UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4324
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HATTIE DARLENE HUTSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(6:91CR22(1))

(December 2, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Hattie Darlene Hutson appeals her conviction for one count of arson, in violation of 18 U.S.C. § 844(a)(i) & (j). In sum, she challenges the sufficiency of the evidence; because it was sufficient to support her conviction, we **AFFIRM.**

I.

Hutson owned a jewelry store in Jacksonville, Texas, which was destroyed by fire on the night of January 28, 1989, along with

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 Pursuant to that rule, the court has determined that this opinion should not be published.

several adjacent stores. Local, state, federal, and private fire investigators working together concluded that the fire started in Hutson's store and involved the use of an accelerant, indicating arson. Several factors, including the statement of a witness who had seen Hutson leaving the store around the time the fire started, the absence of evidence of a forced entry, the poor financial condition of her business, and her inconsistent statements to investigators, led to Hutson's arrest and indictment. She was convicted of arson in March 1992, following a jury trial, in which the district court denied her motions for judgment of acquittal at the close of the goverments's case and all the evidence, and was sentenced to 33 months imprisonment, followed by two years of supervised release.

II.

Hutson contends that, as a matter of law, the evidence was insufficient to support her conviction because it is impossible for the fire to have started according to the theory advanced by the government. She relies upon testimony given by defense experts that refutes the government's theory that the fire started in the middle room of her store, and asserts that the evidence shows, instead, that the fire started in the store adjoining hers on the east.

Hutson acknowledges the usual standards for our review of a challenge to the sufficiency of the evidence in a criminal trial before a jury; one standard being that, ordinarily, the jury is the ultimate arbiter of the credibility of the witnesses. *See* ***United***

Stated v. Lerma, 657 F.2d 786, 789 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982). She asserts, however, that in this case, the evidence supporting her conviction was "so unbelievable on its face that it defies physical laws" and that this court should "declare it incredible as a matter of law". ***Id.*** Obviously, this standard is extremely difficult to satisfy; in fact, we find only one Fifth Circuit case in which it has been met. *See* ***Geigy Chemical Corp. v. Allen***, 224 F.2d 110 (5th Cir. 1955).

In ***Geigy***, this court rejected, among other things, the plaintiff's testimony that, although his car was travelling at forty-five miles per hour, he could have stopped it within five feet. ***Id.*** at 114. Stating that "[c]ourts are not required to believe testimony which is inherently incredible or which is contrary to laws of nature and of human experience", this court reversed the jury verdict and held that the plaintiff had been contributorily negligent as a matter of law. ***Id.*** at 114-15.

Geigy illustrates the type of case in which this most narrow exception for physical impossibility may be appropriate. As explained by the Second Circuit in ***Fortunato v. Ford Motor Co.***, 464 F.2d 962, 965-66 (2d Cir. 1972), *cert. denied*, 409 U.S. 1038 (1972), the doctrine is used sparingly and should apply only where the underlying physical facts are themselves undisputed; for example, where the issue involves an easily measured distance or height. Needless to say, this is not such a case.

Hutson's own statement of her contention illustrates its complexity:

> "Taking the physical laws of the nature of fire and smoke [i.e., that "fire travels up and out unless held by something", that "[f]ire seeks oxygen", that "[t]he geometry of a room ... will affect the way the fire and its smoke travel", that "[f]ire creates heat", and that "[f]ire will burn through 3/16th-inch paneling quicker than it will through sheetrock or a brick wall" in conjunction with the configuration of the buildings involved and the eyewitness testimony of the firefighters regarding what they saw and felt at the scene, the fire could not have originated in [the jewelry store]."

