IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5586

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LISA MICHELLE SILVAS
and
JACK WELDON NEALY,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
SA 91 CR 413 02

June 29, 1993

Before WISDOM, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Jack Nealy appeals his conviction of one count of bank robbery and aiding and abetting bank robbery in violation of 18 U.S.C. § 2113(d), and one count of carrying a firearm during a crime of violence in violation of 18 U.S.C. § 942(c)(1). Lisa Silvas appeals her conviction of one count of aiding and abetting bank

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 Pursuant to that rule, the court has determined that this opinion should not be published.

robbery and one count of carrying a firearm during a crime of violence. Because we find that the district court erroneously admitted certain hearsay statements during the trial, we reverse and remand for a new trial.

I.

On September 21, 1991, a man wearing a mask, maintenance clothes, ski cap and gloves, and carrying a gun and police scanner, robbed a motor bank in San Antonio, Texas, stealing $242,624. The robbery occurred early on a Saturday morning, when two tellers, Kelly McGinnis and Lisa Silvas, arrived to open the bank. McGinnis was dropped off by her boyfriend, and Silvas parked her car on the lower level of the garage adjacent to the bank, where customers parked and no access key was required.

McGinnis and Silvas entered the bank's "mantrap," a set of double doors that can be opened only with separate keys, and the second door will not open until the first is closed. The man, whom two witnesses had observed loitering around the entrance to the bank prior to McGinnis's and Silvas's arrivals, entered the first door behind Silvas, who was following McGinnis into the bank, and threatened to kill both tellers if he heard any reports about the bank robbery over his police scanner.

After McGinnis, who had the alarm key, did not respond when the man asked her for it, the man tied McGinnis's wrists with plastic straps and, pointing toward the alarm room door, ordered Silvas to deactivate the alarms. Silvas asked McGinnis for the key

and complied. The man then ordered Silvas to get the money from the currency vault. Silvas opened the vault and the safe inside the vault, using McGinnis's combination and keys that were readily accessible to Silvas instead of in their customary location in the teller window area.

Silvas emptied the money, including $4000 in marked "bait bills," into the man's bag. The man then inquired as to the contents of the second vault, and, after stating that the second vault contained coins, Silvas directed the man's attention to the teller drawers. The man ordered McGinnis and Silvas to open their drawers. Silvas complied, and when McGinnis had trouble remembering her combination, Silvas urged her to remain calm, whereupon McGinnis opened her drawer.

After obtaining the money from the two tellers and tearing the telephone from the wall of the vault, the man inquired as to how to exit the building. McGinnis gave him her key and explained the exit procedure. The man took both tellers' keys but left only Silvas's keys at the scene. After the tellers heard the man exit the building, McGinnis hit the alarms and Silvas dialed "911."

McGinnis contacted her supervisor shortly after the robbery, and the supervisor and police arrived to find the two tellers upset and nervous. McGinnis called her boyfriend, who arrived at the scene minutes later, and Silvas called her husband, Nealy, who was, at that time, a San Antonio police officer. He did not arrive until several hours after the incident. Nealy became a suspect in the robbery after police discovered that someone using Silvas's

computerized access card had entered the upper levels of the parking garage on Saturday morning before the robbery occurred, and after Nealy and Silvas gave conflicting statements following the incident.

Silvas and Nealy had made plans to depart on October 5, 1991, for a honeymoon to Grand Cayman Island. On the date of departure, Silvas, knowing that Nealy was under suspicion for bank robbery, became frantic when she could not locate him. She called upon one of Nealy's colleagues to help her search for Nealy. Silvas and the police officer found Nealy the same day, soaked with sweat and covered in dirt. Nealy explained that he had been working off a debt at his mother's residence. Nealy and Silvas departed for Grand Cayman two days later.

On October 12, 1991, after receiving a telephone call from William Murray, Nealy's stepfather, a sheriff's deputy met Murray in a parking lot, where Murray turned over to the deputy sheriff a plastic garbage bag surrounding a blue duffel bag containing $147,779 and certain high school memorabilia belonging to Silvas that bore Silvas's fingerprints. Officers found all of the "bait money" stolen from the bank in the stacks of money in the duffel bag. The top "bait money" bill bore the handwritten inscription "Mexico money."

