UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8716
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TINA MATTHEWS
and SALVADOR SANTANA,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas
(EP-92-CR-201-2)

(December 17, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Tina Matthews and Salvador Santana appeal from their conspiracy and mail fraud convictions, contending, *inter alia*, that the district court erred in admitting evidence of extraneous acts. We **AFFIRM**.

I.

Matthews and Santana were charged with wire fraud and conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 371,

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 Pursuant to that rule, the court has determined that this opinion should not be published.

1343. The indictments charged that between September 1988 and May 25, 1989, Matthews, owner of B & C Office Machines, Inc., and Santana, Matthews' brother and vice president of B & C, "devised a scheme to obtain monies from finance companies willing to purchase and lease office equipment by pretending to have legitimate businesses enter into lease agreements for office equipment". Three separate counts of wire fraud were charged, involving: (1) submission of false lease documents and a fraudulent invoice for $114,274.00 to Hertz Commercial Leasing[2] in October 1988, for equipment to be leased to Banco Nacional de Mexico (Banamex) (count two); (2) submission of false lease documents and a fraudulent invoice for $101,032.21 to Hertz in December 1988, for equipment to be leased to Banamex (count three); and (3) submission of false lease documents and a fraudulent invoice for $16,540.59 to Bank One in May 1989, for equipment to be leased to Chrysler Corporation (count four). At the close of the Government's case, the defendants' motions for judgments of acquittal as to count four (the Chrysler lease) were granted. The jury found both defendants guilty on the conspiracy count and the two remaining wire fraud counts. Both were sentenced to 21 months in prison to be followed by three years of supervised release, and ordered to pay $199,277.05 in restitution to Bank One.

II.

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[2] Hertz Commercial Leasing was acquired by Bank One Leasing Corporation during the latter part of 1988; Bank One assumed the Hertz leases at issue.

Both appellants contend that the district court erred in admitting evidence of uncharged conduct. Matthews also asserts that a comment by the prosecutor during closing argument deprived her of a fair trial.

A.

Santana and Matthews maintain that the district court erred in admitting (1) the testimony of Calvin Rothman, vice-president of Phoenix Leasing, concerning a $214,000 leasing transaction; and (2) an allegedly forged letter, purportedly written by Banamex officer Jose Gonzalez Del Rio to Commercial Financial Limited, in connection with another leasing transaction. In addition, Matthews asserts that the district court erred in admitting the testimony of Roderick Wilkins, concerning a leasing transaction with Co-Data (a finance company), and testimony regarding her duplication of an unnamed person's signature.

Fed. R. Evid. 404(b) pertains to the admission of extraneous acts.[3]

> This court has set forth a two-part test for determining the propriety of admitting evidence of "bad acts" not alleged in the indictment. First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that is not substantially

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[3] Fed. R. Evid. 404(b) provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

> outweighed by its undue prejudice and must meet the other requirements of rule 403.[4]

United States v. Dula, 989 F.2d 772, 777 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 172 (1993) (citing ***United States v. Beechum***, 582 F.2d 898, 911 (5th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 920 (1979)). "The district court's determinations on these matters `will not be disturbed absent a clear showing of abuse of discretion'". ***United States v. Robichaux***, 995 F.2d 565, 568 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 322 (1993).

As background for our consideration of these contentions, we briefly summarize the other evidence adduced at trial. Under the lease agreements that formed the basis for the charges in the indictment, office machines supplied by B & C were leased to Banamex, with Hertz (later Bank One) financing the transactions. After paying B & C for the equipment, Hertz was to receive the lease payments from Banamex. The lease documents were purportedly signed by "Gonzales Del Rio" on behalf of Banamex.

On October 28, 1988, Hertz and Banamex entered into a lease agreement for various Panasonic office machines. Pursuant to a company policy, Hertz would not pay the vendor until the lessee had confirmed that the equipment was installed and working properly. An "equipment acceptance" dated October 28, 1988, indicated that

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[4] Fed. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Banamex had received the equipment and that it was working properly. Hertz also obtained telephonic confirmation. Santana sent Hertz a facsimile transmission on B & C letterhead, listing the serial numbers of the machines covered under the lease. B & C also sent Hertz an invoice for $114,274, reflecting that the machines had been sold by "Sal".

Banamex signed another lease in December 1988, for more Panasonic machines supplied by B & C. Hertz again received an equipment acceptance form and telephonic confirmation that the equipment had been installed and was in working order. B & C again sent Hertz a letter providing the serial numbers of the equipment. An invoice for the equipment covered in this lease reflected a total price of $101,032.21.