Such matters are not within the realm of "common knowledge, common experience, and common sense", *see* ***Geigy***, 224 F.2d at 114 n.5 (borrowing from ***Teche Lines v. Bounds***, 179 So. 747, 749 (Miss. 1938)), such that we can reject with confidence the testimony of certified experts in the field of fire investigation as incredible as a matter of law. To analyze Hutson's contention that the government's theory presents a scientific impossibility would require this court to be an expert in that specialized field, which we are not.[2]

Moreover, the underlying facts upon which Hutson bases her argument are not undisputed. One of her contentions is that the fire could not have burned through the sheetrock wall between the two stores and built up enough heat to cause a "flashover" in the adjoining store before it burned through a partition composed of

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[2] Our holding does not affect the standard discussed in ***Christophersen v. Allied-Signal Corp.***, 939 F.2d 1106 (5th Cir. 1991) (en banc), *cert. denied*, __ U.S. __, 112 S. Ct. 1280 (1992), for excluding expert witnesses from testifying; Hutson does not contend that the government experts should not have been allowed to testify in the first place. In fact, in ***Christophersen***, we specifically stated that the scientific correctness of the expert's opinion, as opposed to his methodology, was not a matter for the court to decide. *See* ***id.*** at 1115-16.

thin wooden paneling. Even if we were to accept this premise as scientifically indisputable, which we cannot do, a government witness expressed doubt about whether this is in fact what happened.

In further support of her theory that the fire started in the adjoining store, Hutson notes that one firefighter reported feeling heat in the adjoining store's front window while Hutson's front window was cool. Another firefighter, however, reported the opposite finding when he went to the back of the stores.

Hutson's brief resembles a closing argument; it demonstrates nothing more than a conflict among government experts and witnesses on one hand, and defense experts on the other. *Accord* ***Spesco, Inc. v. General Elec. Co.***, 719 F.2d 233, 237 (7th Cir. 1983) ("In our view, this case presents a typical example of opposing experts offering conflicting views to the jury about the laws of science as relevant to causation of the fire"). Although defense witnesses interpreted the evidence differently than the government experts, both views were presented to the jury, which by its verdict found the government's witnesses more credible.

"The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." ***United States v. Greer***, 939 F.2d 1076, 1090 (5th Cir. 1991) (quoting ***Glasser v. United States***, 315 U.S. 60, 80 (1942), *aff'd on reh'g*, 968 F.2d 433 (5th Cir. 1992) (en banc). Substantial evidence that the fire originated in Hutson's store, not the adjoining store, supports the jury verdict in this

case. Six government witnesses lent support to the theory advanced by the government: Captain Jesse Hooker, a thirteen-year veteran of the Jacksonville Fire Department; firefighter Brad Solmon, a seven-year veteran of the department; Assistant Chief Joel Moore, an eight-year veteran of the department, Jacksonville Fire Marshall Ronnie McCollum; insurance investigator Thomas Joe West; and Dr. Andrew Armstrong, a chemist and president and owner of a forensic laboratory specializing in the analysis of fire debris.

According to Hooker, the first firefighter on the scene, the smoke pouring out of Hutson's store and the store abutting hers on the west was inconsistent with Hutson's theory that the fire originated in the store adjoining hers. Moore testified that the fire first broke through the part of the roof that was directly over Hutson's store, not the part over the adjoining store. Working from inside the adjoining store, the firefighters were unable to keep the flames that were burning along the wall that adjoined the two stores extinguished, indicating that the fire was coming from the other side.

McCollum testified that a video recording of the fire indicated that the first flames appeared in Hutson's store. He stated that only in Hutson's store was the floor burned through to the ground underneath. According to him, the hole through the floor along with the discovery of traces of petroleum products in the area of the hole suggested that the fire started in Hutson's store.

West testified that burn patterns on the floor of Hutson's store indicated that a flammable liquid had been poured on the floor and that the fire originated in Hutson's store. Finally, Armstrong testified that samples taken from Hutson's store contained mineral spirits of kerosene, a common fire accelerant.

We cannot say that the government's theory of the fire's origination was so patently incredible as to defy the laws of nature; the jury verdict was supported by substantial evidence.

III.

For the foregoing reasons, the conviction is

AFFIRMED.