IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1544

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN W. BROPHY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-138-D)

(May 3, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

John W. Brophy and Tommy G. Lane were indicted in a five-count indictment as follows:

Count I - conspiracy in violation of § 371;

Count II - bank fraud in violation of § 1344;

Count III - misapplications of funds of a federally insured financial institution in violation of § 657;

Count IV - making a false statement to a federally

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

insured financial institution in violation of § 1014; and

Count V - unlawful participation in violation of § 1006.

After bench trial, Brophy was convicted on all counts and received concurrent four-year terms of incarceration on Counts II and III, a concurrent two-year term of incarceration on Count IV, and two concurrent five-year terms of probation on Counts I and V. The concurrent terms of probation were ordered to run consecutively to the concurrent terms of incarceration. Brophy also received a $250 special assessment.

The facts agreed to are as follows: Brophy was Financial Vice-President, Group Financial Officer, and an Advisory Director to the Board of Directors of Independent American Savings Association (American); he was also a member of numerous committees as well as one of the five largest shareholders of American. American was insured by the Federal Savings & Loan Insurance Corporation (FSLIC).

Richard P. Bernstein, Inc. (Bernstein) was an entity engaged by American to perform a fair-market-value appraisal of American and its common stock. The Employee Stock Ownership Plan (ESOP) was an employee benefit plan administered by a trustee, and contributions were made by American on behalf of its employees. First Benefit Trust Company of Texas (Trust) was a Dallas, Texas, company hired by American to act as plan administrator and trustee for the ESOP.

American entered into a Covered Call Program under which it invested in a portfolio of U.S. Treasury bonds and sold "call

options" to purchase these bonds at a specified price and at a subsequent date. The "Put" was a contractual obligation which American negotiated contemporaneously when it executed a lease for corporate headquarters. The "Put" gave American the right to demand the immediate purchase, by the landlord, of fifty percent of American's ownership interest in the lease headquarters building at a set price at any time after the first rent payment.

Brophy was in charge of working with Bernstein regarding an appraisal of American stock which the ESOP was to buy. Brophy provided Bernstein with false, fraudulent, and misleading financial statements and information regarding American, its financial condition, and its exercise of its "Put" option. Brophy also failed to disclose to Bernstein that $23.5 million of proposed income from the sale of real estate was improperly included in the financial statements provided, and that American had approximately $20 million in losses from its Covered Call Program which were not included in the financial statements.

DISCUSSION:

ISSUE 1:

Brophy maintains that the evidence is insufficient to support his five convictions. When evaluating the sufficiency of the evidence after a bench trial conviction, this Court must determine whether the finding of guilt is supported by "substantial evidence." U.S. v. Jennings, 726 F.2d 189, 190 (5th Cir. 1984). This Court views the evidence in the light most favorable to the judgment and (deferring to the reasonable inferences of fact drawn

by the trial court) will determine whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. U.S. v. Reeves, 782 F.2d 1323, 1326 (5th Cir.), cert. denied, 479 U.S. 837 (1986).

To prove involvement in a conspiracy to defraud under 18 U.S.C. § 371, the Government must prove beyond a reasonable doubt "(1) that there was an agreement by two or more persons to violate the law; (2) that the defendant knew of and voluntarily joined the conspiracy; and (3) that overt acts were committed to further the conspirators' purpose." U.S. v. Investment Enterprises, Inc., 10 F.3d 263, 266-67 (5th Cir. 1993). The jury may infer the existence of an agreement from a defendant's concert of actions with others. U.S. v. Magee, 821 F.2d 234, 239 (5th Cir. 1987). "Circumstances all together inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." U.S. v. Roberts, 913 F.2d 211, 218 (5th Cir. 1990) (citation and internal quotations omitted), cert. denied, 111 S.Ct. 2264 (1991). The elements of conspiracy "may be inferred from the development and collocation of circumstances." U.S. v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991) (citations and internal quotations omitted).

