IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5127
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RUBY S. LATOUR
and
MARISA DUTILE,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana
(91-CR-60062(01))

(April 28, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Ruby Latour and Marissa Dutile appeal their convictions of conspiracy and misapplication of bank funds in violation of 18 U.S.C. §§ 371 and 656. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In 1989, Sharon and Phillip Gray owned and operated a used car dealership known as Gray Motor Company. Sharon Gray (Gray) was responsible for conducting the company's banking. Its retail sales were conducted on a cash basis. The company obtained the money needed to purchase its used car inventory through the use of a "floor plan" financing method, whereby the company would purchase cars wholesale with a bank draft and deliver title to the lending bank. Holding the car title as security, the bank would advance funds needed to purchase the vehicle by depositing that amount into the Gray Motor Company account. When a car was purchased for cash, the bank would be paid and the title transferred to the buyer.

In 1989 and 1990, the company did its banking and maintained its floor plan at Bank of Iberia. Gray, who handled the company's daily banking, dealt almost exclusively with Latour and Dutile at Bank of Iberia, because they worked in the loan department at the bank, and the deposits Gray made were usually related to sales of cars financed at the bank. Gray usually went to Latour or Dutile when making deposits in order to take care of all her banking business at one time.

The Grays and Gray Motor Company maintained several checking accounts at the bank that were utilized for different purposes for their business and personal needs. The "Phil Gray Commission Account" was the principal business account, into which all the proceeds from car sales were deposited. The "Phil Gray Enterprise Account" was used to pay the company's operating expenses and the

Gray's household bills and was funded by transfers from the Commission Account as needed.

Gray paid Dutile approximately fifty dollars a month to reconcile her monthly business and personal bank statements on these various accounts. The monthly bank statements were held at the bank at Gray's request and were usually kept at Latour's desk. On her daily trips to the bank, Gray would periodically ask to see the statements and would inspect the balances. She would not scrutinize the individual items or entries, but would give the statements to Dutile so that Dutile could post the checks and deposits and reconcile the statements.

Gray maintained duplicate carbon copies of the deposit slips related to car sales for the business records of company. She utilized a separate deposit slip for the proceeds of each car sale, containing information related to the loan on the car, the sales price, and associated expenses.

In June 1990, Gray received a call from the bank advising her that the Commission Account was significantly overdrawn. Based upon her checkbook entries, she concluded that there must have been an error by the bank or some lag time in flooring some vehicles. Gray asked Latour to check on the problem, and Latour agreed to do so. Although Gray inquired about the situation several times, Latour never gave her an answer. Latour suggested that the discrepancy might indeed be because of the fact that some cars had not yet been floored.

A few months later, Gray and her husband separated, but Gray

continued to work at the company. Concerned about the June overdraft problem, Gray scrutinized her records and compiled a list of some deposits reflected in her book of carbon copies that did not show up on her monthly statements. She gave the list to Latour and again asked her to look into the problem. At this time, Gray noticed a distinct change in Latour's demeanor. Instead of chatting and gossiping with her as usual, Latour became more businesslike. Again, Latour failed to provide Gray with any explanation for the discrepancy in the account.

Thereafter, Gray paid closer attention to the cash deposits. When a deposit she made in September 1990, while accompanied by her daughter-in-law Mary Beth Clifton, did not appear on her monthly statement, she contacted her CPA, Darryl Romero, for advice. She delivered to Romero her duplicate deposit slips and the bank statements she had retrieved from Dutile. Romero reviewed them and prepared a letter to Phillip Gray, with a copy to the bank, listing the discrepancies he found. Romero met with Benny Menard, the president of Bank of Iberia, and asked him to investigate the problem.

Shortly thereafter, Gray saw Dutile at the bank and noticed that she was visibly upset and crying. When Gray asked her what was wrong, Dutile said that she was afraid Menard and Latour "were going to blame her for everything." Gray was advised by Latour a few days later that she would no longer be permitted to do her banking through Dutile. After a tense meeting with Latour and Menard at the bank, Gray stopped going to the bank in person.