Law enforcement officers accompanied Murray to property belonging to Murray and Nealy's mother, where Murray led them to an area behind his house and pointed. The officers then dug a hole at that location, and an FBI agent testified that Murray claimed he

had discovered the bag of money buried in that hole.

Nealy was arrested on October 15, 1991. A grand jury returned an indictment the next day, charging him with armed bank robbery in violation of 18 U.S.C. § 2113(d). The grand jury returned a first superseding indictment on November 6, 1991, charging Silvas with aiding and abetting armed robbery. A second superseding indictment charged both defendants with a second count of carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c). A jury found the defendants guilty on both counts.

Defendants challenge, among other things, the sufficiency of the evidence to support their convictions and the district court's admission of hearsay statements surrounding Murray's conversation with law enforcement agents regarding the location of the bag containing the money. We find sufficient evidence but, because the district court erred in admitting the highly prejudicial hearsay statements, we reverse the convictions and remand for a new trial.

II.

Silvas and Nealy contend that the district court erroneously admitted certain hearsay statements to which Hunt testified. He stated that Victoria Murray told him that she was Nealy's mother and that the land on which the money was found was her property. Hunt testified that William Murray told him that he was Victoria Murray's husband and Jack Nealy's stepfather; that William Murray led Hunt and other law enforcement personnel to a hole in the

ground and pointed to it; that William Murray told Hunt that he extensively had searched the property on October 11, 1991, and saw a garbage bag protruding above ground; and that William Murray told Hunt that he was going to show him where the money was buried, and showed Hunt the loose dirt, saying that was where he got the garbage bag and the duffel bag containing the money. Silvas and Nealy argue that Hunt's testimony regarding statements made to him by Victoria and William Murray was inadmissible because the government did not give sufficient notice of its intent to offer the statements and the statements lacked circumstantial guarantees of trustworthiness pursuant to FED. R. EVID. 804(b)(5); because the probative value of the statements was outweighed by the danger of unfair prejudice under FED. R. EVID. 403; and because admission of the evidence violated Silvas's and Nealy's Sixth Amendment confrontation right.

The district court admitted Victoria and William Murray's statements regarding their relationship to each other and to Jack Nealy under FED. R. EVID. 804(b)(4), the family history exception to the hearsay rule.[1] Aside from contesting unavailability of the

[1] The exception reads as follows:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to

(continued...)

Murrays, which we discuss below, the defendants do not allege error in admission under this exception, and we find none. We therefore address only the statements made by William Murray concerning the duffel bag containing the money and its location on his property.[2]

Our recent decision in **United States v. Flores**, 985 F.2d 770 (5th Cir. 1993), explained the Confrontation Clause analysis in light of **Idaho v. Wright**, 497 U.S. 805 (1990). The Confrontation Clause requires the prosecution to show that the declarant is unavailable and that the statement bears "adequate indicia of reliability." **Flores**, 985 F.2d at 775. Silvas and Nealy argue that neither requirement was met.

Nealy first contests the unavailability of the Murrays, arguing that the government did not make a good faith effort to locate them. Nealy asserts that the government knew of the Murrays' reluctance to testify, yet did not monitor their whereabouts after they testified before the grand jury and did not attempt to serve subpoenas on them until shortly before trial. The district court, after a hearing to establish unavailability, determined that the Murrays were unavailable as that term is

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(...continued)
have accurate information concerning the matter declared.

FED. R. EVID. 804(b)(4).

[2] William Murray's nonverbal act in pointing to the hole in the ground is a "statement" as defined in FED. R. EVID. 801(a)(2) ("A `statement' is . . . nonverbal conduct of a person, if it is intended by the person as an assertion.").

defined by rule 804.[3]

We find no error in the district court's determination. The record establishes that the government made sufficient efforts to locate the Murrays, including checking with the local mail carrier and post office, repeatedly contacting and interviewing relatives, and visiting the Murrays' residence more than once. We conclude that the government, through their use of "process and other reasonable means" to locate the Murrays, established unavailability pursuant to rule 804.

