IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2959

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN F. BAKER, JR. and
JAMES A. GILBERT,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 93 121 3)

(March 29, 1995)

Before KING, EMILIO M. GARZA, and DeMOSS, Circuit Judges.

PER CURIAM:*

John F. Baker, Jr., and James A. Gilbert appeal a jury verdict finding them guilty of one count each of bank fraud in violation of 18 U.S.C. § 1344. In addition, Gilbert appeals the jury's verdict finding him guilty of conspiracy to commit bank

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

fraud in violation of 18 U.S.C. § 371. They contend that there is insufficient evidence to support the verdicts. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Gilbert is a one percent shareholder of a federally-insured bank, Fallbrook National Bank ("Fallbrook"), in Houston, Texas.[1] Baker is a real estate broker and friend of Gilbert.[2]

In October 1984, Gilbert borrowed $1.92 million from Remington Savings and Loan Association in order to purchase 35.5 residential lots in the Wimbledon Estates and Racquet Club in Harris County, Texas. By late 1986, Gilbert had reduced the outstanding principal of the loan to approximately $1 million, although he had been delinquent in making some of the interest payments.

Also in late 1986, Fallbrook loaned $230,000 each to two of Gilbert's and Baker's friends and business associates, Kentner Shell and Rex Clemons, in order to enable them to purchase several of Gilbert's Wimbledon Estate lots. Fallbrook also made a third loan of $230,000 to Harold Sellers, an individual who

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[1] Gilbert was not on Fallbrook's loan committee. The government does not suggest that Gilbert attempted to improperly influence Fallbrook's decision to approve the loans at issue in this case.

[2] After the loans involved in this case were approved, Baker became a director of Fallbrook. The government does not aver, however, that Baker was in a position to, or actually did, influence Fallbrook's decision to make the loans involved in this case.

knew Baker, but not Gilbert.[3] This loan was also to purchase Wimbledon Estate lots from Gilbert.

Prior to approving these loans, Fallbrook apparently obtained appraisals on the property.[4] In addition, Fallbrook obtained financial information from all three of the borrowers, who had significant net worths and signed personal guaranties for the loans.[5] Two of the borrowers-- Shell and Sellers-- signed the loan documents (except for their personal guaranties) as "trustee"; however, none of the documents disclosed the identity of the supposed beneficiary and both men testified that no trusts

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[3] Gilbert and Baker argue that the evidence with regard to the Sellers' loan was reversible error because it constituted a judicial amendment of the indictment. See Stirone v. United States, 361 U.S. 212 (1960) (judicial amendment of indictment is reversible error per se). We disagree. The indictment adequately placed Gilbert and Baker on notice of the relevance of the Sellers' loan by alleging that Gilbert and Baker conspired with Shell, Clemons, and "with other individuals, both known and unknown to the Grand Jury" to defraud Fallbrook by "find[ing] nominee buyers for the lots that James A. Gilbert owned in Wimbledon Estates and Racquet Club." As such, evidence regarding the Sellers' loan was not an amendment of the indictment, but evidence which was relevant to prove the scheme to defraud *as set forth in the indictment*. See United States v. Salinas, 654 F.2d 319, 324 (5th Cir. Unit A Aug. 1981) (noting that no fatal amendment of indictment would have occurred if grand jury indictment had charged "unnamed principals."), overruled in part on other grounds, United States v. Adamson, 700 F.2d 953 (5th Cir. 1983). In any event, the evidence regarding the Sellers' loan is not necessary to prove the government's theory of fraud; therefore, any alleged error in the admission of such evidence would be, at most, a harmless variance. Id. (noting that variance occurs "where the evidence proves facts different from those alleged in the indictment[,]" but does not materially alter the nature of the charged offense).

[4] The value of the properties as reflected in the appraisals is not revealed in the record. When asked by the district court whether Fallbrook obtained appraisals on the properties, Stephen Marshall (the President of Fallbrook at the time that the loans were approved) replied, "I'm sure we did."

[5] The parties do not dispute that Shell, Sellers and Clemons were creditworthy borrowers.

were formally established. Clemons, by contrast, never signed any loan documents as "trustee."

Baker's apparent role, as a real estate broker, was to find individuals willing to "warehouse" Gilbert's property until Gilbert could find builders who wanted to buy the property to construct houses thereon. Sellers, for example, testified that he was told by Baker that "[e]ven though I was taking title to these lots, I was not taking them for myself. I was still holding them on behalf of Mr. Gilbert." Baker likewise told Shell that "Mr. Gilbert would cover the carrying costs of holding the lots" and that Shell was supposed "to hold the lots" for Gilbert until Gilbert could find a buyer. All three borrowers testified that they did not expect to own the lots very long because they expected Baker or Gilbert to find buyers within the original 90-day term of the loan. All three borrowers, however, admitted that, if a buyer could not be found, they understood that their personal guaranties created a legal obligation to repay the loan. In return for his recruiting efforts with Sellers and Shell, Baker received a brokerage commissions totaling approximately $4,600 ($2,300 per transaction).

