UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4179
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BOBBY LYNN STOFF, a/k/a Bob Stoff
and RITA A. STOFF,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Texas
(4:91-CR-22 (1))

(November 18, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Bobby Lynn Stoff and Rita A. Stoff appeal their convictions. We **AFFIRM**.

I.

On January 28, 1991, Bobby Stoff called the Dallas Police Department to report that his 1990 Chevrolet pickup had been stolen

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

from his place of employment. His wife, Rita, then reported the loss to Allstate Insurance Company, the couple's automobile insurer. Allstate responded by mailing various claim forms to the Stoffs. Rita completed the forms, had them notarized and mailed them back to Allstate. On March 12, 1991, Allstate paid off the Stoff's loan on the reportedly stolen truck and paid the remaining balance to the Stoffs.

Two weeks later, agents from the Texas Department of Public Safety, Motor Vehicle Division (DPS), the National Auto Theft Bureau (NATB) and the FBI conducted a search of the Stoffs' backyard, where they discovered various vehicle parts, including the original motor and transmission from the 1990 Chevrolet truck reported stolen. In July, the pickup was pulled from a lake. It had been stripped of its seats, steering column, radiator, engine, transmission and tailgate.

That August, Rita and Bobby Lynn Stoff were indicted on one count of conspiracy to commit an offense against or defraud the United States, in violation of 18 U.S.C. § 371, and two counts of mail fraud and aiding and abetting, in violation of 18 U.S.C. §§ 2 and 1341. Both defendants filed motions to suppress the evidence seized from their backyard. The motions were denied. Bobby moved for judgment of acquittal, Fed. R. Crim. P. 29, at the end of the government's case and again at the close of all of the evidence; Rita did so only at the close of all the evidence. Both were denied. Rita and Bobby were both found guilty on all counts. The court sentenced Bobby to, *inter alia*, 18 months of imprisonment for

each count, to run concurrently, and ordered him to pay $8,629.26 restitution to Allstate. Rita was sentenced to, *inter alia*, 12 months imprisonment for each count, also to run concurrently.

II.

Rita and Bobby contend that the district court abused its discretion in denying their motions to suppress and in admitting extrinsic evidence of Rita's prior untruthful acts. Bobby also asserts that the denial of his motions for judgment of acquittal was erroneous.

A.

The Stoffs contend that the engine and transmission found in their backyard were the fruits of an illegal search, in violation of their Fourth Amendment rights. The government responds that Rita Stoff freely and voluntarily consented to the search. Rita replies that she did not consent and, in the alternative, that any consent was coerced and involuntary.

On the first day of trial, the district court conducted a suppression hearing. Sergeant Smith of the DPS Motor Vehicle Theft Division testified that, on the day of the search, having received information from FBI agent Blanton that a stolen motor might be hidden in the Stoffs' backyard, he and Agent Latimer of the NATB observed a motor there. The initial observation was made from a back alley, which was public property. The officers then went to the front of the Stoffs' home and knocked on the door. When Rita Stoff answered, they told her that they were looking for stolen parts in the area and inquired about the motor in her backyard.

Rita insisted that the motor belonged to her and was not stolen. She invited the officers inside and offered to show them a title to the motor. The officers advised her that the document was not a title, but a contract to purchase the truck, and asked if they could look at the motor. Rita brought her guard dog in the house, allowing Smith and Latimer to enter the backyard. Smith further testified that Rita unlocked a metal storage building in the backyard, allowing them to search it. Various interior parts of a 1990 Chevrolet pickup were found inside. Blake Stewart of the FBI testified that he and FBI agent Blanton joined Latimer and Smith at the Stoff home after they had entered the backyard.

Rita Stoff's version of the story was quite different. She testified that all four agents arrived together, identified themselves, and said that they wanted to look in her backyard. When she refused, Agent Blanton allegedly said, "Why, do you have something to hide? ... Well, make it easy on yourself, why don't you let us in the backyard?" Rita testified that she felt she had no choice but to allow the officers to search her yard, so she brought the dog inside and let the officers into the backyard. She said that she neither unlocked the storage building nor gave permission to search it.