Subsequently, the lease payments became delinquent. In attempting to resolve those delinquencies, which amounted to approximately $250,000, Patrick Henderson, a lease work-out specialist for Bank One, spoke by telephone to Santana at B & C approximately ten times. Santana indicated to Henderson that B & C would be willing to purchase the leases from Bank One to pay off the delinquencies. Henderson did not find this unusual because, by then, he was under the impression that the equipment had not been delivered. Henderson then attempted to obtain the machines in lieu of money. Santana, however, told Henderson that they were in a warehouse, the location of which Santana did not disclose.

Melody Blankenship, a collections specialist for Bank One, attempted to collect the delinquencies on the Banamex leases.

Blankenship was told by the previous Bank One collection specialist that B & C should be contacted because it had been making the payments on the Banamex lease. Ultimately, Blankenship contacted Banamex, which informed her that it had never received the subject equipment. Blankenship then called Matthews to discuss the Banamex leases; she informed Matthews that Banamex did not have the equipment and demanded either the return of the equipment or payment in full. Matthews admitted that Banamex did not have the equipment and that it was stored in warehouses in Mexico. Matthews did not deny that Banamex had never received or ordered the equipment. Matthews sent Bank One payments for a few months, totaling approximately $40,000.

John Ennis, who worked in the collection departments of both Hertz and Bank One, spoke on several occasions to Matthews about the delinquent Banamex account. Each time he spoke with Matthews about the account, he would receive funds from her. Matthews informed Ennis that he should not contact Banamex because it would "interfere with the flow of funds".

The parties stipulated that Matthews was one of the owners of the post office box address for Banamex used on the Banamex leases. They also stipulated that Banamex did not have a telephone number in El Paso, and that a telephone number (shown on the leasing documents as the number for Banamex) was actually listed as one of B & C's telephone numbers. The FBI case agent called that number, and the call was answered "Banamex". A former B & C employee testified that B & C had one telephone line that was supposed to be

answered "Banamex". He testified that both Matthews and Santana had instructed him to answer that line in such a manner and that, if a call came to it, he was supposed to transfer the call to Matthews or Santana.

Santana testified, but Matthews did not. Santana admitted making up model numbers to put on the leases, and signing lease documents as a witness to signatures that he did not actually witness.

We now consider the challenged evidence.

1.

The allegedly forged letter about which the appellants complain was first referred to during the trial testimony of Gonzalez Del Rio. He was shown the letter, which was addressed to Amy Braun at Commerce Financial Limited (CFL), and which contained what purported to be his signature. Gonzalez Del Rio testified that he had neither written nor signed the letter, and that he knew nothing about a purported lease agreement between Banamex and CFL. Neither of the appellants objected to Gonzalez Del Rio's testimony about the letter.

The next day, Amy Braun Bostich, former director of special lease services for CFL, was called as a witness by the Government, and testified about a lease between CFL and Banamex, involving seven Panasonic copiers sold by B & C. Matthews and Santana objected to Bostich's testimony about the CFL lease transaction under Rule 404(b). The district court overruled the objection, stating that "it seems to meet just about every one of the

criterion in 404(b) as being admissible. A scheme or plan, state of mind, intent, almost everything".

Bostich testified that, during the lease negotiations, she received a facsimile of a letter purportedly written to CFL by Gonzalez Del Rio. (This is the same letter previously shown to Gonzalez Del Rio.) Because the letter was not on letterhead containing the Banamex logo, Bostich found it suspicious. The deal ultimately was cancelled. At the conclusion of Bostich's direct examination, the Government offered the letter into evidence; it was admitted after both appellants stated that they had no objection.

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context...." Fed. R. Evid. 103(a)(1). Accordingly, we review the appellants' contention regarding the admission of the CFL letter only for plain error. *See* Fed. R. Evid. 103(d); ***United States v. Graves***, 5 F.3d 1546, 1551 (5th Cir. 1993).[5] Because the CFL transaction was substantially identical to the Hertz/Banamex lease transactions, the CFL letter was relevant

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[5] Prior to trial, the appellants filed motions in limine seeking to exclude evidence of extraneous acts; neither motion specifically referred to the CFL letter or the CFL lease transaction. At a pretrial conference shortly before trial, the district court stated that it would postpone ruling on the motions until the evidence was offered "and somebody objects". *Cf.* ***Graves***, 5 F.3d at 1551.

to the issue of intent to defraud Hertz/Bank One. Therefore, the district court did not commit plain error in admitting it.

2.

Calvin Rothman, vice president of Phoenix Leasing, was called as a witness by the Government. Rothman testified that in October 1988, Phoenix entered into a lease agreement with Banamex for Panasonic copiers, with B & C as the vendor. The lease agreement was signed by "Gonzales Del Rio" as senior vice president of Banamex and by Sandra Caraveo as secretary. Phoenix subsequently received a document entitled "Equipment Acceptance Notice", signed by Gonzalez Del Rio, indicating that the machines had been received.[6] The equipment covered by this lease was the same as that involved in the Hertz/Banamex leases.