Gray identified numerous transactions handled by Latour and Dutile that involved cash deposits, reflected on her duplicate deposit slips, that were either offset by unauthorized debit memos[1] or did not appear on her monthly bank statements. Some of the duplicate deposit slips bore a Bank of Iberia "duplicate" date stamp; some bore the initials of either Latour or Dutile; and some had the word "duplicate" in handwriting identified by a bank employee as Dutile's.

Gray also identified debit memos prepared on or near the dates of the missing cash deposits that had the effect of offsetting the amount of cash in the deposit. Although a few of the debit memos bore her name or initials, Gray testified that she had not prepared or authorized anyone to prepare any of them. When interviewed by FBI Agent Jack Juel, Dutile admitted that she had prepared the four debit memos Juel showed her, claiming that she had done so at Gray's direction.

At the bank's request, Deborah Gordon, a CPA experienced in auditing financial institutions, reviewed the Grays' accounts and uncovered $28,646 in suspicious transactions. Gordon testified as an expert witness at trial. In her opinion, the manner in which many of the transactions were structured was too complex to have been carried out by a person without intimate knowledge of internal banking procedures. She noted that suspiciously, a cash deposit

[1] A "debit memo" is a form used by banks for internal transfers of money between accounts and as a type of "counter check" for customers wishing to withdraw cash without a personal check. At Bank of Iberia, a multi-purpose form was used with a special code "66" designating the item as a debit memo.

was frequently offset immediately with a debit memo, sometimes drawn on another account. Because of the absence of "cash in" and "cash out" tickets on the bank's proof tapes she reviewed, Gordon concluded that the cash had never actually made it into a bank cash drawer. The defendants defended the charges upon the basis that all actions taken on the accounts were authorized by Gray and that Gray had actually received all of the funds allegedly embezzled.

II.

A.

1.

Latour and Dutile argue that the evidence was insufficient to show that they conspired to misapply bank funds. They argue that the government's only proof of a conspiracy was the fact that they worked together in the loan department of the bank, and that a conspiracy can be established only by drawing inference upon inference.

Latour and Dutile made oral motions for acquittal at the close of the government's case and, although they did not renew their motions at the close of all the evidence,[2] they did file timely motions for acquittal pursuant to FED. R. CRIM. P. 29(c), which the district court denied. Therefore, the regular standard of review for sufficiency of the evidence applies. United States v. Allison, 616 F.2d 779, 783-84 (5th Cir.), cert. denied, 449 U.S. 857 (1980).

[2] Although the docket sheet and the district court's minute entries state that the defendants reurged their oral motions at the close of all the evidence, the trial transcript does not reflect this fact.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the government. The inquiry is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. All reasonable inferences and credibility choices are made in support of the jury's verdict. United States v. Schmick, 904 F.2d 936, 941 (5th Cir. 1990), cert. denied, 498 U.S. 1067 (1991).

2.

A conviction for conspiracy under 18 U.S.C. § 371 requires that the government prove beyond a reasonable doubt (1) an agreement between two or more persons (2) to commit a crime against the United States and (3) an overt act committed by one of the conspirators in furtherance of the agreement. Schmick, 904 F.2d at 941; United States v. Parekh, 926 F.2d 402, 405-06 (5th Cir. 1991). The government must prove beyond a reasonable doubt that the defendant had knowledge of the conspiracy and voluntarily intended to join it. Schmick, 904 F.2d at 941; Parekh, 926 F.2d at 406.

The conspiracy need not be proved by direct evidence, but agreement may be inferred from circumstantial evidence, such as concert of action. Schmick, 904 F.2d at 941. We do "`not lightly infer a defendant's knowledge and acquiescence in a conspiracy.'" United States v. Basey, 816 F.2d 980, 1002 (5th Cir. 1987) (quoting United States v. Jackson, 700 F.2d 181, 185 (5th Cir.), cert. denied, 464 U.S. 842 (1983)) (emphasis in Basey). The government's burden may be satisfied through reasonable inferences, but the

government "must do more than `pile inference upon inference'" to prove a conspiracy charge. United States v. Williams-Hendricks, 805 F.2d 496, 502 (5th Cir. 1986) (citations omitted). "When the Government attempts to prove the existence of a conspiracy by circumstantial evidence, each link in the inferential chain must be clearly proven." United States v. Galvan, 693 F.2d 417, 419 (5th Cir. 1982).

