UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8540

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND D. CHAVEZ, ROBERT M. PAYNE and BILLYE E. BOSTIC,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Texas

(EP-92-CR-447-1,2,3 (B))

(November 23 1994)

Before REAVLEY, DAVIS and DEMOSS, Circuit Judges.

PER CURIAM:*

The defendants, Raymond D. Chavez, Robert M. Payne and Billye E. Bostic, were convicted of conspiring to cause false entries to be made in the records of a financial institution and conspiring to make false statements to a federal officer. 18 U.S.C. § 371; 18 U.S.C. § 1006; 18 U.S.C. § 1001. Payne and Bostic also were

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

convicted of the substantive offense of causing false entries to be made in the records of a financial institution. 18 U.S.C. § 1006; 18 U.S.C. § 2. In addition, only Payne was convicted of the substantive offense of making false statements to a federal officer. 18 U.S.C. § 1001. The defendants now appeal the sufficiency of the evidence supporting their convictions, in addition to various other rulings by the district court.

I.

This case stems from the repurchase of delinquent construction loans from a federally insured bank to an electric company. We will separate our discussion of the facts from our discussion of procedural history.

A.

In January 1985, the Federal Home Loan Bank Board (FHLBB) began examining the El Paso Federal Savings & Loan Association (EPF) and ultimately found that the federally insured bank had understated its "scheduled items"[1] by approximately $10 million. The FHLBB therefore ordered EPF to strengthen its net worth.[2] Robert Payne, EPF's president at that time, responded that the bank intended to sell approximately $5 million of scheduled loans. The FHLBB, however, became concerned that EPF would sell those loans "with recourse" to another financial institution, Sun Country

[1]Scheduled items are delinquent loans that have been modified. The modification usually is an extension or renewal of the loan.

[2]Under federal regulations, a federally insured financial institution's minimum net worth must be equal to 20 percent of its scheduled items.

Savings Bank (SC), which was then headed by Raymond Chavez. If the loans were sold with recourse, EPF would remain secondarily liable for the loans, and its net worth would still be insufficiently low. The FHLBB therefore asked Payne and Chavez in April 1985 whether EPF intended to sell the loans with recourse to SC. Chavez and Payne responded separately the following month. Chavez stated that SC had not entered into any transaction with EPF and that, if it did, SC would notify the FHLBB. Several weeks before, however, Chavez had committed SC to participating in EPF's sale of the loans to the El Paso Electric Company (EPEC). Payne, meanwhile, informed the FHLBB that EPF intended to sell the loans to EPEC. Payne did not indicate, as the FHLBB had requested, whether the sale would be with or without recourse.

In late May 1985, EPF's board of directors held a meeting and discussed the proposed transaction between EPF and EPEC. According to two board members who testified at trial, Payne never indicated that the proposed sale was with recourse. Billye Bostic, who was then executive vice president of EPEC, attended the board meeting. Bostic had been a director of EPF and later became an advisory director to the bank. Bostic also did not indicate whether the proposed sale would be with or without recourse. EPF's board held another meeting in early June 1985 and again discussed the proposed sale. Again, neither Payne nor Bostic mentioned that the sale would be with recourse.

EPF eventually sold the loans with recourse to EPEC in late June 1985 for $5.5 million. The loans sold to EPEC were made to

Meacham Construction Company. Under the terms of the sale, EPF agreed to re-purchase the loans one year after the date of sale. EPF posted an additional $10 million in loans as collateral for its obligation to repurchase the delinquent construction loans. SC, for its part, provided a "take out" commitment to EPEC, by which SC agreed to purchase the loans from EPEC one year after the date of sale. EPEC paid SC $5,000 for its commitment, whereupon EPF reimbursed EPEC. In effect, SC's commitment to purchase the loans meant that SC initially would be liable for the loans, and in the event that SC defaulted on its obligation, EPF would become liable, i.e., obligated to re-purchase the loans.

The transaction was memorialized in two separate documents. The Loan Participation Agreement (LPA) originally included reference to EPF's contingent repurchase obligation, but the reference eventually was deleted. The reference was deleted by an outside attorney at the direction of Gary Hedrick, an EPEC employee. Hedrick testified at trial that he did not recall who ordered him to direct the attorney to delete the reference. He further testified that only three EPEC officers, including Bostic, would have been authorized to do so. The LPA in its final form represented that the transaction was an outright sale without recourse. Though the LPA was one of two documents reflecting the sale, it stated: "this document contains the entire agreement between the parties hereto." The Collateral Assignment and Security Agreement (CASA), the second document, set forth the details of EPF's contingent repurchase obligations and the

collateralization of those obligations. The CASA referred to the LPA, but the LPA did not refer to the CASA. At closing, Bostic signed on behalf of EPEC and Robert Hawley signed on behalf of EPF. Neither Payne nor Chavez were present at closing. The CASA -- but not the LPA -- was filed at the El Paso County Courthouse.

