UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7150
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TERESIA MURRAY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CR F92 00017 L N)

(October 19, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

A jury convicted Teresia Murray on the following counts: conspiracy to defraud the United States by theft of money and property of the United States Navy Exchange and aiding and abetting in the same; 18 U.S.C. §§ 371, 641, and 2. The presentence report

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(PSR), applying the theft guideline U.S.S.G. § 2B1.1, arrived at an adjusted offense level of 17. Together with a criminal history category of I, this yielded a sentencing range of 24-30 months.

Murray filed written objections to, among other things, the PSR's calculation of the amount of loss attributable to her. At the sentencing hearing, the probation officer explained her calculations and corrected a mistake, resulting in a revised offense level calculation of 16 and changing the applicable guideline range to 21-27 months. The district court sentenced Murray to 24 months of imprisonment to be followed by three years of supervised release, $2,500 in restitution, and a $150 special assessment.

OPINION

Murray argues that the district court erred in failing to provide her with a copy of witness Robyn Bailey's written statements made to investigators "well in advance of trial." Bailey worked with Murray at the United States Navy Exchange and became a confidential informant for the Government. Murray contends that she was not able to cross-examine Bailey effectively because she was not given sufficient time to review the statements. She cites Fed. R. Crim. P. 26.2 in support of this contention.

Because Bailey was listed as an expected defense witness, the Government was only required, under the district court's discovery order, to produce her statements "just prior to direct examination of that witness." Nevertheless, after Murray's attorney complained of the non-disclosure at trial, the court briefly delayed the

proceedings and rearranged the order of the witnesses' testimony to give the defense sufficient time to review Bailey's written material. Moreover, the trial judge stated, "I'm going to move along now, but if you feel like you're overwhelmed by what you see, let me know." Murray's attorney failed to request additional time for review of the statements provided. On appeal, there has been no showing that the material was not received in time to effectively cross-examine the witness. See United States v. Mitchell, 777 F.2d 248, 255 (5th Cir. 1985) (trial court's denial of defendant's continuance motions because they failed to show that they had not received the materials in time to prepare properly was not an abuse of discretion), cert.denied, 476 U.S. 1184 (1986).

Further, Murray's reliance on Rule 26.2 is misplaced. Rule 26.2(a) requires that "[a]fter a witness other than the defendant has testified on direct examination," the Government must produce on the motion by the defendant "any statement of the witness that is in [its] possession and that relates to the subject matter concerning which the witness has testified." See also Jencks Act, 18 U.S.C. § 3500(b) (stating substantially the same thing). Thus, Rule 26.2 provides for discovery of statements by a Government witness after direct examination of that witness at trial. Since Bailey's written statements were turned over to the defense before she took the stand, the Government clearly complied with the time limit prescribed by Rule 26.2.

Murray also argues that the district court erred in admitting prejudicial, hearsay statements of Bailey. The Government counters

that the testimony in question was admissible under Fed. R. Evid. 801(d)(1)(B).

Review of a trial court's evidentiary rulings is "highly deferential," and this Court will reverse such rulings only for an abuse of discretion. United States v. Anderson, 933 F.2d 1261, 1267-68 (5th Cir. 1991). Nevertheless, in direct criminal appeals, review of evidentiary rulings is "necessarily heightened." Id. at 1268.

During the trial, Murray's co-worker, Carla Swann, who had earlier pleaded guilty to aiding and abetting the theft of property of the United States in excess of $100, took the stand and testified that Murray, as a floor supervisor, approved fraudulent transactions and received one-half of the proceeds. Swann was cross-examined vigorously by the defense in an attempt to discredit her. Subsequently, Bailey was recalled as an adverse witness by the defense and questioned about her secretly recorded telephone conversations with other United States Navy Exchange employees. Specifically, the defense asked her if she had any personal knowledge of wrong-doing by Murray based on the recorded conversations. Bailey responded that all she knew about Murray was what she had been told by Swann. On cross-examination, the Government attempted to question Bailey about her telephone conversations with Swann, but the court sustained defense counsel's objection on the ground that the testimony would be hearsay. The court then changed its ruling based on the Government's argument that Bailey's testimony as to what Swann had said to her concerning

Murray during their telephone conversations was admissible because it was not hearsay under Fed. R. Evid. 801(d)(1)(B). Bailey was recalled to the stand and testified that Swann told her that Murray had stolen clothes and other items; that she had, on one occasion, split $600 with another employee; and that her cut of the illegal proceeds was about $1,000 a month.