Gray testified that she dealt primarily with Latour and Dutile to conduct her banking business because they constituted the loan department. Dutile admitted to Juel during an interview at FBI offices that she was Latour's assistant and handled transactions on the Gray accounts as Latour had taught her. Latour and Dutile had convenient access to Gray's bank statements, as Gray left them at the bank in their custody. The statements were kept at Latour's desk until Gray came into the bank to get them, and Gray would then give the statements to Dutile to reconcile.

The documents admitted into evidence at trial provide circumstantial proof of Latour's and Dutile's concerted actions. Counts III, IV, and V, each of which charged a distinct act of misapplication, were documented with duplicate deposit slips initialed by Latour and offsetting debit memos created by Dutile. Mardell Broussard, another employee of the bank, identified the handwriting of Latour and Dutile on these documents. The transaction charged in count X involved a cash deposit handled by Dutile and an unauthorized debit memo, initialed by Dutile, with "Sharon" signed in Latour's handwriting. These documents, along with

Gordon's testimony that the proof tapes indicated the deposits and offsetting withdrawals occurred at the same time, provide sufficient evidence for the jury reasonably to infer that Latour and Dutile acted together pursuant to an agreement.

B.

Latour and Dutile also argue that the evidence was insufficient to support their convictions on the substantive counts of misapplication of bank funds. In particular, they argue that the government did not prove that they "embezzled" funds from the bank, because there was no proof that they converted the funds to their own use. Latour and Dutile also argue that the evidence did not show where the funds went. Dutile argues that the evidence was weak and that the transactions could have been initiated by Sharon Gray.

Latour cites United States v. Sayklay, 542 F.2d 942 (5th Cir. 1976) in support of her argument that the government was required to prove that she "embezzled" or converted the funds to her own use. In Sayklay, this court reversed the defendant's conviction because there was no evidence of the element of embezzlement of initial lawful possession of the funds. Id. at 944. As noted in United States v. Acosta, 748 F.2d 577, 580 (11th Cir. 1984), "Sayklay simply stands for the principle that if a person is charged only with embezzlement, there must be proof of entrustment; proof of a misapplication without proof of entrustment will not support a verdict of guilty where only embezzlement is charged."

Defendants were not charged with embezzlement alone; the indictment also charged misapplication. Therefore, Sayklay is inapposite. Defendants are correct, however, that proof of conversion is required as part of the proof of misapplication.

The elements of a violation of 18 U.S.C. § 656 are (1) that the defendant was an officer, director, agent, or employee of the bank; (2) that the bank was in some way connected with a nationally or federally insured bank; (3) that the defendant willfully misapplied the monies or funds of the bank; and (4) that the defendant acted with the intent to injure or defraud the bank. United States v. Brock, 833 F.2d 519, 522 (5th Cir. 1987). The term "misapplication" is defined by this circuit's Pattern Jury Instructions as "a willful conversion or taking by a bank employee of such money or property to his own use and benefit, or the use and benefit of another, whether or not such money has been intrusted to his care, and with the intent to defraud." FIFTH CIRCUIT PATTERN JURY INSTRUCTION 2.32 (emphasis added); see also United States v. Rochester, 898 F.2d 971, 979 n.5 (5th Cir. 1990). This is the charge the district court used.

The evidence is sufficient to sustain the jury's verdict against both defendants on the substantive misapplication charges. On count II, Gray identified Latour's handwriting on the deposit slip for a $1,200 cash deposit to one of the Gray accounts. Gray denied authorizing the notation "less $200" on the deposit slip. Gray also identified Latour's signature on a $200 money order made payable to Phil Gray and denied requesting or authorizing that

money order. The money order was not endorsed but was stamped paid by the bank. Although Gray admitted that she sometimes paid sales commissions to employees with money orders, she testified that she would not have requested a money order payable to her husband but would have simply written him a check.