Silvas and Nealy next contend that the hearsay statements do not bear adequate indicia of reliability. They emphasize that the Murrays' disappearance after the grand jury hearing, coupled with the recovery of only a portion of the stolen money, erodes any trustworthiness that might otherwise buttress the hearsay statements.

If a statement falls within a "firmly rooted hearsay exception," reliability may be presumed. **Flores**, 985 F.2d at 775. However, if a statement does not fall within a firmly rooted

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[3] Rule 804 provides in pertinent part,

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant))

* * *

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

* * *

FED. R. EVID. 804(a)(5).

exception, the required indicia of reliability must be shown from "particularized guarantees of trustworthiness." **Flores**, 985 F.2d at 775. In **Wright**, the Supreme Court held that these "particularized guarantees of trustworthiness" include only the relevant circumstances "that surround the making of the statement and that render the declarant particularly worthy of belief." **Wright**, 497 U.S. at 819.

The district court admitted William Murray's statements surrounding the location of the duffel bag under rule 804(b)(5), the "catchall" hearsay exception. That hearsay exception is not firmly rooted for Confrontation Clause purposes. **Wright**, 497 U.S. at 817 (holding that Idaho's identical residual hearsay exception was not firmly rooted). Therefore, admission of the hearsay statements violated Silvas and Nealy's rights under the Confrontation Clause unless particularized guarantees of trustworthiness "substantially eliminate any reasonable possibility" that Mr. Murray's statements are unreliable. **Flores**, 985 F.2d at 782.

In ruling on the admissibility of the statements under rule 804(b)(5), the district court stated that it was satisfied that there was "some trustworthiness to the representations made." In support of the district court's finding, the government argues that the following factors constitute circumstantial guarantees of trustworthiness: (1) Mr. Murray did not seek consideration from the government, his statements were not self-serving, and he had no motive to falsify; and (2) the statements implicated Mr. Murray.

We conclude that the hearsay statements do not bear adequate

indicia of reliability. The government's first factor views the absence of evidence showing improper motives as indicating trustworthiness. However, as we explained in **Flores**, when a statement belongs to a category that is presumed unreliable, "the absence of evidence does not remove this presumption." **Flores**, 985 F.2d at 782. The government's second factor relies on the fact that Mr. Murray's statements "exposed him to the likelihood of investigation." Mr. Murray's act of turning in the currency did connect him to the robbery. But his story about how he found the currency did not implicate him in the robbery enough to rebut the presumption of unreliability. More possibilities exist suggesting untruthfulness than truthfulness, including the possibility that Murray himself kept $94,000 of the money and quickly and intentionally disappeared.

Because Mr. Murray's statements do not bear adequate indicia of reliability, their admission violated the defendants' rights under the Confrontation Clause of the Sixth Amendment. We cannot say that this error was harmless. Contrary to the district court's assertion, Mr. Murray's statements implicate "key critical issues" in the case. William Murray's statements regarding the location of the duffel bag in a hole on his property establish the only direct link between Nealy and the stolen money. Additionally, William Murray's statement that he found the duffel bag and its contents prejudices Silvas in establishing a connection between the money and Silvas's possessions that police found in the bag.

Because we find that admission of the hearsay statements

violated Silvas and Nealy's rights under the Confrontation Clause, we do not address the defendants' argument concerning the government's failure to give adequate notice under the rule or their assertion that admission of the evidence constituted an abuse of discretion under rules 403 and 804(b)(5).

III.

We review challenges to the sufficiency of the evidence in the light most favorable to the verdict. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Williams, 985 F.2d 749, 753 (5th Cir. 1993); United States v. Bell, 812 F.2d 188, 195 (5th Cir. 1987). We will affirm a conviction if a rational trier of fact could have found that the evidence establishes the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316 (1979); Williams, 985 F.2d at 753; United States v. Molinar-Apodaca, 889 F.2d 1417, 1423 (5th Cir. 1989). A jury is free to choose among reasonable constructions of the evidence, Bell, 812 F.2d at 195, and the test is the same whether the evidence is circumstantial or direct. United States v. Fox, 613 F.2d 99, 101 (5th Cir. 1980).

A.