Under Rule 801(d)(1)(B), a witness's prior consistent statement is not hearsay if the witness "is subject to cross-examination concerning the statement" and it "is offered to rebut an express or implied charge against [him] of recent fabrication or improper influence or motivation." Swann testified at trial and her veracity and motives were attacked throughout defense counsel's cross-examination. The Government offered the testimony of Bailey concerning Swann's consistent statements alleging Murray's involvement in criminal activity to rebut charges against Swann of recent fabrication and improper motive.

Further, notwithstanding her assertion to the contrary, Murray "opened the door" regarding Swann's statements by initiating the questioning of Bailey regarding her secretly recorded telephone conversations with other United States Navy Exchange employees. See United States v. Pena, 949 F.2d 751, 757 (5th Cir. 1991). Accordingly, the district court did not abuse its discretion in admitting Bailey's testimony under Rule 801(d)(1)(B). See id.; see also United States v. Zuniga-Lara, 570 F.2d 1286, 1287 (5th Cir.), cert. denied, 436 U.S. 961(1978).

Finally, because the statements in question are cumulative of other testimony at trial, their admission was harmless error. See Koteakos v. United States, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946).

Murray also contends that the district court erred in calculating the amount of loss based on estimated inventory shrinkage. She argues that this measure of loss is arbitrary and speculative and that the proper amount of loss that should be attributed to her is at most $13,994, which she contends represents the market value of the property taken from the Navy Exchange.

The calculation of the amount of loss is a factual finding reviewed for clear error. United States v. Wimbish, 980 F.2d 312, 313 (5th Cir. 1992), cert. denied, 113 S. Ct. 2365 (1993). A factual finding is not clearly erroneous if it is plausible in light of the record as a whole. Id.

Section 2B1.1(b)(1) enhances the base offense level of 4 on a graduated scale according to the amount of the victim's loss. Application Note 2 to § 2B1.1 defines loss as:

> [T]he value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.

The district court is not required to determine the loss with precision and may infer it "from any reasonably reliable information available." § 2B1.1, comment. (n.3).

The district court's loss calculation is plausible in light of the record as a whole. At the sentencing hearing, Kerry Keeter, a special agent with the United States Naval Investigative Service, explained that determining the amount of loss from the conspiracy was difficult because the defendants had taken so much over such a long period that they could not remember everything they had stolen. Based on video-taped surveillance over a two-month period and the admissions of the conspirators, Keeter had calculated that the amount of loss due to theft was $13,994. He testified at sentencing, however, that this measure of loss did not accurately reflect the entire amount of theft attributable to the conspiracy.

Instead, in determining the amount of loss, the court relied on the probation officer's inventory shrinkage calculation. Shrinkage is the amount of unexplained inventory loss over a certain period of time. The Navy finds an acceptable amount of shrinkage for a year to be 1 percent, as compared to 3 percent for a public retail store. An inventory for the first 6 1/2 months of 1991, revealed a shortage of $182,000. This figure represented a shrinkage of 3.7 percent, which exceeded the shrinkage figures for 1988 and 1989, which were 2.6 percent and 2.8 percent, respectively. In 1992, after the breakup of the conspiracy, shrinkage dropped dramatically to .33 percent.

The probation officer divided $182,000 by 12 months, equaling $15,166. This figure was multiplied by 7 1/2 months, the months one of the co-defendants worked, and then divided by two, in an effort to be lenient, for a total of $56,872.50. This figure

represented the amount of loss attributable to the conspiracy in 1991. To it, the probation officer then added the amount of loss attributable to the conspiracy from September 1990 to January 1991, again using one-half of the actual inventory shrinkage, which equalled $49,344. The resulting total of $106,216.50 was used to calculate the defendants' offense level pursuant to § 2B1.1.

Given the difficulty in determining the amount of loss attributable to a conspiracy that continued for nearly one year, the district court did not clearly err in arriving at a total loss figure based upon the amount of inventory shrinkage; see United States v. Chang Ho Kim, 963 F.2d 65, 69-70 (5th Cir. 1992). Special Agent Keeter explained that the $13,994 figure relied upon by the defendants did not adequately account for the entire amount of theft attributable to the conspiracy. To account for the possibility that not all of the increase in inventory shrinkage was due to the conspirators, the total amount of shrinkage was discounted by one-half. Thus, as the district court's loss calculation was based on a reasonably reliable measure supported by the record, the court did not clearly err.

AFFIRMED.