On count III, Gray testified that she filled out the deposit slip initialed by Latour on October 13, 1989, and deposited $1,000 cash on the sale of a car with Latour's assistance. Gray testified that she did not authorize the October 13 debit memo initialed by Dutile.

Counts IV, V, IX, XII, and XIV are similar transactions. In each instance, Gray identified her cash deposit but denied authorizing the offsetting debit memo on the same account. It is significant to note that the internal banking code used on all the offsetting debit memos, except for exh. 12G, was "81," a code that would cause the transaction to appear at the bottom of the bank statement with a series of dots after it instead of identifying the transaction as a debit memo. Broussard testified that these codes are designated by the bank employee, not the customer. Gray testified that she thought the dots after such entries on her bank statements indicated bank charges. The use of the "81" code provided a means for the appellants to conceal the fraudulent transactions by separating them from other legitimate debit memos.

Counts VI and VII are also similar. Gray deposited cash with Latour's assistance, as indicated by Latour's initials on the duplicate deposit slips. The cash deposits never showed up on

Gray's bank statement, however, and the original deposit slips could not be located at the bank. Because of the necessity for balancing credits and debits without offsetting debit memos, the defendants would have had to destroy the deposit slips to prevent an imbalance in their daily work totals.

Count XV involved an unauthorized debit memo only, with no accompanying cash deposit. Gray testified that a $500 debit memo in Dutile's handwriting, bearing the "81" code, was unauthorized.

Counts VIII and X are more complex. Count VIII involved a $1,500 cash deposit with the duplicate signed by Dutile and an unauthorized $1,500 debit memo, initialed by Dutile, drawn on an account different from the one into which the deposit was made. The transaction charged in count X involved a $514.96 cash deposit handled by Dutile and an unauthorized debit memo, initialed by Dutile, with "Sharon" signed in Latour's handwriting, for $510, again drawn on a separate account. It is important to note that the "66" code, which identifies the transaction on the bank statement as a debit memo, was used here. The fact that the debit memo was drawn on an account different from the one the deposit was made into provided the concealment.

Count XI involved an even greater level of complexity. Gray's $600 cash deposit, handled by Dutile, was later offset by two unauthorized debit memos in Dutile's handwriting, one on the Commission Account and the other on the Enterprise Account. Gordon testified that the complexity of the transactions would make the scheme more difficult to detect.

Counts XVI and XVII differ from count XI in that the money converted by Dutile involved the deposit of a check instead of cash. Again, Gray's deposit was handled by Dutile, and two unauthorized debit memos in Dutile's handwriting were drawn on separate accounts.

Count XIII was the most complex transaction. Gray testified that she made a $630 cash deposit with Dutile's assistance. She testified that she did not authorize a debit memo, in Dutile's handwriting, on a separate account for $430. Gordon testified that her review of the proof tape for that day indicated that two Gray floor plan loans had been paid off and two new loans totaling exactly $200 more than the old loans were created. The total of the new $200 debt and the $430 debit memo was $630, the exact amount of the original cash deposit. The back-up documentation for the new loans could not be located at the bank.

The increasing complexity of the transactions tends to contradict the defense's theory that Gray herself authorized the debits as a means of secretly siphoning money out of the accounts without her husband's knowledge. Gordon testified that these transactions were complex and that it would be very difficult for the average bank customer to accomplish them without banking knowledge. As a mere bank customer, it is unlikely that Gray possessed the necessary knowledge of banking procedures to have executed the plan outlined above.

It is also important to note that all of the offsetting debit memos had one thing in common: They were not signed by Gray.

Mardell Broussard, a bank employee, and bank auditor Darryl Romero testified that debit memos, like checks, should bear the signature of the customer. Broussard also testified that the use of a debit memo in a situation where a bank customer wishes to hold back part of a deposit is improper. A "less cash" designation on the deposit slip is the usual procedure.

