IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1104
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PHILLIP J. CRAWFORD,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(3:91-CR-123-R(2))

(January 20, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Phillip J. Crawford and a codefendant, Garlan Norvell Sullivan, were charged with one count of conspiracy to commit bank fraud and numerous substantive counts of misapplication of bank funds and bank fraud. Sullivan pleaded guilty, agreed to cooperate with the government, and testified for the government at Crawford's jury trial. Although he made no motion for judgment of acquittal

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

when the government rested, Crawford did so move at the close of all the evidence. The motion was overruled.

A jury found Crawford guilty of all counts. The district court sentenced Crawford to two consecutive five-year terms of incarceration, followed by a five-year term of probation.

Crawford has filed a timely notice of appeal.

I

Crawford argues that the evidence was insufficient because the government failed to present adequate proof that the bank was insured by FDIC, as set forth in the indictment.

Federally insured status as of the date of the offenses is an essential element of the crimes committed against a "bank" or "financial institution." See 18 U.S.C. §§ 656, 1344. This is equally true of other federal crimes against a "bank." See, e.g., U.S. v. Platenburg, 657 F.2d 797, 799 (5th Cir. 1981) (for 18 U.S.C. § 1014 false-statement offenses against banks, FDIC-insured status must be proved beyond a reasonable doubt to establish federal jurisdiction).

Crawford failed to object at trial to testimony that Allied Bank, the bank at issue, was insured by the FDIC. Nor did he raise the issue in his motion for judgment of acquittal.

As for whether evidence is sufficient for a reasonable juror to find FDIC-insured status, this court noted in U.S. v. Maner, 611 F.2d 107, 109 (5th Cir. 1980), that a failure to object, move for judgment of acquittal, or move for a new trial would subject

challenges on appeal to plain-error review, citing Cook v. U.S., 320 F.2d 258 (5th Cir. 1963). In Cook, the defendant failed to move for judgment of acquittal. Maner, 611 F.2d at 109. This court has held that the standard in Cook also applies when a defendant moves for acquittal, as Crawford did, but failed to object during trial to evidence as to FDIC-insured status. See U.S. v. Rangel, 728 F.2d 675, 676 (5th Cir.), cert. denied, 467 U.S. 1230 (1984).

"`Plain error' is error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness and integrity or public reputation of judicial proceedings." U.S. v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991).

A total lack of proof as to insured status is clearly plain error. See U.S. v. Trevino, 720 F.2d 395, 400 (5th Cir. 1983) (evidence insufficient where government failed to adduce any evidence of insured status). Here, however, *some* evidence was presented, and we turn to examine Crawford's argument in the light of the facts in this case.

At Crawford's trial, John T. Knight, a former audit investigator of Allied Bank, testified that the bank was insured by the FDIC. Robert Hyde, a branch manager for First Interstate Bank, which acquired Allied Bank, also testified that Allied Bank was insured by FDIC.

Crawford argues that "the testimony of the two witnesses regarding bank insurance is given no time reference whatsoever." This argument lacks merit.

A witness's reference to the time of a bank's insured status may be reasonably inferred from the context of the witness's testimony. See Rangel, 728 F.2d 676. Knight offered the following testimony on direct examination:

> [PROSECUTOR]: Did you also investigate situations of possible crimes where persons outside the bank would attempt to defraud the bank?
>
> [KNIGHT]: Yes, sir.
>
> [PROSECUTOR]: Was that the position you held the entire time that you worked with Allied Bank and First Interstate Bank?
>
> [KNIGHT]: Yes, sir.
>
> [PROSECUTOR]: Let me ask you if at some point in time you were called upon to investigate a situation, a series of loans involving a Phillip Crawford?
>
> [KNIGHT]: Yes, sir.
>
> [PROSECUTOR]: Did that also involve a loan officer of Allied Bank by the name of Norvel [sic] Sullivan?
>
> [KNIGHT]: Yes, sir.
>
> [PROSECUTOR]: Where was Mr. Sullivan working?
>
> [KNIGHT]: He worked for the -- it was Allied Irving Bank *at that time*, I believe.
>
> [PROSECUTOR]: And Allied Bank *in its entirety*, was it insured by the Federal Deposit Insurance Corporation?
>
> [KNIGHT]: Yes, Sir.

R. 7, 41-42 (emphasis added).

The acts for which Crawford was charged occurred between 1984 and 1988. The jury was instructed that the offenses were committed during that period. The jury could infer from Knight's testimony regarding the Crawford's involvement in the scheme to defraud that Allied was FDIC-insured from 1984 to 1988. See Rangel, 728 F.2d at 676.

Crawford argues that there was no testimony offered that the deposits themselves were insured by the FDIC. However, Knight's testimony was that Allied was insured "in its entirety." Crawford argues in his reply brief that Knight was referring to the various branches of the bank because he had just testified as to the geography of the branches involved in his investigation and as to where Sullivan had been working. This argument does not persuade us.

That Knight's comment referred to branches of the bank does not foreclose an inference that the deposits in each bank were also insured. The prosecutor's question whether the bank was insured in its entirety by the "Federal Deposit Insurance Corporation" implicitly refers to deposits. There remains, at the least, a permissible inference to that effect.

Crawford argues that Knight, who identified himself at the time of trial as an officer of Franklin National Bank, was not competent to testify as to FDIC-insured status because he was only an "audit investigator" at the time he worked for Allied.

