UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4298

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BARBARA JEAN HENDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(92-CR-30013(2))

(July 14, 1994)

Before JONES and DeMOSS, Circuit Judges and COBB,[1] District Judge.

COBB, District Judge:[2]

A jury convicted Barbara Jean Henderson of one count each of conspiracy (18 U.S.C. § 371), bank fraud (18 U.S.C. § 1344), mail fraud (18 U.S.C. § 1341), making a false statement to a federally insured bank (18 U.S.C. § 1014), and harboring a person for whom it is known an arrest warrant has been issued (18 U.S.C.

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[1] District Judge of the Eastern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 1071).[3] Finding no reversible error, the Court affirms.

Henderson brings two broad points of error. First, she argues that the indictment is multiplicitous. Second, she asserts there is insufficient evidence to support her convictions. Neither has merit.

The Multiplicity Challenge.

Henderson maintains that certain charges in the indictment are multiplicitous. She argues that a charge of bank fraud precludes the United States from independently charging additional counts of conspiracy and mail fraud predicated on acts taken in furtherence of the bank fraud scheme. We disagree.

An indictment that charges a single offense in more than one count is multiplicitous. *United States v. Hord*, 6 F.3d 276, 280 (5th Cir. 1993). A multiplicitous indictment creates the danger that a defendant will receive more than one sentence for a single offense. *Hord*, 6 F.3d at 280. When a single act violates two statutes, we must determine whether Congress intended multiple punishments for the same act. *United States v. Berry*, 977 F.2d 915, 919 (5th Cir. 1992). Congress intends multiple punishments when each statute requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

The present indictment is not multiplicitous. First, it is well settled that one may be convicted both of conspiracy and underlying offenses. *See, e.g., United States v. Duvall*, 846 F.2d

[3]Henderson was also charged under 18 U.S.C. § 2 for aiding and abetting. That section imposes principal liability on aiders and abettors.

966, 976 (5th Cir. 1988). This is so because a conviction for conspiracy requires proof of an agreement and an overt act in furtherence of the conspiracy while a conviction for the underlying offense requires proof of each element of that offense. Similarly, with respect to bank and mail fraud, the texts of the statutes require proof of different elements. A conviction for bank fraud under § 1344 requires proof that the defendant executed a scheme to defraud a named financial institution--the mail fraud statute, § 1341, is not limited to such institutions. Likewise, mail fraud requires proof of a mailing, and bank fraud does not. Therefore, under *Blockburger* and its progeny, Henderson may be charged with and convicted for conspiracy, bank fraud, and mail fraud without offending the Double Jeopardy clause.

Henderson erroneously relies on *United States v. Lemons*, 941 F.2d 309 (5th Cir. 1991) and *United States v. Heath*, 970 F.2d 1397 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1643 (1993). She argues that these cases hold that when a defendant is charged with bank fraud, she may not be charged with any other acts taken in furtherance of executing the scheme to defraud. Henderson misinterprets our holdings. *Lemons* and *Heath* merely hold that a defendant may be charged with *bank fraud* only once per execution of a scheme to defraud. These cases have no application to the present situation--where a single act violates two different statutes. Consequently, they do not control, and we therefore hold the indictment is not multiplicitous.

The Sufficiency Challenge.

Henderson also asserts the evidence is legally insufficient to sustain her convictions. Although the defendant moved for a judgment of acquittal at the close of the government's case, she failed to renew the motion at the close of the evidence. Consequently, she has waived the district court's earlier denial of the motion. *United States v. Daniel*, 957 F.2d 162, 164 (5th Cir. 1992). Moreover, this Court's review is limited to determining whether there was a manifest miscarriage of justice, in other words, whether the record is devoid of evidence pointing to guilt. *Id.*

After a studied review of the record, we are convinced that sufficient evidence exists to sustain the convictions.[4] As a result, we overrule Henderson's evidentiary attack.

Finding no reversible error, Henderson's convictions are in all respects

AFFIRMED.

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[4] Although Henderson challenges her conviction for making a false statement as an attack on the sufficiency of the evidence, the argument seems to assert that § 1014 does not prohibit making a false statement in an application for a checking account for purposes of influencing the bank's action thereon. We need not decide this issue today, however, because Henderson's sentences for this count and bank fraud are to be served concurrently. We hold sufficient evidence exists to support the conviction for bank fraud and need not decide the scope of § 1014. For the same reasons, we need not determine whether the district court erroneously charged the jury with respect to § 1014.