This case hinged on the credibility determination of the jury as to whether they believed Gray's testimony that the debit memos were unauthorized, or the defendants' theory that Gray herself removed the funds. From the verdict, it is obvious that the jury believed Gray. The credibility of witnesses is within the sole province of the jury, and this court cannot disturb the jury's verdict because the defendants believe that Gray was not credible. United States v. Lechuga, 888 F.2d 1472, 1476 (5th Cir. 1989).

If Gray's testimony is believed, it is reasonable to infer that the only logical explanation for where the funds went is that they were converted by Latour and Dutile. The funds came into their possession when Gray presented her deposits, and the funds either did not make it into Gray's account in the instances where the deposit was not posted to the account, or the funds were immediately removed from the accounts by means of the debit memos. The evidence is sufficient.

C.

Dutile argues, and Latour adopts her argument, that the Assistant U.S. Attorney (AUSA) made several statements in closing

argument that were improper, prejudiced the defendants, and require reversal of their convictions and a new trial. They argue that the AUSA impermissibly vouched for the credibility of government witnesses Jack Juel and Sharon Gray, vouched for the strength of the government's case, placed his credibility at issue, misrepresented the testimony of a defense witness, and misstated the law relating to punishment.

1.

Juel interviewed Gray's daughter-in-law, Mary Beth Clifton, about the events of September 1990 regarding the day she accompanied Gray to the bank to make a deposit. Clifton testified for the defense. She stated that she went with Gray to the bank at Gray's request to be a witness to an $1,100 cash deposit because of previous cash deposits that were missing. She testified that she left Ruby's office when Gray and Ruby began to transact their business.

Clifton stated that before her interview with Juel, Gray told her to tell the FBI that she (Clifton) stayed in the room. She also testified that Gray made the statement "you scratch my back and I'll scratch yours." She testified that Gray told her that the bank was going to have to pay her back on some of the transactions for which she actually got money.

On cross-examination, Clifton admitted that a few days before trial, when she was interviewed by AUSA's Walker and Domingue, with Juel present, she had told them that she did not remember and that

she might have stayed in the room when Gray made the deposit. She also admitted that she had failed to tell them that she had witnessed Gray pick up cash at the bank. Clifton explained that she lied during this meeting with the AUSA's because she was afraid of Juel. She testified that when Juel and another agent, Duplechin, interviewed her earlier, they became very upset with her when she told them that she left the room and that she was scared. On rebuttal, Juel testified that he had never acted in a confrontational manner with Clifton in any way during the interview.

In closing arguments, defense counsel praised the honesty of Clifton's testimony. In rebuttal argument, the AUSA made the following argument that the defendants argue to be impermissible vouching for Juel's credibility:

> Would that man risk his entire career, his entire life, livelihood, to lie in order to try to convict people? Of course not. He's just doing a job. He's doing the job that he has to do. He's doing the job that every other FBI agent goes out and does. He investigates cases, and he testifies as to what he discovers, which is exactly what he did in this case. But to believe that woman, you've got to believe that that agent got on the stand and lied, and it just doesn't make any sense.

Because defendants did not object to this statement at trial, the issue is reviewed for plain error. United States v. Carter, 953 F.2d 1449, 1460 (5th Cir.), cert. denied, 112 S. Ct. 2980 (1992). We exercise discretion to correct errors under FED. R. CRIM. P. 52(b) only if the error is plain, affects substantial rights of the defendant, and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." United

States v. Rodriguez, 15 F.3d 408, 415-16 (5th Cir. 1994) (quoting Olano, 113 S. Ct. 1770 (1993)).

It is improper for a prosecutor to vouch for a government witness's credibility, because it implies that the prosecutor has additional personal knowledge about the witness and facts that confirm the witness's testimony, and it adds the influence of the prosecutor's official position to the witness's testimony. Carter, 953 F.2d at 1460. The alleged improper comments must be viewed in context. United States v. Bright, 630 F.2d 804, 825 (5th Cir. 1980).