Crawford's failure to raise the objection at trial only preserves the issue for plain-error review. The record is not clear whether an audit investigator was technically an "officer." Crawford does not provide any authority that an audit investigator is not a bank officer or that a witness has to be an officer at the time of the alleged illegal acts. In any event, Knight was a branch manager of another bank at the time he testified. Crawford fails to cite any authority that requires the witness to be an officer of the bank at the time of trial.

A juror, based on a "reasonable understanding" of the testimonies of Knight and Hyde, could have concluded beyond a reasonable doubt that the bank was insured. See Rangel, 728 F.2d at 676. Under the plain-error standard, Crawford fails to demonstrate any error "so obvious and substantial that failure to notice and correct it would affect the fairness and integrity or public reputation of judicial proceedings." See Lopez, 923 F.2d at 50.

II

Crawford argues that the district court plainly erred when it failed to instruct the jury regarding the element that the bank be FDIC-insured as to the bank fraud and conspiracy counts.

As to the bank fraud and conspiracy counts, the district court only stated that the government had to prove beyond a reasonable doubt the existence of a conspiracy and the fraudulent acts "as charged in the indictment." The government argues that this was

sufficient to instruct the jury under the plain-error standard. Crawford argues in his reply brief that the district court failed to give the jury the definition of a federally-insured institution.

The "as charged" language in the bank fraud and conspiracy counts was sufficient in this case to instruct the jury under the plain-error standard. See Slovacek, 867 F.2d at 847. We are strengthened in this conclusion when we consider the adequacy of the "as charged" language together with those instructions for the misapplication counts, which were indeed adequate to instruct the jury.[1]

The instruction for the misapplication counts contained the statutory language "whose deposits are insured by the Federal Deposit Insurance Corporation," which is the "saving or ameliorative language" Crawford suggests is missing from the bank fraud and conspiracy counts.

Crawford argues, however, that the instruction as to the misapplication counts was flawed in another respect because it required the jurors to find that Allied Bank was a "federally chartered" institution. Crawford relies on U.S. v. Fitzpatrick, 581 F.2d 1221 (5th Cir. 1978), in which the district court

[1]Crawford in his reply-brief argues that the government has conceded that the plain-error standard of review does not apply. This argument amounts to a misreading of the government's argument. In its brief, the government noted that Crawford did *not* object to the district court's instruction and only referred to the district court's sua sponte comment that the record would reflect that Crawford objected to any variances between his instructions and the district court's charge (p. 14 n.5).

erroneously instructed the jurors that they must find the existence of a federal charter, an alternative jurisdictional basis. However, the district court in Crawford's case did not base its instruction solely on the existence of a federally chartered institution, as in Fitzpatrick, see id., but also pointed to statutory language, "*any bank* [whose deposits are insured by the Federal Deposit Insurance Corporation] . . ." The correct alternative jurisdictional footing was therefore set forth. See Fitzpatrick, 581 F.2d at 1223.

We thus conclude that the instructions, taken as a whole, set forth the "principles of law applicable to the factual issues confronting them." Lara-Velasquez, 919 F.2d at 950.

III

Crawford next argues that the government's indictment charging eleven counts of bank fraud and eleven counts of mishandling bank funds violated double jeopardy because the indictment was multiplicitous.

"Multiplicity is charging a single offense in more than one count of an indictment." U.S. v. Heath, 970 F.2d 1397, 1401 (5th Cir. 1992) (internal quotations and citation omitted), cert. denied, 113 S.Ct. 1643 (1993).

Crawford filed a pretrial motion to dismiss either the misapplication counts or the bank-fraud counts because the counts were based on conduct charged in the others, citing U.S. v. Lemons, 941 F.2d 309 (5th Cir. 1991).

Crawford argues that the evidence at trial supports, at most, eleven *acts* in the execution of *one scheme*. This argument is meritless because each act was an *execution* of the scheme. Rather than payment of one kickback distributed over a period of time, as in Lemons, this case involved the execution of eleven different loans, each punishable as a separate and distinct act. See U.S. v. Barakett, 994 U.S. 1107 (5th Cir.), petition for cert. filed (Sept. 22, 1993) (No. 93-6128).

IV

Finally, Crawford argues that the jury was confused and his right to be informed of the charge against him was violated when the district court instructed the jury that this case was a "separate schemes case" rather than a separate execution case, as indicated by the government in its response to his motion to dismiss. Crawford failed to raise this objection to the instruction at trial and must show that the instruction amounted to plain error. See Fed. R. Crim. P. 52(a); Lopez, 923 F.2d at 50.

The government only had to prove one scheme and each execution of the scheme. See 28 U.S.C. § 1344; Lemons, 941 F.2d at 317-18. In each count to defraud, the indictment charges that Crawford did "knowingly execute and attempt to execute a scheme . . . to defraud[.]" The jury instructions characterized the indictment as charging that "on eleven separate occasions" Crawford and Sullivan "devised a scheme and plan to defraud." Arguably, executed would have been more accurate than devised because the government only

had to prove one scheme and each execution of the scheme. The district court also instructed the jury that the government must, inter alia, prove beyond a reasonable doubt that "there was a scheme or plan to obtain money . . ."

On the facts of this case, Crawford fails to point out how devising a "separate scheme" on each occasion would amount to anything but a repeated execution of the same scheme. See Barakett, 994 F.2d at 1108-11. Crawford thus fails to demonstrate that the instruction amounted to error "so obvious and substantial that failure to notice and correct it would affect the fairness and integrity or public reputation of judicial proceedings." See Lopez, 923 F.2d at 50.

V

For the reasons stated herein, the convictions of Phillip J. Crawford are

A F F I R M E D.