In order to convict for bank fraud under § 1344, the Government must prove beyond a reasonable doubt that a defendant knowingly: 1) engaged in a scheme or artifice to defraud a federally insured financial institution or 2) participated in a scheme to obtain money under custody or control of the financial

institution by means of false statements or representations. See U.S. v. McClelland, 868 F.2d 704, 709 n.4 (5th Cir. 1989). Scheme and artifice includes "any fraudulent pretenses or misrepresentations intended to deceive others to obtain something of value, such as money, from the institution to be deceived." U.S. v. Lemons, 941 F.2d 309, 314-15 (5th Cir. 1991) (quotation marks and citation omitted).

A conviction for misapplication pursuant to § 657 requires the Government to prove beyond a reasonable doubt that: 1) American was federally insured; 2) Brophy was an officer, agent, or employee of, or connected in any capacity with American; 3) that Brophy wilfully misapplied American funds; 4) Brophy acted with intent to injure or defraud American; and 5) the amount of money taken was more than $100. § 657; see U.S. v. Tullos, 868 F.2d 689, 693 and n.5 (5th Cir.), cert. denied, 490 U.S. 1112 (1989).

To establish a violation of § 1014, the Government must prove beyond a reasonable doubt that: 1) Brophy made a false statement to a financial institution; 2) knowingly; 3) for the purpose of influencing the financial institution's action; and 4) the statement was false as to a material fact. U.S. v. Thompson, 811 F.2d 841, 844 (5th Cir. 1987). The defendant need not know that the institution falls within the ambit of § 1014, as long as he knew that it was a financial institution and the institution was indeed within the ambit of § 1014.

Lastly, to prove a violation of § 1006, the Government must show beyond a reasonable doubt that: 1) Brophy was an officer of

American; 2) American's deposits were insured by the FSLIC; 3) with intent to defraud an institution regulated by the United States or an agency thereof; 4) Brophy participated or shared directly or indirectly in money or other benefits through any transaction, loan commission, contract, or any other act of American.

Brophy's argument regarding the sufficiency of the evidence boils down to a factual assertion that he lacked criminal intent and that the "prudent man" principle is the proper legal standard by which to judge his actions, relying on Donovan v. Cunningham, 716 F.2d 1455, 1458 n.1 (5th Cir. 1983) cert. denied, 467 U.S. 1251 (1984), a civil ERISA case. Brophy maintains that Donovan holds that evaluation of an ESOP need not comply with the accounting or regulatory rules but is governed by the "prudent man" standard regarding the price paid for stock. Brophy admits that he "may have been negligent" and that he "may have breached a civil fiduciary duty," but maintains that the Donovan standard warrants reversal of his convictions. He admits that there is "little doubt about what [he did]," but that the question is "whether he had criminal intent."

Brophy offers no authority supporting his contention that the Donovan standard applies. Furthermore, the record contains substantial direct and circumstantial evidence regarding his criminal intent. An intent to injury or defraud "'is proven by showing a knowing, voluntary act by the defendant, the natural tendency of which may have been to injure the bank even though such

may not have been [the defendant]s] motive.'" U.S. v. Hopkins, 916 F.2d 207, 215 (5th Cir. 1990) (citation omitted).

Brophy was knowledgeable about American's financial status and was regarded by the Board of Directors as an expert in financial matters. Due to his financial expertise, especially in the area of valuation, Brophy was given the responsibility of working with an appraiser to conduct an appraisal of American stock for the ESOP. Richard Crowe testified that prior to the retention of Bernstein as an appraiser, a target price of $34 to $35 was set regarding American stock. Crowe raised what he considered to be problems regarding valuation and testified that Brophy responded that it was none of Crowe's business and that Brophy was "taking care of solving these technical problems." Crowe further testified that Brophy assured American directors what he could "substantiate" the desired stock price.