Several days later, Robert Carvalho, the EPF employee responsible for making ledger entries, recorded the transaction. Though he was aware that the transaction was collateralized and with recourse, Carvalho's office recorded it as an outright sale without any reference to EPF's liability. Shortly thereafter, Susan Long, EPF's comptroller, prepared EPF's quarterly report to be submitted to FHLBB. Long testified that she used the ledger prepared by Carvalho to compile the quarterly report, and as a result, she did not report that EPF had sold the loans to EPEC with recourse.

Meanwhile, at SC, the transaction was never recorded. Specifically, Chavez's "take out" commitment in April 1985 was never entered into SC's financial statements. In addition, the SC board met twice in May 1985 and once in June 1985. According to the board's minutes, SC's commitment to EPEC was never discussed by the board. The transaction also went unrecorded at EPEC. In fact, the only reference in EPEC's records of the transaction is in the minutes of an EPEC investment review committee that met in May 1985, a month prior to the transaction. Bostic represented to the committee that EPEC would loan EPF $5.4 million and EPF would

collateralize the loan. On the same day of the committee's meeting, however, Bostic had committed EPEC to buying the loans.

In October 1985, the FHLBB expressed to EPF its renewed concerns over the bank's financial stability and recommended that EPF permit the FHLBB to supervise the bank. In response, EPF's board met, with Payne and Bostic in attendance, and approved a letter to the FHLBB that discussed the EPF/EPEC transaction. The letter does not mention that the sale was with recourse. The board attached a copy of the LPA but not the CASA. In late December 1985, approximately six months after the transaction, EPF repurchased the loans directly from EPEC. SC apparently played no transactional role in the repurchase. At two separate EPF board meetings the following month, the board did not consider whether EPF should have repurchased the loans. Instead, the repurchase apparently was couched as a favor for EPEC, who allegedly was under pressure from utility regulators to sell the loans. The board's minutes do not indicate whether Payne and/or Bostic were present.

In late January 1986, just days after EPF had completed its repurchase, the FHLBB and EPF entered into a supervisory agreement, which provided, inter alia, that EPF would be unable to repurchase scheduled loans. Pursuant to the supervisory agreement, Payne was required to complete a management questionnaire that asked for information regarding EPF's (1) existing liabilities and contingent liabilities and (2) existing agreements which affected the bank's financial condition but were not recorded. Payne responded in April 1986 that no such liabilities or agreements existed at that

time. In addition to signing a supervisory agreement with EPF, the FHLBB commenced another examination of EPF in May 1986. William Couhig, the FHLBB examiner, questioned Payne about the EPF/EPEC transaction. Payne stated that EPF was under no obligation to repurchase the loans and that the repurchase was intended as a favor for EPEC, an EPF depositor. Payne stated that the EPF board, in fact, had voted at the May 1985 meeting to repurchase the loan, though the minutes do not reflect a vote. Payne did not reveal the CASA to Couhig.

B.

In December 1992, Payne, Bostic and Chavez were jointly and individually charged in an eight-count indictment. Count 1, the conspiracy charge, involves the whole sequence of events. It alleges that all three of the defendants conspired (1) to make false entries in the records of a financial institution, and (2) to make material false statements to a federal officer. Count 2 involves the May 1985 EPF board meeting. It alleges that Payne, aided and abetted by Bostic, made false entries in EPF's records when he failed to disclose to the directors that the transaction was with recourse.

Count 3 involves EPF's ledger. It alleges that Payne caused a false entry to be made in EPF's ledger when he did not specifically direct Carvalho to record the transaction as one that was collateralized and with recourse. Count 4 involves the quarterly report from EPF to the FHLBB. It alleges that Payne caused a false entry to be made in the report when he did not

specifically direct Long to report the transaction as one that was collateralized and with recourse.

Counts 5 and 6 involve the management questionnaire. It alleges that Payne made a false entry in the questionnaire in April 1986 when he stated that EPF had (1) no contingent liabilities and (2) no unrecorded agreements affecting the financial condition of EPF. Count 7 involves Payne's response to the FHLBB's request in April 1985 as to whether EPF would sell the loans with or without recourse. It alleges that Payne made a false statement to a federal officer when he represented that the transaction would be an outright sale. Count 8 involves Payne's interview with FHLBB examiner Couhig. It alleges that Payne made a false statement to Couhig, a federal officer, when he stated that EPF was under no obligation to repurchase the loans from EPEC.

In March 1993, Bostic and Chavez moved to sever their trials. They argued that Payne would provide exculpatory testimony only if Bostic and Chavez were tried separately, and alternatively that the weight of evidence implicating Payne alone would "spill over" and prejudice their respective defenses. Within a week of the filing of the motion to sever, Payne and the government began plea negotiations. The parties discussed the possibility of conditioning Payne's plea on his agreement not to testify on behalf of Bostic and Chavez. In response, Bostic and Chavez moved for a dismissal of the government's case on the ground that the proposed plea constituted prosecutorial misconduct. The district court held

a hearing in camera and denied both the motion to sever and the motion to dismiss.