When evidence of the Phoenix lease was first introduced, Matthews objected, and the following colloquy occurred:

> THE COURT: ... What is your objection?
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> [MATTHEWS' COUNSEL]: This is why we filed our motion in limine, going into 404(b).
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> THE COURT: Well, what is your objection?
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> [MATTHEWS' COUNSEL]: It's not relevant to this case, Your Honor.

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[6] Jose Gonzalez Del Rio testified that he was the head of "internal operation" at Banamex until April 1989, that he had never served as "senior vice president", and that Banamex did not use that title. He testified that he had no power to enter into lease agreements for office equipment without approval from his supervisor. Sandra Caraveo was his secretary, not the secretary of Banamex. Gonzalez Del Rio examined the lease documents in which his signature appeared, and testified that he had not signed any of them and that the purported signature of Caraveo did not appear to be authentic. There was evidence that the seal used on the documents was not the official corporate seal of Banamex.

THE COURT: Overruled.

[MATTHEWS' COUNSEL]: It's not in the indictment.

After a few more questions by the prosecutor concerning the Phoenix lease, Matthews (later joined by Santana) clarified her objection to Rothman's testimony, asserting that it "does not meet the balancing test required under rule 404(b), and it is unduly prejudicial pursuant to rule 403". The court overruled the objection, stating:

> Well, let the record reflect that based on your opening statement, intent is the crucial issue in this case. And obviously, this is admissible for that purpose. I don't know whether the jury will consider it as being significant or not or whether they will give it any weight, but it certainly is admissible for the purpose of intent.

The theory of the defense was that the appellants lacked the intent to defraud, and that they acted in good faith. The Phoenix transaction was substantially similar to those involving Hertz/Bank One: the transactions took place during the same time period; they involved Banamex as the lessee and B & C as the vendor; the lease documents in both instances bore the signature of Gonzalez Del Rio on behalf of Banamex, and contained false addresses and telephone numbers for Banamex; verification of the installation of the equipment was falsified; the leased equipment had the same model numbers, with the exception of prefix codes; and payment for the leases came directly from B & C, Santana, or Matthews rather than from Banamex.

> [W]here the issue addressed is the defendant's intent, extrinsic offenses that are similar in nature are admissible because "the relevancy of the

> extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses. The reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense".

United States v. Osum, 943 F.2d 1394, 1404 (5th Cir. 1991) (quoting ***Beechum***, 582 F.2d at 911). Accordingly, Rothman's testimony and the other evidence regarding the Phoenix lease transaction were admissible under Rule 404(b), as proof of intent to defraud Hertz/Bank One.

To the extent that Matthews and Santana contend that the district court erred in not adequately performing a ***Beechum***/Rule 403 balancing analysis, that contention is meritless. "When requested by a party, a trial court must articulate on the record its findings as to the ***Beechum*** probative value/prejudice evaluation". ***Osum***, 943 F.2d at 1401.

> In the absence of on-the-record findings in response to such a request, the appellate court will order a limited remand to enable the trial court to make such findings unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling.

Osum, 943 F.2d at 1402 (internal quotation marks and citation omitted). We do not consider the appellants' objection that Rothman's testimony did "not meet the balancing test required under rule 404(b), and it is unduly prejudicial pursuant to rule 403" as a specific request for a ***Beechum*** analysis. But, even if it could be so construed, a remand would be unnecessary, because the factors relevant to that analysis "are readily apparent from the record,

and there is no substantial doubt about the correctness of the ruling".[7] *See* ***Osum***, 943 F.2d at 1402.

3.

Roderick Wilkins, former vice president of Co-Data, a finance company, testified that in late October 1988, he was involved in negotiations to lease Panasonic copiers to Banamex through Santana at B & C. Again, all of the requisite documents were signed by "Gonzalez Del Rio". After Wilkins expressed reservations about completing the deal, Wilkins was invited to El Paso, Texas, to see the Banamex offices and meet Gonzalez Del Rio. During the visit, Santana escorted Wilkins to the B & C offices and to one of the Banamex branches in Juarez, but Wilkins never met Gonzalez Del Rio. After the visit, Wilkins rejected the lease application. Co-Data sent B & C a check made payable to Banamex, refunding the first lease payment. Santana protested that the check should be made payable to him. Co-Data then received a facsimile letter, purportedly from Gonzalez Del Rio, indicating that Co-Data could refund the money directly to Santana. The serial numbers of the