Gilbert's activities were more varied. For example, shortly after the loans had been closed, Gilbert paid Shell and Clemons $2,300 each. Shell, a licensed real estate broker, testified that his $2,300 represented payment of a brokerage commission to himself. Clemons testified that his $2,300 represented payment for unrelated legal services rendered for Gilbert. Gilbert's role also included paying the closing costs and making the interest payments on all three loans. After paying off the his indebtedness to the original mortgagee (Remington), Gilbert made over $70,000 in "profits" from the three transactions with Shell, Sellers, and Clemons.

After the initial ninety-day term of the three loans expired, the loans were extended on several occasions. During this period, the housing market in Houston had suffered a reversal and it became apparent that the lots were not going to sell. Fallbrook refused to grant another extension and began pressuring the borrowers to make a principal payment on the loans. When confronted by Fallbrook, however, each borrower told the bank to look to Gilbert because Gilbert had promised that he would pay off the loans. When payment was not forthcoming from either Gilbert or the borrowers, Fallbrook instituted foreclosure proceedings and experienced a total deficiency of over $100,000.

Gilbert and Baker were subsequently indicted on one count each of conspiracy to commit bank fraud in violation of 18 U.S.C. § 371, and one count each of bank fraud in violation of 18 U.S.C. § 1344. The government's theory in this case was that Gilbert and Baker arranged for Shell, Clemons, and Sellers to obtain loans from Fallbrook as an "accommodation" to Gilbert, who (unbeknownst to Fallbrook) had promised to pay off the loans. Such accommodation loans, the government contends, had the purpose and intent of defrauding the bank because the bank's credit decision would, at a minimum, have been affected if it had known that the "true" borrower was Gilbert, the purported "seller."

A jury convicted Baker of the substantive count of bank fraud, but found him not guilty of conspiracy. The jury found

Gilbert guilty of both bank fraud and conspiracy. Gilbert was sentenced to thirty months of imprisonment to run concurrently on each of the two counts, as well as $35,000 restitution, three years of supervised release, and a $100 special assessment. Baker was sentenced to twelve months of imprisonment, $4600 in restitution, and a $50 special assessment. Both men filed a timely appeal to this court, asserting that there was insufficient evidence to support their convictions. We affirm.

II. STANDARD OF REVIEW

The scope of our review of the sufficiency of the evidence after conviction by a jury is narrow. We must affirm if a reasonable trier of fact could have found the evidence established guilt beyond a reasonable doubt. United States v. McCord, 33 F.3d 1434, 1439 (5th Cir. 1994), petition for cert. filed Feb. 21, 1995; United States v. Townsend, 31 F.3d 262, 266 (5th Cir. 1994). We consider the evidence, and all reasonable inferences which can be drawn therefrom, in the light most favorable to the verdict. McCord, 33 F.3d at 1439; Townsend, 31 F.3d at 266. The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence. McCord, 33 F.3d at 1439. Thus, evidence tending to show that the loans were legitimate is insufficient to require a reversal. United States v. Parekh, 926 F.2d 402, 406 (5th Cir. 1991).

III. ANALYSIS

The federal bank fraud statute states:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
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> (1) to defraud a financial institution; or
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> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
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> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344.

Thus, the statute broadly prohibits two types of conduct: (1) knowing fraud; or (2) knowing obtainment of property by false or fraudulent pretenses or representations. See United States v. LeDonne, 21 F.3d 1418, 1425-27 (7th Cir.), cert. denied, 115 S. Ct. 584 (1994). The question in this case is whether the evidence was sufficient to prove, beyond a reasonable doubt, that Gilbert and Baker acted with the requisite intent to defraud.

The requisite intent to defraud under § 1344 is established if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to himself. United States v. Saks, 964 F.2d 1514, 1518 (5th Cir. 1992); United States v. Lemons, 941 F.2d 309, 314-15 (5th Cir. 1991). An actual financial loss is not required; exposing a financial institution to a risk of loss is sufficient to support a bank fraud conviction. United States v. Holley, 23 F.3d 902, 908 (5th Cir.), cert. denied, 115 S. Ct. 635 (1994); Saks, 964 F.2d at 1519.

The government's theory, both in the indictment and at trial, was that Gilbert and Baker's scheme to obtain "nominee" borrowers to "warehouse" Gilbert's property evidences their intent to defraud Fallbrook.[6] Specifically, the indictment alleges that Gilbert and Baker committed bank fraud because they "f[ound] nominee buyers for the lots that James A. Gilbert owned in Wimbledon Estates and Racquet Club[,]" and that Gilbert and Baker "would and did promise Kentner Shell and Rex Clemons that Fallbrook Bank would look solely to James A. Gilbert for repayment of the loans." The gravamen of the government's theory is that Fallbrook was defrauded because, if it had known that Shell, Sellers, and Clemons were "nominee" borrowers for Gilbert, it would have affected Fallbrook's credit decision.