Viewing the AUSA's comments in context, it is evident that they were made in relation to the credibility of Clifton's testimony and her accusations of Juel's unspecified behavior at her interview that caused her to be frightened and lie to the AUSA at a pre-trial meeting. The argument leading up to the challenged statement concerns the problems with Clifton's credibility. The AUSA discusses her explanation that she was scared of Juel as the reason for why she lied at the meeting. He then questions Juel's motive to lie in a comparison of Juel's credibility to Clifton's.

The comments were fair rebuttal to the defense's suggestion through Clifton's testimony, that Juel engaged in some type of behavior that frightened Clifton enough to cause her to lie. "While it is true a prosecutor may not vouch for the credibility of witnesses based on facts personally known to the prosecutor but not introduced at trial, . . . that does not mean the prosecutor cannot argue that the fair inference from the facts presented is that a

witness has no reason to lie." Bright, 630 F.2d at 824 (citations omitted). "The prosecutor is not obliged to sit quietly while character assaults are made on his witnesses; he is entitled to argue fairly their credibility." Id.

The AUSA did not express a personal opinion as to Juel's credibility, and he did not intimate that he had other evidence supporting Juel's credibility. He merely urged the jury to assess the motive of Juel to lie and argued that Juel had no such motive. This was not impermissible bolstering, much less plain error. See United States v. Robles-Pantoja, 887 F.2d 1250, 1255-56 (5th Cir. 1989).

2.

Defendants also argue that the AUSA vouched for Gray's credibility. The challenged comment is as follows:

> She was completely honest with you. Her frank honesty, her willingness to tell everything she did both good and bad)) and the reason she was willing to do that is because, ladies and gentlemen, she is the victim of this crime.

Again, there was no objection, and so the comment is reviewed for plain error. See Carter, 953 F.2d at 1460.

On cross-examination, through Clifton's testimony and in closing arguments, both defense attorneys repeatedly assaulted Gray's credibility, accusing her of stealing from her husband, falsifying a claim against her insurance company, lying in a sworn deposition, lying to her attorney, falsifying an unemployment claim, and criticizing her filing of a civil lawsuit against the

Bank, Latour, and Dutile. In rebuttal, the AUSA drew the jury's attention to her frank admissions and her demeanor during her testimony on cross-examination. His comments about Gray's being honest referred to her admissions on cross-examination when the defense attorneys attempted to impeach her with the fact that she cashed a check made out to Gray Motor Company for $5,000 and took $30,000 from her husband's bank account.

In context, the AUSA merely was arguing in rebuttal to the defense's attack on Gray's credibility based upon the evidence in the record. See United States v. Fuentes, 877 F.2d 895, 900-01 (11th Cir.), cert. denied, 493 U.S. 943, 982 (1989). These comments were not a personal voucher by the AUSA for Gray's credibility. These comments were not error, much less plain error.

3.

Defendants argue that the AUSA placed his experience and credibility as a prosecutor at issue when he commented in closing argument, "This is something that's probably completely different to you, but normally in a document case, you don't have witnesses. Normally in a document case you only have the documents to look at." They argue that the AUSA was attempting to argue to the jury that based upon his experience, this was a stronger case than usual because it involved documents and witnesses.

The intent of the comment, when viewed in context, was not to suggest that this case was stronger than usual but merely to point out that the outcome of the case came down to the jury's assessment

of the credibility of the witnesses. If anything, the comment was an admission that although the documents alone demonstrated guilt, the testimony of the witnesses created room for doubt depending upon whose testimony the jury found credible. The comment was an introduction to the portion of his rebuttal argument regarding the comparative credibility of Clifton and Gray. The AUSA did not place his experience or credibility at issue with this comment.

Defendants also argue that the AUSA placed his credibility at issue and misrepresented Dutile's testimony by the following comment:

> She (Mary Beth Clifton) comes up and says, I was battered around by FBI agents and prosecutors. Now, ladies and gentlemen, y'all have got to sit and watch me for a long time in this court, at least for this week. You got to sit and watch Ms. Domingue. This is probably about the loudest y'all have heard me talk, and I'm just doing it so I can make sure people on the back can hear me. I don't have the microphone like usual. If y'all think I battered her around, I'd be amazed, and if you think the FBI agent battered her around, it would be just as amazing.