Furthermore, Brophy's criminal intent may be deduced from his concealment from Bernstein of material information. See Hopkins, 916 F.2d at 215-16. Brophy concealed: 1) information concerning an insufficient down-payment received from the purchasers of the Cedar Hill property, prohibiting American from recording a profit from the "sale" of the property; 2) that both internal and external auditors insisted that any gain from exercising the "put" could not be recognized as income but was only an amortized rent reduction because the "put" would not be exercised in the current fiscal year; and, 3) that American was deferring huge losses resulting from its involvement in the Covered Call Program. Bernstein

testified that he had no knowledge of each of these items; knowledge that was indispensable to reaching a valid conclusion as to stock value. The Covered Call Program losses would have had to had been offset against the stock value "dollar for dollar."

Brophy's argument that Generally Accepted Accounting Principles (GAAP) and Regulatory Accounting Principles (RAP) do not apply to ESOP valuations, fails to address the fact that Bernstein commenced his valuation based on the assumption that American's books were kept in accordance with GAAP. Brophy received a draft of Bernstein's appraisal, to which he remained silent regarding the assumption.

Additionally, Brophy's criminal intent can be inferred from his actions regarding the alleged "gain" in the securities portfolio. Trial testimony indicated that the securities portfolio was not "held for trading." Furthermore, the securities portfolio which American did hold contained little unrealized gain. American's practice was to realize immediately and profit in the securities held to meet cash requirements. Brophy provided Bernstein with various numbers of so-called fair market value which Bernstein used to prepare a calculation of unrealized gain, but Brophy refused to provide Bernstein with the adding-machine tape supporting those numbers. Although he promised to provide those data, Brophy later reneged on the promise.

Substantial evidence exists indicating Brophy's criminal intent. His attempted reliance on the "prudent man" standard is misplaced and without a jurisprudential basis. Brophy's

convictions are supported by "substantial evidence." See Jennings, 726 F.2d at 190.

ISSUE 2:

Brophy next asserts that his conspiracy conviction should be reversed because he was indicted under the "commit any offense" clause but convicted under the "defraud the United States" clause of § 371. Brophy also contends that because his conspiracy conviction should be reversed, the remaining convictions should also be reversed because they were obtained based on co-conspirator testimony which was conditionally admitted subject to the establishment of a conspiracy. Both arguments fail.

Brophy did not object to the sufficiency of the indictment nor did he allege any fatal variance therein in the district court. He raises his arguments for the first time on appeal. Thus, this Court must find the indictment sufficient "'unless it is so defective that by any reasonable construction, [the indictment] fails to charge an offense for which the defendant is convicted.'" U.S. v. Alford, 999 F.2d 818, 823 (5th cir. 1993) (citation omitted). Brophy relies on U.S. v. Haga, 821 F.2d 1036 (5th Cir. 1987). Haga is inapposite.

Brophy was charged in Count I with conspiracy to commit offenses against the United States, specifically, the substantive violations previously discussed in Issue I. He was also charged with the corresponding substantive offenses. Brophy was found guilty on all counts. The district court entered specific findings of fact and conclusions of law.

Unlike the defendant in Haga, Brophy was convicted of violating the "commit any offense" clause of § 371, and the proof at trial and the findings of the district court demonstrate that he actually committed the charged offenses. See Issue I: Haga, 821 F.2d at 1045. Brophy was not indicted for, or convicted of, a conspiracy to defraud the United States, in contrast to the Haga defendant. Haga 821 F.2d at 1042-45; see Issue 1.

To the extent Brophy argues that his convictions on Counts II-V should be reversed because his conviction on Count I is erroneous, he is mistaken. His conviction on Count I was proper.

ISSUE 3:

Brophy next contends that an ex post facto violation occurred because the 5-year limitations period delineated in 18 U.S.C. § 3282 barred his prosecution. He is mistaken. This Court has recently foreclosed such an argument. U.S. v. Brechtel, 997 F.2d 1108, 1113 (5th Cir.), cert. denied, 114 S.Ct. 605 (1993).