In the ordinary nominee borrower situation, the nominee borrows money in his own name and then passes the proceeds along to a third party who, in turn, promises the nominee that he will repay the loan. To use an example from one of the defendant's closing arguments, a father may borrow money in his own name in order to purchase a car for his daughter, who then promises her father that she will make the car payments. Under ordinary circumstances such as these, a nominee loan is not fraudulent because the sales transaction (i.e., the purchase of the car) is at arm's length. The father (nominee) has an incentive to borrow

[6] The government also argued that Gilbert and Baker's scheme defrauded Fallbrook because the three loans, totaling $ 690,000, exceeded the bank's maximum allowable lending limit to one borrower. See 12 U.S.C. § 84. We need not address the viability of this argument, however, as we find sufficient evidence of an intent to defraud in Gilbert and Baker's solicitation and use of nominee borrowers.

only as much as is necessary to pay fair market value for the car. The lender is not placed at risk because the loan amount accurately reflects the value of the car, in which the lender holds a security interest.

By contrast, when the nominee is a nominee for the purported "seller," the transaction becomes much murkier. In such a situation (as in the case at bar), the nominee borrows money to accommodate the owner of the collateral, who needs to raise money but, for whatever reason, cannot or chooses not to borrow money against the collateral in her own name. In essence, the "true" borrower and the "seller" are one and the same. If a lender is unaware that the borrower has a "side agreement" with the seller in which the seller promises to repay the loan, the bank has been placed at a risk of loss and hence, defrauded. The transaction between the nominee borrower and the seller is, by definition, not conducted at arm's length-- the parties have colluded to "sell" collateral at a price fixed by the seller. The "sales" price is not the product of good faith negotiations at arm's length but the seller's need for cash. A bank which lends money to finance such a "sale" is therefore lending its money with blinders on; it cannot see that the borrower is not a BFP. It believes that the borrower has negotiated the sales price and that the sales price accurately reflects the value of the collateral. It does not know that the borrower has merely accepted the "sales" price dictated by the seller.[7]

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[7] The potential for over-inflating the "sales" price in a nominee transaction involving the seller may be evidenced in this case by the fact that, in the declining Texas real estate market of late 1986, Gilbert made a total "profit" of over

Gilbert and Baker argue that there is insufficient evidence to support their convictions for bank fraud because: (1) the bank was not placed at a risk of loss because the borrowers were creditworthy; and (2) they did not make any false or fraudulent representations to the bank. In addition, Gilbert makes a derivative argument that there is insufficient evidence to support conspiracy conviction because there is insufficient evidence to prove that he committed bank fraud. We proceed to address each of these arguments in turn.

With regard to the first contention-- that the bank was not placed at a risk of loss because Shell, Sellers, and Clemons were creditworthy-- we explicitly rejected an analogous argument raised by the defendant in United States v. Saks, 964 F.2d 1514 (5th Cir. 1992), in which we stated:

> Defendants also contend that they could not have committed bank fraud because the loan they obtained was amply secured, and they assumed a legal obligation to repay it. They maintain that under these circumstances, any omissions concerning [an undisclosed loan recipient's] involvement were simply not material. We disagree. The fraudulent loan transaction plainly exposed Security and the other lenders to a risk of loss, which is all that is required under § 1344.

Id. at 1519; see also United States v. Parekh, 926 F.2d 402, 407 n.8 (5th Cir. 1991) ("A debtor's financial ability to repay the note is [] necessary but not sufficient to render a loan legitimate."). In addition, in the analogous context of the mail/wire fraud statute, 28 U.S.C. § 656-- which is the model upon which the bank fraud statute was built-- numerous Courts of

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$70,000 from the transactions with Sellers, Shell, and Clemons.

Appeal have concluded that the nominee's creditworthiness is irrelevant to determining whether the defendant (a bank insider) acted with an intent to defraud. See United States v. Blanco, 920 F.2d 844, 846 (11th Cir. 1991) ("The fact that the named borrowers on these loans may have had the financial ability and intent to repay the loans does not alter our conclusion . . . . It is the failure to disclose the interest of the bank officer in the loans which justifies finding that the funds have been misapplied."); United States v. Walker, 871 F.2d 1298, 1307 (6th Cir. 1989) (where loan is made for benefit of undisclosed bank officer, named debtor's ability to repay loan is immaterial); United States v. Olson, 825 F.2d 121, 123 (7th Cir. 1987) (same); United States v. Wolf, 820 F.2d 1499, 1503 (9th Cir. 1987) (same), cert. denied, 485 U.S. 960 (1988); United States v. Krepps, 605 F.2d 101, 108 (3d Cir. 1979) (same).[8]

Gilbert and Baker's next argument is that they cannot be convicted of bank fraud under § 1344(a)-- the false or fraudulent representations theory-- because there is no evidence that either one of them made a false or fraudulent representation to Fallbrook. Specifically, they contend that Fallbrook knew or

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[8] Gilbert also argues in his brief that the district court erred in refusing to submit a requested jury instruction which read:

> If at the time the loan is made, the named borrowers are both financially capable of repaying the loans and intend to repay the loans, then the Defendants cannot be found guilty as charged in the indictment.