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[7] Santana also contends that Rothman's testimony was not relevant because Rothman could not recall dealing directly with either of the appellants. Matthews contends similarly that there is no evidence that she was linked to any transactions between Santana and Phoenix. We disagree. Rothman testified that he "may have briefly" dealt with Santana or Matthews, but did not "have much recollection of that". In light of the obvious similarities in all of the leasing transactions, and Santana's testimony about his role in negotiating the leases (including testimony about the Phoenix transaction), the jury reasonably could have inferred that both Matthews (owner and president of B & C) and Santana (Matthews' brother and vice president of B & C) were involved in the Phoenix transaction.

copiers covered by this lease were identical to those in the Hertz leases, except for the prefix codes.

Matthews objected to Wilkins' testimony on the ground that it was "outside the indictment ... [and] under [Rule] 404(b)"; the objection was overruled. Wilkins' testimony was admissible for the same reasons that Rothman's testimony was -- to show intent to defraud; there was no abuse of discretion.[8]

4.

Luis Oscar Parra, who was employed by B & C from 1980-1986, testified for the Government. The prosecutor asked Parra if he had witnessed Matthews duplicating others' signatures. The court overruled Matthews' objection that the testimony was irrelevant. Parra testified that he saw Matthews sign her husband's name to checks. Parra testified that, on another occasion, Matthews and another employee were discussing signatures; the employee mentioned that he had previously worked for a lawyer in Miami, and wrote the lawyer's name on a piece of paper; Matthews duplicated it.

Matthews contends that this evidence was irrelevant because it had no probative value and because there was no allegation that she had forged or duplicated any signatures on any of the documents involved in the charges alleged in the indictment. As noted,

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[8] Matthews also contends that Wilkins' testimony was irrelevant because there was no evidence of her involvement in any transactions between Santana and Co-Data. The Co-Data transaction was substantially identical to the other Banamex transactions with which Matthews was involved. As was the case with the Phoenix lease, the jury reasonably could have inferred Matthews' awareness of, and involvement in, the Co-Data transaction. *See* note 7, *supra*.

Gonzalez Del Rio examined the lease documents on which his signature appeared, and testified that he had not signed any of them. Accordingly, there was evidence that *someone* else signed the documents, using his name. The evidence of Matthews' ability to duplicate signatures was therefore relevant and could have supported an inference that she had signed Gonzalez Del Rio's name on the lease documents. In any event, even if this evidence was erroneously admitted, the error was harmless in light of the overwhelming evidence of Matthews' guilt, and the court's instruction to the jury that the appellants were "not on trial for any act or conduct or offense not alleged in the indictment". *See* ***United States v. Williams***, 957 F.2d 1238, 1241-44 (5th Cir. 1992) (admission of testimony regarding drug courier profile and extrinsic offense was harmless in light of overwhelming evidence of guilt); ***United States v. White***, 972 F.2d 590, 599 (5th Cir. 1992) (danger of prejudice minimal when it is made clear to jury that extrinsic evidence is admitted for limited purpose), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1651 (1993).

B.

Matthews contends that she was deprived of a fair trial by the prosecutor's remark, during closing argument, that, when the district court questioned Santana during his testimony, the court was "incredulous". Matthews objected and requested a cautionary instruction. The following ensued:

> THE COURT: The Court has no opinion as to any of the issues in this case or how you should decide the case. [The prosecutor], I think, was trying to imply that I did. If so, that was

> improper. I sustain their objection to it. You are to disregard it.
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> [PROSECUTOR]: ... I am not seeking to have the Court comment on the statement, and I would not.
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> THE COURT: Well, by the same token, I have every right to ask witnesses questions to try to clarify something that is confused just to help you. That's all I did. Go ahead.

"`[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's arguments standing alone'". ***United States v. O'Banion***, 943 F.2d 1422, 1431 (5th Cir. 1991) (citation omitted). Our "task in reviewing a claim of prosecutorial misconduct is to decide whether the misconduct casts serious doubt upon the correctness of the jury's verdict". ***United States v. Kelley***, 981 F.2d 1464, 1473 (5th Cir.) (internal quotation marks and citation omitted), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2427 (1993). "In making that determination, we consider: (1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of the appellant['s] guilt". ***Id.*** (internal quotation marks and citation omitted.

The prejudicial effect, if any, of the remark was minimized immediately by the court's cautionary instruction. Considered in light of the strong evidence of Matthews' guilt, we conclude that the prosecutor's comment did not "cast[] serious doubt upon the correctness of the jury's verdict". ***Kelley***, 981 F.2d at 1473.

III.

For the foregoing reasons, the judgments of conviction are

AFFIRMED.