They argue that Clifton never accused the FBI or the prosecutors of "battering" her and that the use of that word is not supported by the record.

Again, this comment was not objected to at trial and must be reviewed for plain error. See Carter, 953 F.2d at 1460. The context of the remark was part of the AUSA's rebuttal argument regarding Clifton's credibility. The AUSA had just referred to Clifton's testimony, how her testimony at trial was different from what she had told prosecutors before trial, and how she refused to admit that she had lied. He was attempting to point out the

incredulity of Clifton's explanation that she was afraid of Juel and to defend Juel and the prosecution against Clifton's suggestion that something had occurred at the meeting that frightened her enough to cause her to lie. There is no plain error.

4.

Defendants also argue that the AUSA misstated the applicable law regarding punishment with his statement that "[t]hey talk about don't send these innocent people away, don't put these innocent people in jail. Well, ladies and gentlemen, that's not your job. Whether they go to jail or not go to jail if convicted is a job for that judge, and that is within his sole discretion." Defendants argue that under the Sentencing Guidelines, sentencing is no longer in the sole discretion of the judge. Again, there was no objection to this comment, and so it is reviewed for plain error. See Carter, 953 F.2d at 1460.

It is evident from the context of the statement that it was the AUSA's intention to inform the jury that the sentence the defendants might receive was the judge's concern and not theirs. Immediately preceding the statement, the AUSA referred to the arguments of defense counsel regarding jail. Counsel for Latour said in closing argument, "Don't send two innocent women away because of Sharon Gray." Counsel for Dutile stated, "[Y]ou don't go to jail in the United States of America because you follow bad banking procedure." At the time these comments were made, the AUSA objected to the attempt to elicit sympathy for the defendants by

talking about going to jail, and the district court instructed that sentencing was up to the court. The court repeated its instruction, after closing arguments, that the jury was not to consider punishment in arriving at a verdict.

Appellants cite United States v. Ambrose, 740 F.2d 505 (7th Cir. 1984), cert. denied, 472 U.S. 1017 (1985), but Ambrose actually supports the conclusion that the AUSA's statement was not improper. Like the statements of prosecutor in Ambrose, the AUSA's comment, read in context, was a permissible argument in rebuttal to defense counsel's appeals to the jury not to send the defendants away to jail, and to remind the jury that it should not consider the consequences of convicting the defendants.

D.

Latour argues that the indictment was impermissibly amended by the prosecutor and the court. She argues that the indictment charged her only with embezzlement of "funds deposited to and entrusted to the custody and care of the Bank of Iberia" but that the proof at trial showed)) and the government's theory was)) that the funds never came into the custody of the bank because they were entrusted to her as a bank employee and did not ever make it to the bank's cash drawer. Latour acknowledges that this issue was not raised in the district court; therefore, it is reviewed for plain error. Rodriguez, 15 F.3d at 414.

It is not necessary to discuss the law relating to amendment of the indictment as opposed to a material variance in proof, as

the predicate for Latuour's argument is false. First, in addition to alleging that the funds were entrusted to the custody of the bank, the indictment also alleged in each substantive count that the funds "had come into her possession and control by virtue of her position as an [sic] loan officer of Bank of Iberia." Therefore, the element of § 656 that Latour claims was not alleged in the indictment was indeed so alleged.

Second, even if the indictment had omitted this allegation, proof that the funds came into Latour's possession as a bank employee would constitute proof of custody by the bank as well. Latour's argument that her custody of the funds as a bank employee does not constitute custody by the bank is specious. Although this court has not addressed this specific issue, in Golden v. United States, 318 F.2d 357, 363 (1st Cir. 1963), the court stated that there could be no question that if a defendant received funds as an agent for a bank, the funds became bank funds. Latour does not argue that she received the deposits from Gray in any other capacity than as an employee of the Bank of Iberia. When Latour received the deposits, they became bank funds as alleged in the indictment. There was no amendment of the indictment.

AFFIRMED.