ISSUE 4:

Brophy next asserts that he was not provided with exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed.2d 215 (1963), regarding: 1) a March 1986 letter from James Croft to American's management; and 2) a September 1986 letter concerning an alleged indemnification agreement between the Government and one of its witnesses, Rebecca Grimmer. Brophy contends that the Croft letter "would provide evidentiary support for [his claim] that Bernstein rather than [he] was responsible for any errors in the appraisal." Brophy also argued that

alternatively, the Croft letter "might support the argument that Brophy's conduct amounted to negligence or some other type of conduct which was not criminal." He further argues that the Grimmer letter "was essential for [Brophy] to be able to both impeach Grimmer and to provide explanations for Grimmer's interpretations of key events." His contentions are unavailing.

To establish a Brady violation, Brophy must show that: 1) evidence was suppressed; 2) the evidence suppressed was favorable to his defense; and 3) the evidence was material to guilt or punishment. Barnes v. Lynaugh, 817 F.2d 336, 338-39 (5th Cir. 1987). Evidence is material when there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. U.S. v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Brophy originally requested the two documents in a pretrial Brady motion. The Government responded, stating that it had satisfied its Brady obligations. The district conducted in camera reviews to ensure compliance with Brady. The district court also informed both parties, during trial, that it had decided all Brady issues and did not order the disclosure of the two documents. Brophy did not request an in camera review of the documents. After trial, but before a verdict, Brophy filed a motion requesting a final ruling on his Brady requests as to the two documents. The district court denied the motion.

Brophy maintains that the Croft letter is exculpatory regarding his alleged criminal intent. He is mistaken. A summary of the letter provided to the district court indicates that Croft was aware of accusations by some of American's senior management about "friendship" deals and fraud on the part of American's senior management and that the ESOP appraisal was insufficient. Brophy has not shown that the Croft letter was exculpatory, and, if anything, the letter appears to be inculpatory.

Brophy contends that the Grimmer letter involved "a possible indemnification agreement between the Government and prosecution witness, Rebecca Grimmer." He maintains that the Government's failure to produce that letter somehow limited his ability to cross-examine Grimmer. His assertion is without a factual basis.

The summary of the Grimmer letter (actually a letter from SA Churchill to Bronwyn Brock), indicates that the letter concerned the fact that Churchill, an officer of the Federal Home Loan Bank of Dallas, Texas, had no objection to the Government's indemnification of Grimmer and three other American officers. The letter does not establish that there was actually any indemnification agreement between the Government and Grimmer, and the Government's non-production of the letter did not preclude Brophy from cross-examining Grimmer as to any possible indemnification agreement. Furthermore, the district court conducted an in camera review of materials regarding Grimmer and found no Brady violation.

Brophy has not shown how these two documents were material to his defense, how their production would have changed the outcome of the case, or that the failure to produce them undermined the integrity of the trial. See U.S. v. Masat, 948 F.2d 923, 932 (5th Cir. 1991), cert. denied, 113 S.Ct. 108 (1992). As discussed in Issue I, there was sufficient proof of Brophy's criminal intent, and these two documents do not negate that evidence.

ISSUE 5:

Brophy also contends that he received ineffective assistance of counsel at trial due to his attorney's failure to cross-examine Bernstein and to call Lane as a witness. His ineffective-assistance-of-counsel claim is premature and is more properly the subject of a § 2255 proceeding.

> [C]ontrolling precedent directs that a claim of ineffective assistance of counsel generally cannot be addressed on direct appeal unless the claim has been presented to the district court; otherwise there is no opportunity for development of an adequate record on the merits of that serious allegation . . . . [This Court] "resolve[s] claims of inadequate representation on direct appeal only in rare cases where the record allow[s this Court] to evaluate fairly the merits of the claim."

U.S. v. Navejar, 963 F.2d 732, 735 (5th Cir. 1992) (citations omitted).

Because the record lacks necessary details to evaluate trial counsel's strategy and reasons, this Court should decline to review the merits of this argument without prejudicing Brophy's right to raise the issue in a § 2255 proceeding. See U.S. v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991), cert. denied, 114 S.Ct. 135 (1993).

This Court should affirm.