813-14 (5th Cir.), cert. denied, 111 S.Ct. 2806 (1991). Bookout challenges the sufficiency of the evidence concerning only the third element of the offense on both counts.

A jury verdict must be sustained if there is substantial evidence, taking the view most favorable to the government to support it. Glasser v. U.S., 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); accord U.S. v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989). The jury is, of course, the final authority on the credibility of witnesses. U.S. v. Lerma, 657 F.2d 786, 789 (5th Cir. 1981), cert. denied, 455 U.S. 921 (1982) (citation omitted). Evidence is sufficient to uphold a jury verdict if a reasonable trier of fact could have found all the necessary elements of the crime beyond a reasonable doubt. Lechuga, 888 F.2d at 1476.

At trial Bookout objected to the sufficiency of the evidence on counts three (Mrs. Summers) and two (Dr. Tang). On appeal, Bookout objects to the sufficiency of the evidence on counts one (Mr. Epp) and two. Bookout does not reassert his objections to the sufficiency of the evidence concerning Summers's use of the U.S. mail, and that issue should not be considered.

The allegation underlying count one was an investment by Mr. Epp in AQC. Bookout argues that the fact that Epp testified that

he "mailed" a check, without specifying whether he used the U.S. mail or a private company, prevented the jury from finding guilt beyond a reasonable doubt.[1] His argument is meritless. This evidence is sufficient for the jury to reach a determination that Epp used the U.S. mails beyond a reasonable doubt.

Bookout also challenged the sufficiency of the evidence to convict on count two. Count two related to an investment by Dr. Tang. During direct examination, Tang testified that she "mailed" a check to AQC. On cross-examination Bookout's defense counsel questioned Tang about the method she used to send her check to AQC:

> A. The back -- in the back of the check is deposit only and a Federal Express number.
>
> Q. You sent this Federal Express?
>
> A. That's right.
>
> Q. Not through the United States mails?
>
> A. No.
>
> Q. But Federal Express?
>
> A. Right.

However, during re-direct examination the Government refreshed Tang's memory with a questionnaire she had filled out for a United States Postal Service investigation.

> Q. Is your memory now refreshed as to how that check was sent to the American Quartz Corporation?

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[1] If the defendant causes a victim to use the mails, this constitutes use of the mails. Shively, 927 F.2d at 814.

A. Yes.

Q. How was that check sent, ma'am?

A. Sent by American Express, American Quartz.

Q. Again I ask you to read this over. You said American Express. Okay. Read that again.

A. Federal Express.

Q. Read it to yourself. The words. I realize you have some difficulty with your language but -- is your memory now refreshed as to how that mail was sent, ma'am?

A. First class U.S. mail.

Q. And is that in fact the way you did send it by first class United States mail, ma'am?

A. I believe so.

The Government also established that Tang's check was dated January 3, 1988, and deposited January 11, 1988. The sufficiency of testimonial and circumstantial evidence is measured by the same test. U.S. v. Lopez, 979 F.2d 1024, 1028 (5th Cir. 1992). Evidence is sufficient to convict if the jury could "reasonably, logically, and legally infer that the defendant was guilty beyond a reasonable doubt." We must say that the contradiction and equivocation in Dr. Tang's testimony has caused us serious concern whether a legal reasonable doubt exists on her use of the United States mails, so as to render the evidence insufficient to convict on this count. Upon thorough consideration, however, we think that it was ultimately up to the jury. We simply cannot gainsay the

jury's right to credit Dr. Tang's one direct and unequivocal response--after having her memory refreshed--that her check was sent first class U. S. mail. The jury was entitled to evaluate her various responses and ultimately to credit the testimony that she used the U.S. mails. Consequently, there is sufficient evidence to convict Bookout on both counts one and two.

IV

Bookout also asserts that his sentence was improper because the district court erred in determining that the victims were vulnerable under U.S.S.G. § 3A1.1.

The district court is authorized to augment a defendant's offense level by two levels, "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct." § 3A1.1. The guideline section applies where the defendant targets a vulnerable victim, as in marketing an ineffective cancer cure or robbing a person because he is handicapped. Id. at comment. (n.1). The guideline would not, however, apply to a sale of securities by mail to the general public where one of the victims "happened to be senile." Id.

The determination that a victim is vulnerable is a factual finding which the district court is best suited to make since the district court can observe the victim in court. U.S. v. Rocha, 916 F.2d 219, 244-45 (5th Cir. 1990), cert. denied, 111 S.Ct. 2057

(1991). Vulnerability is a "complex fact" that is "not reducible to a calculation of the victim's age or to a diagnosis of the victim's disease." Id. (citation omitted). The district court's decision that a victim is vulnerable, as well as the court's determination of what the defendant knew or should have known are reviewed for clear error. Id.

According to the PSR, at least three of the victims were elderly and one was physically handicapped. In his objection to the PSR, Bookout argued that all of the investors were contacted by telephone, no telemarketer could tell if the victim was vulnerable, and vulnerable victims were not targeted. The addendum to the PSR reflects that Bookout knew that at least one of the victims, Mrs. Summers, "was elderly and easily influenced because he had previously defrauded her in another bogus investment scheme."

At sentencing the district court explained that it was overruling Bookout's objection because "I do agree with the Pre-Sentence Report based on the -- the people that I saw testify, particularly Mrs. Summers. I would certainly put her in the category of being a victim who was the type at which that adjustment was aimed at." Bookout persisted in his objection on the grounds that his co-defendant contacted Mrs. Summers and that he merely "recognized the fact that he had known her once before and made a comment." The district court deemed this irrelevant "because she was obviously one of the victims . . . ."

Bookout argues that he targeted prospective investors based on their financial capabilities and not on their mental or physical limitations. According to Bookout, his activities were similar to offering securities by mail to the general public. There are several shortcomings to this argument. First, Bookout's reliance on U.S. v. Moree, 897 F.2d 1329, 1335 (5th Cir. 1990) is misplaced because that case occurred in a clearly distinguishable context where the Court held that a condition which is a necessary prerequisite to the crime cannot constitute an enhancing factor under § 3A1.1. Id. Here, that is not the case. Additionally, Bookout knew Mrs. Summers from an earlier failed investment scheme, and his attorney admitted this fact at sentencing. Considering that Bookout supervised the telemarketer who worked with Summers and that selling an investment to an individual over the phone is different from sending out a blind mailing, it is entirely plausible and therefore not clearly erroneous, see Anderson v. Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), that Bookout knew or should have known that Summers was a vulnerable victim.

V

For the reasons stated above, the judgment of the district court is

A F F I R M E D.