Title 18 U.S.C. § 2113(a) and (d) reads as follows:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, . . . any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank . . . [commits an offense].

> (b) Whoever, in committing, or in attempting to commit, any offense defined in subsection[] (a) . . . assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device [shall be subject to greater punishment].

18 U.S.C. § 2113(a), (d) (1984 & Supp. 1993). Nealy does not contest the proof on any specific element of the offense charged. Rather, he lodges a general challenge to the sufficiency of the evidence on the robbery count, arguing that the direct evidence implicated only Silvas and that the two major pieces of circumstantial evidence were insufficient to establish Nealy's participation in the bank robbery beyond a reasonable doubt.

First, Nealy contends that the only identification made of him as the robber is incredible. On the morning of the robbery, Robert Ramos, a painter who was working in the main bank building, briefly spoke to a man dressed in maintenance clothing who was standing outside the bank doors. Ramos observed the man as Ramos was gathering materials from his truck. Ramos did not have a key to the building and asked the man whether he was working with the window cleaners; the man replied that he was not.

Two weeks after the robbery, Ramos selected Nealy's photo from a lineup, telling the FBI agent that if Nealy, the man in the picture, had slightly longer hair and an unshaven face, Nealy would be the person that Ramos saw. Ramos described the man as "white or Mexican," 5 feet 10 inches in height, and as having brunette or reddish-brown collar-length hair.

Ramos made an in-court identification of Nealy, stating that he was "75 or 80 percent" sure that Nealy was the man he saw on

September 21, 1991. Upon questioning by the court as to whether he was one hundred percent positive that Nealy was the person he saw at the bank, Ramos answered in the affirmative. Ramos explained that he had not earlier stated that he was absolutely certain because on the day of the robbery, Nealy had appeared unshaven. Ramos was thoroughly cross-examined by Nealy's counsel.

Nealy points to Ramos's uncertainty in his identification of Nealy, both to the FBI agent and in court, and to his lack of specificity regarding Nealy's physical appearance, as undermining Ramos's credibility. Nealy asserts that other evidence showed that he was less that 5 feet 10 inches tall and that police department regulations required that officers appear clean-shaven. Nealy concludes that because the government failed positively to place him at the scene of the robbery, the government failed to prove all essential elements of the offense.

Second, Nealy contests the credibility of evidence presented to the effect that part of the stolen money was found on land owned by Nealy's mother and stepfather. We already have determined that such evidence, embodied in statements made by William Murray to which Agent Hunt testified, was erroneously admitted. Even after excluding the erroneously admitted hearsay evidence from our consideration, however, we find the evidence sufficient to support Nealy's conviction on the robbery count.

Judging the credibility of witnesses is not the function of this court. United States v. Murray, 527 F.2d 401, 410-11 (5th Cir. 1976). Credibility determinations are the province of the

jury, and we cannot declare a witness's testimony "incredible as a matter of law unless `it is so unbelievable on its face that it defies physical laws.'" Bell, 812 F.2d at 193 n.5 (quoting United States v. McKenzie, 768 F.2d 602, 605 (5th Cir. 1985), cert. denied, 474 U.S. 1086 (1986)).

In United States v. Bonds, 526 F.2d 331 (5th Cir.), cert. denied, 429 U.S. 843 (1976), we affirmed a conviction where only one witness identified the defendant and qualified her identification by stating that the defendant looked different in the courtroom from how she had looked across a bank counter. Id. at 338. Upon cross-examination, the woman could not positively identify the defendant. Id. at 338-39. We observed that the district court and jurors were in a much better position to assess the witness's credibility, and we recognized that jurors reasonably could have attributed the weakening of the witness's testimony to the skill of defense counsel rather than to any inherent flaw in her testimony. Id. at 339. Similarly, we have rejected challenges to the sufficiency of the evidence based upon a tentative identification that is supported by sufficient corroborating evidence. See United States v. Washington, 550 F.2d 320, 327 (5th Cir.), cert. denied, 434 U.S. 841 (1977).