As we conclude above, the debtor's financial capability and intent to repay is not a defense if the scheme placed the financial institution at a risk of loss. Accordingly, it was not error for the district court to refuse to submit an instruction which has no basis in the law.

should have known that the named borrowers were acting as nominees. They first point to the fact that the loan documents on all three loans revealed that Gilbert was the seller of the property. While it is true that Gilbert is listed on the contracts of sale as the seller, this does not notify Fallbrook that Gilbert was the true borrower. In short, the appearance of Gilbert's name on the contract of sale did nothing to inform Fallbrook of the existence of a side agreement among the contracting parties. It is precisely Gilbert's dual role as both the seller and the true borrower which placed the bank at risk.

Gilbert and Baker next argue that because Shell and Sellers signed all documents with Fallbrook as "trustee," Fallbrook knew or should have known that these two men were acting as nominees. Thus, Fallbrook's failure to inquire further as to the identity of the true borrower indicates that the identity of the true borrower was irrelevant to Fallbrook's lending decision. Fallbrook's decision to approve these two loans without knowing the identity of the true borrower evinces Fallbrook's tacit agreement to loan the money to Shell and Sellers as nominees.

As an initial matter, we note that Clemons did not sign any loan documents as "trustee." Thus, even assuming arguendo that this argument has merit, it would not alter our conclusion that Gilbert and Baker committed bank fraud by soliciting and using Clemons as a nominee borrower. In addition, while it may be true that the use of the term "trustee" put Fallbrook on notice that Shell and Sellers were acting as nominees, it does not necessarily follow that Fallbrook was on notice that *Gilbert*-- the seller-- was the true borrower.

The undisputed testimony before the jury indicated that it is common for real estate to be held in trust for undisclosed beneficiaries. The testimony also indicated that Fallbrook did not inquire as to the identity of the trusts' beneficiaries. The President of Fallbrook at the time the loans were approved testified that he was not aware of any side agreement between Gilbert and the borrowers. He also testified that knowledge of such an agreement would have affected his decision to make the loans. Furthermore, while it is true that Gilbert made the interest payments on all three loans, the source of these interest payments was hidden from the bank. The trial evidence indicated that Gilbert made the interest payments by writing checks to Shell, Sellers, and Clemons; once Gilbert's checks cleared, Shell, Sellers, and Clemons wrote their own checks to Fallbrook. By making the interest payments in this manner, Gilbert's status as the true borrower continued to be hidden from Fallbrook. Under the totality of these circumstances, it was reasonable for the jury to infer that Fallbrook did not know that *Gilbert*-- the supposed "seller" of the property-- was the trust beneficiary, as opposed to a third party BFP. Thus, the argument that there was insufficient evidence to prove an intent to defraud because Fallbrook knew that Gilbert was the true borrower is without merit.

In short, the government proffered sufficient evidence for a reasonable jury to infer that Gilbert and Baker solicited and entered into "side agreements" with Shell, Sellers and Clemons whereby Shell, Sellers and Clemons agreed to borrow money from Fallbrook on behalf of Gilbert, without disclosing that Gilbert had promised to repay the loans. In short: the loans were arranged by Baker and Gilbert; Gilbert paid all closing costs on the loans; Gilbert made all interest payments on the loans; all three borrowers denied liability when the notes became due and told Fallbrook to look to Gilbert for payment; the parties admitted that they did not negotiate over the price paid for the lots; and when the lots were finally sold at a foreclosure sale, Fallbrook suffered a total deficiency of over $ 100,000. Viewing this evidence in the light most favorable to the verdict, a reasonable jury could infer that Gilbert and Baker solicited and obtained nominee borrowers with an intent to defraud Fallbrook National Bank.

Gilbert's final argument is that there is insufficient evidence to support his conviction of conspiracy in violation of 18 U.S.C. § 371. Specifically, Gilbert argues that there is insufficient evidence to prove that he possessed the requisite intent to conspire because he did not possess the requisite intent to defraud. In light of the conclusion reached above that there was sufficient evidence from which a jury could infer that Gilbert intended to defraud Fallbrook, this argument is without merit.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.