The court then commenced trial. After three days, Payne was convicted of Counts 1, 2, 3, 4, 5, 6 and 8[3], and he was sentenced to three years of imprisonment. Bostic was convicted of Counts 1 and 2 and was sentenced to two years of imprisonment. Chavez, convicted of Count 1 only, was sentenced to 18 months of imprisonment. Payne, Bostic and Chavez now appeal the sufficiency of the evidence to support their convictions. They also appeal the district court's denial of the motion to dismiss on the ground of prosecutorial misconduct. Finally, Bostic and Chavez appeal the district court's denial of their motion to sever.

II.

A.

We review the denial of a motion to sever for abuse of discretion. United States v. Rocha, 916 F.2d 219, 227 (5th Cir. 1990). To establish that a court has abused its discretion, a defendant must show that he suffered specific and compelling prejudice against which the district court could not provide adequate protection, and that this prejudice resulted in an unfair trial. Id. We find that the district court in this case did not abuse its considerable discretion. While Payne had been charged with substantially more criminal counts than had Bostic and Chavez, all three were charged with conspiracy. Thus, whether the defendants were charged separately or together, the government

[3]Payne was acquitted of Count 7 at the close of the evidence.

would have marshalled the same quantum of evidence in prosecuting the conspiracy count. The district court's denial of the motion to sever is affirmed.

B.

We affirm a jury's verdict if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). We therefore "`must view the evidence in the light most favorable to the verdict, accepting all credibility choices and reasonable inferences made by the jury.'" United States v. McCord, 33 F.3d 1434, 1439 (5th Cir. 1994) (quoting United States v. Gardea Carrasco, 830 F.2d 41, 43 (5th Cir. 1987)). With regard to the conspiracy charge, we find that a jury could rationally conclude beyond a reasonable doubt from this evidence that the defendants conspired to conceal the nature of the transaction and, therefore, conspired to defraud a bank and to deceive federal officers. In making its case, the government proffered an abundance of evidence regarding the EPF/EPEC transaction. The government, in essence, argued below that bank officers with the breadth of banking experience the defendants have would never have conducted themselves as the defendants did unless they intended to conceal the true nature of such a transaction. The jury arrived at the same conclusion, and we do not find that conclusion an unreasonable one. The defendants' conspiracy convictions are affirmed.

With regard to the convictions for the underlying substantive offenses, we affirm each of those with one exception. Count 5

charged Payne with making a false statement in a FHLBB questionnaire that requested the following: "List all liabilities and all contingent liabilities (except current accruals) which are not recorded on the general books." Payne answered, "None." Payne points out that the request is in the present tense. By the time Payne completed the form in April 1986, EPF had already repurchased the loans. Payne therefore contends that he did not make a false statement. We agree and reverse his conviction as to Count 5.

C.

Finally, the defendants appeal several of the district court's rulings with regard to alleged prosecutorial misconduct. The first appeal stems from the plea negotiations between the government and Payne. The government stated at the in camera hearing that it was concerned that Payne would perjure himself if he testified on behalf of Bostic and Chavez. Claiming it would not suborn such perjury, the government therefore proposed that Payne plea to one count on the condition that he not testify. The defendants claim that the government's tactic violated their due process rights because it intimidated Payne into not testifying. We disagree. To begin with, we recognize that we typically condemn plea agreements that forbid the pleading party from testifying on behalf of his co-conspirators. See United States v. Hendricksen, 564 F.2d 197, 198 (5th Cir. 1977). Payne, however, never entered a plea agreement with the government. In addition, we have established that "[t]he prosecutor's hands are not tied so tightly as to prevent good faith

efforts to avert perjury." United States v. Whittington, 783 F.2d 1210, 1219 (5th Cir. 1986). Thus, to the extent that the government's thinly veiled warning of possible prosecution was the critical factor in Payne's decision not to testify, we find that the government's strategy does not amount to a violation of the defendants' due process rights.

The remaining appeals involve the government's examination of witnesses and its closing argument. We do not view a prosecutor's comments in isolation, but rather in the context of the entire trial. United States v. Young, 470 U.S. 1, 11 (1985). The dispositive question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict. United States v. Kelly, 981 F.2d 1464, 1473 (5th Cir. 1993). After reviewing the trial transcript, we find the prosecutor's remarks in this case do not undermine the reliability of the jury's verdicts.

III.

The defendants' convictions, with the exception of Payne's convictions as to Count 5, are AFFIRMED. Payne's convictions as to Count 5 is VACATED. Because we have vacated the conviction on Count 5, we REMAND the case to the district court for re-sentencing as the district court may deem appropriate.