

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1129  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

PERRY THOMAS STUART,  
a/k/a Kenneth Eugene Nichols,  
Thomas Troy Bennett,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
2:92 CR 41 01

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August 17, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

I.

Perry Stuart was indicted for bank robbery in violation of 18 U.S.C. § 2113(a) (count 1), possession of a firearm during a crime of violence in violation of 18 U.S.C. § 974(c)(1) (count 2),

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 Pursuant to that rule, the court has determined that this opinion should not be published.

being a fugitive in possession of a firearm in violation of 18 U.S.C. § 922(g)(2) (count 3), and being a felon in possession of a firearm in violation of 18 U.S.C. § 924(e)(1) (count 4). Stuart initially entered a guilty plea to three counts of the indictment but later successfully moved to withdraw his guilty plea because of a mistake as to the range of punishment on count 3. He then entered a plea of not guilty.

## II.

On July 20, 1993, Stuart and one other man entered the Team Bank in Amarillo, Texas, at 9:00 a.m. Stuart proceeded to the office of the branch manager, Jeanne DeMont, where he pointed a gun at DeMont and demanded money. He followed DeMont to the teller area, where he instructed everyone to get down on the floor. He proceeded to take approximately \$20,000 from the teller drawers and then instructed one of the tellers to open the vault. Before the teller returned, however, Stuart ran out of the bank, where his accomplice was waiting with a getaway car.

An officer of the Amarillo Police Department, already en route to the bank because a silent alarm had been activated during the robbery, spotted Stuart's light blue Cadillac and gave chase. A high speed chase ensued, ending when Stuart lost control and crashed. The passenger was apprehended after a chase on foot, and Stuart was found later, hiding in an empty trailer near the damaged getaway vehicle. The firearm and approximately \$20,000 in cash were recovered near the trailer home.

III.

Stuart was convicted of all four counts. The government then successfully moved to dismiss the fugitive-in-possession count, electing for Stuart to be sentenced on the remaining three counts.

IV.

A.

Stuart first argues that the government failed to establish that Team Bank is an institution insured by the Federal Deposit Insurance Corporation ("FDIC"). We review such a claim to determine whether, when the evidence is viewed in the light most favorable to the government, a reasonable juror could "accept the relevant and admissible evidence as [adequate] and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." United States v. Slovacek, 867 F.2d 842, 845 (5th Cir.), cert. denied, 490 U.S. 1094 (1989) (citations and internal quotations omitted). A conviction under section 2113(a) requires that the government prove beyond a reasonable doubt that the institution in question meets the statutory definition of a "bank," which includes "any institution the deposits of which are insured by the Federal Deposit Insurance Corporation." 18 U.S.C. § 2113(f); see also Slovacek, 867 F.2d at 845.

The government offered several pieces of evidence in order to establish Team Bank's status as a "bank" under section 2113(f). Branch manager DeMont identified government's Exhibit No. 9 as the FDIC lobby sticker stating that the bank is federally insured.

DeMont also testified that, on the date of the robbery, the bank was federally insured by the FDIC and that the sticker in Exhibit No. 9 established that. Stuart made no objection to DeMont's testimony on this point, nor did he choose to cross-examine DeMont.

Stuart contends that under United States v. Platenburg, 657 F.2d 797 (5th Cir. Unit A Oct. 1981), a greater quantity of proof is required. In Platenburg, the government attempted to establish the bank's FDIC-insured status by producing a copy of an insurance certificate that predated the offense by seven years. This court rejected the evidence as insufficient and reversed the conviction. Id. at 799-800.

We have recognized that the Platenburg decision established "a minimum level of acceptable proof below which reversal would be warranted." Slovacek, 867 F.2d at 846. In Slovacek, however, we found that the testimony of a bank's vice-president that the bank was federally insured on the day of the robbery was sufficient to establish it as a "bank" under section 2113(f). Id. at 845-46. We noted that the testimony was persuasive because it established the bank's status on the day of the robbery and because it was not challenged on cross-examination. Id. at 846 (citing United States v. Rangel, 728 F.2d 675, 676 (5th Cir.), cert. denied, 467 U.S. 1230 (1984)). See also Cook v. United States, 320 F.2d 258, 259 (5th Cir. 1963) (testimony that bank was insured by FDIC without objection by defendant is sufficient to establish insured status).

Both of these factors were part of the government's evidence in the case against Stuart: DeMont, a bank official, testified as

to the bank's status on the day of the robbery, and Stuart did not cross-examine her on this portion of her testimony. The government's proof was bolstered further by DeMont's testimony regarding the FDIC sticker. In light of our decision in Slovacek, the evidence adduced in the instant case was sufficient to establish Team Bank as a "bank" under section 2113(f).

B.

Stuart also argues that the government was allowed to introduce highly prejudicial evidence regarding his status as a fugitive and a felon. In United States v. Munoz-Romo, 989 F.2d 757, 758 (5th Cir. 1993), the defendant appealed his conviction of being an alien in possession of a firearm in violation of section 922(g)(5) and being a felon in possession of the same firearm in violation of section 922(g)(1). We held that the subdivisions of section 922(g) do not support the imposition of separate penalties for the possession of one firearm, noting that "we are not persuaded that Congress in § 922 intended to authorize multiple punishments for a single act of possession of a firearm." Id. at 759. We thus directed the district court to vacate one of the two multiplicitous counts of conviction and to resentence the defendant. Id. at 759-60.

Stuart argues that, while the government complied with the dictates of Munoz-Romo by dismissing the fugitive-in-possession count prior to sentencing, it intended to dismiss this count all along and indicted Stuart on that count solely to provide a pretext

for the introduction of prejudicial evidence regarding his status as a fugitive. Stuart has not established that the government's indictment was a pretext. The record is devoid of any evidence to support that allegation. Prosecutors are vested with substantial discretion regarding the conduct of criminal prosecutions, including the selection of charges to be brought in a particular case. Ball v. United States, 470 U.S. 856, 859 (1985). The government also must prove each element of a charged crime beyond a reasonable doubt. United States v. Ruiz, 986 F.2d 905, 908 (5th Cir. 1993) (citation omitted), petition for cert. filed (June 14, 1993) (No. 92-9063). One of the elements needed to establish a violation of section 922(g)(2) is the defendant's status as a fugitive. Thus, the government was obligated to provide evidence proving that element of the crime.

In addition, Stuart has not demonstrated any prejudice from the introduction of evidence establishing him as a fugitive. He argues that two prosecution witnesses testified that he was wearing dark pants when he was actually wearing gold pants at the time of his arrest and that the introduction of "bad character" evidence unfairly could have bolstered the government's case despite such discrepancies in the testimony of its witnesses.

In light of the evidence amassed against Stuart, however, the admission of evidence of his status as a fugitive was not so prejudicial as to deprive him of a fair trial. The government had three eye-witness accounts of Stuart's actions in the bank, as well as positive identifications of Stuart as the robber. The govern-

ment provided testimony from the police officer who chased and apprehended Stuart, and the money and gun were found in close proximity to Stuart when he was arrested. The prejudice, if any, was harmless. See, e.g., United States v. Mortazavi, 702 F.2d 526, 528 (5th Cir. 1983) (introduction of prejudicial extrinsic offense evidence rendered harmless by overwhelming evidence of guilt).

AFFIRMED.