Having heard this testimony, the district court ruled that it found Sergeant Smith's testimony credible and therefore denied the motion to suppress. That ruling is, at least implicitly, a finding that Rita voluntarily consented to the search. When a trial court finds that consent was voluntarily given, we will review that

finding only for clear error. ***United States v. Chenault***, 844 F.2d 1124, 1129 (5th Cir. 1988).

The district court determines the issue of voluntariness from the totality of the circumstances. ***Id***. When there is conflicting testimony, as there is here, that conclusion is, in large part, a credibility determination. The district court stated that it found Smith's testimony clear and credible. His testimony was supported by that of Blanton and Stewart. The district court's determination that Smith was more believable than Rita is not clearly erroneous. *See* ***Chenault***, 844 F.2d at 1129.

B.

Rita Stoff testified at trial. During cross-examination, the government pointed out that on the loan application for a second pickup truck, Rita used a social security number other than the one she identified as her own. Rita testified that she had only one social security number and that, while holding a number of different jobs, her wages had always been earned under the same social security number. In rebuttal, the government offered testimony that Rita had earned wages under yet a third social security number, which belonged to Logan Ward Schackne.

At trial, the Stoffs contended that this rebuttal evidence was improper under Federal Rule of Evidence 608(b).[2] The evidence was

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[2] Rule 608(b) states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the

admitted over their objection, and they re-urge the same point on appeal.

Admission of evidence is reviewed only for abuse of discretion. Even if the evidence was erroneously admitted, it is reviewed under the harmless error doctrine: the error is reversible only if a substantial right is affected. Fed. R. Evid. 103(a); ***United States v. Lopez***, 873 F.2d 769 (5th Cir. 1989). The Stoffs contend that the jury would have found Rita credible but for this evidence. If the jury had believed Rita's testimony, they argue, the Stoffs could not have been convicted. We disagree.

"An error is harmless if the court is sure, after reviewing the entire record, that the error did not influence the jury or had but a very slight effect on its verdict." ***United States v. Underwood***, 588 F.2d 1073, 1076 (5th Cir. 1979). Even assuming the challenged character evidence was admitted in error, such error was clearly harmless. Rita Stoff's own testimony showed that she had used a different social security number on the loan application for the second truck than the one she said was her own. This alone raises questions of her credibility. Furthermore, the evidence of fraud was overwhelming. Rita and Bobby Stoff reported an almost new truck stolen. Soon thereafter, the stripped truck was found at

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> discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

the bottom of a lake and many of the truck's parts were found at the Stoffs' home. The Stoffs' only explanation is that, a few months after purchasing the truck, Bob "changed out" the engine and transmission.

III.

Finally, Bob Stoff contends that the evidence is insufficient to prove that he is the same Bob Stoff named in the indictment. Thus, he says, his motions for judgment of acquittal were erroneously denied. Stoff contends that, in considering this issue, we should look to the state of the evidence at the close of the government's case in chief and should not consider the entire record. This court's precedent dictates otherwise: "[W]hen a defendant puts on evidence after his motion for judgment of acquittal has been denied, the sufficiency of the evidence to support his conviction is to be determined by a reviewing court on the basis of the record as a whole," ***United States v. Perry***, 638 F.2d 862, 864 (5th Cir. Unit A March 1981). Bob Stoff's own witness, Jerry Morgan, pointed him out in the courtroom and identified him as the Bob Stoff who was married to Rita Stoff, also seated at the defense table. This alone is more than sufficient evidence from which a jury could infer that the Bob Stoff in the courtroom was the same Bob Stoff named in the indictment and about whom evidence had been offered at trial.

III.

Accordingly, the judgments are

AFFIRMED.