In this case, the jury chose to believe Ramos after listening to his testimony, observing his demeanor, and assessing his credibility as a witness. Additionally, the jury observed any uncertainty or lack of specificity brought out in cross-examination and apparently still chose to believe Ramos's testimony that Nealy

indeed was the man loitering in front of the bank on the morning of the robbery. We do not find Ramos's testimony "so unbelievable on its face that it defies physical laws." Therefore, we cannot find Ramos's testimony incredible as a matter of law.

Furthermore, additional evidence exists that corroborates Ramos's testimony. The jury heard evidence concerning the robber's apparent familiarity with the bank premises and Silvas's cooperation with the robber; testimony from another witness, a bank customer, who saw a man fitting a similar description loitering in front of the bank on the morning of the robbery; Nealy's inconsistent statements regarding his whereabouts on the morning of the robbery; Nealy's immediate knowledge of the bank robbery, related to a fellow police officer, when Nealy had no means of learning about the robbery while driving his personal car on the morning of the robbery; and Nealy's cash payment for a trip to Grand Cayman shortly after the robbery. Reviewing the record and the evidence in the light most favorable to the verdict, we find that a reasonable trier of fact, upon hearing the evidence presented, could have found that the government established all elements of the offense of robbery beyond a reasonable doubt.

B.

With regard to Nealy's conviction for use of a firearm during the commission of a violent crime, we also find sufficient evidence. Title 18 U.S.C. § 924(c)(1) reads as follows:

> (c)(1) Whoever, during and in relation to any crime of violence . . . for which he may be prosecuted in a court of

> the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . ., be [subject to increased punishment].

18 U.S.C. § 924(c)(1) (1993). We already have stated that sufficient evidence exists supporting Nealy's conviction for the crime of robbery. Evidence that the robber carried a gun is uncontested. Therefore, we find that sufficient evidence exists supporting Nealy's conviction for use of a firearm during the commission of a crime of violence.

C.

In order to convict a defendant of aiding and abetting the commission of a crime, the government must prove that the defendant associated with a criminal venture, participated in the venture, and sought by his action to make the venture succeed. United States v. Parekh, 926 F.2d 402, 406 (5th Cir. 1991); United States v. Manotas-Mejia, 824 F.2d 360, 367 (5th Cir.), cert. denied, 484 U.S. 957 (1987). A person cannot aid or abet a crime that already has been completed. Roberts v. United States, 416 F.2d 1216, 1221 (5th Cir. 1969).

Silvas challenges the sufficiency of the evidence supporting her conviction for aiding and abetting bank robbery. She urges that her actions during the course of the robbery were in strict conformity with bank policies and procedures. Furthermore, she asserts that the government cannot use evidence surrounding the discovery of the duffel bag and its contents as evidence of aiding and abetting. Silvas contends that because the bank robbery was

completed once the possibility of hot pursuit had passed, see United States v. Martin, 749 F.2d 1514, 1517 (11th Cir. 1985), such evidence could prove, at most, that she was an accessory after the fact.

We find that even excluding the evidence surrounding the discovery of the duffel bag, sufficient evidence exists. The jury heard evidence of Silvas's cooperation with the robber; the readily accessible location of the teller drawer keys after Silvas had locked up the bank the night before; Silvas's assistance in opening McGinnis's teller drawer; Silvas's discouraging McGinnis from activating the alarms after the robber's departure; someone's use of Silvas's computerized access card to gain entrance to the parking garage and Silvas's failure to report any theft or loss of the card until after police made inquiry; and Silvas's inconsistent statements, on the morning of the robbery, regarding the robber's appearance.

Viewing the record and evidence in the light most favorable to the government, we conclude that a rational juror could have concluded that the government established each element of the offense of aiding and abetting bank robbery beyond a reasonable doubt. We conclude that sufficient evidence existed to support Silvas's conviction on the first count. Similarly, sufficient evidence exists to support her conviction of use of a firearm during the commission of a violent crime.

IV.

In summary, we conclude that while the evidence was sufficient to support Silvas's and Nealy's convictions, the district court abused its discretion in erroneously admitting the hearsay statements under the catchall exception of rule 804(b)(5). Furthermore, because of the unfair prejudice posed by the hearsay statements against both defendants, the district court's error was not harmless. For these reasons, we reverse Silvas and Nealy's convictions and remand for a new trial.

REVERSED and REMANDED.