IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10192

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARBARA J. LOWE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-531-T)

(October 14, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Barbara J. Lowe was indicted on ten counts of credit card fraud in violation of 18 U.S.C. § 1029(a)(2). A jury found her guilty on all ten counts. Lowe now challenges the sufficiency of the evidence to support her conviction. We affirm.

I. PROCEDURAL POSTURE

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Lowe was charged with ten counts of credit card fraud in a superseding indictment alleging violation of a federal statute which criminalizes conduct of one who "knowingly and with intent to defraud traffics in or uses one or more unauthorized access devices during any one-year period, and by such conduct obtains anything of value aggregating $1,000 or more during that period . . . ." 18 U.S.C. § 1029(a)(2). After rejecting an earlier plea bargain, the district court set Lowe's case for trial. Lowe pleaded not guilty to the superseding indictment and moved for a judgment of acquittal at the close of the government's evidence. The district court denied the motion.

The jury found Lowe guilty on all ten counts. Lowe subsequently moved for judgment of acquittal or, in the alternative, for a new trial. Both motions were denied. Lowe was sentenced to serve twelve months and one day in prison and two years of supervised release.

II. FACTUAL BACKGROUND

In early November 1992, Lamar Tisdale approached Lowe about the possibility of having Lowe process or "factor" cash advances for the owners of several credit cards. Lowe, the owner and operator of a telemarketing company, did not have a merchant account which would enable her to process credit card purchases; however, Lowe had previously facilitated the factoring of credit card charges for Tisdale through John Cloud, a small business owner with a merchant account.

After receiving Tisdale's request for assistance in factoring the cash advances, Lowe contacted Cloud to determine if he would be willing to facilitate factoring the advances in exchange for a fee of fifteen percent. Specifically, Lowe informed Cloud that several businessmen she knew needed to process the cash advances outside "normal business channels," and that a total of $4500 from each card was needed. Cloud, who was cooperating with the Federal Bureau of Investigation ("FBI") in an investigation of telemarketing fraud, informed Lowe that he was willing to help her factor the cash advances.

Cloud told Lowe that he needed signed imprints from each of the cards. He also informed her that he would have to pass the imprints along to a catering business which would be in a better position to process such large cash transactions under the terms of its merchant account. Lowe agreed to the arrangement.

Lowe then received the imprints from Tisdale, wrapped in paper. Lowe mailed the imprints to Cloud, still wrapped in the paper, along with handwritten instructions that read "From B. Lowe. 1 day Run $2,000 Ea card. 2nd day Run 2,500 Each card." The enclosed imprints were unsigned and did not have any dollar amounts filled in. In addition, five out of the ten imprints bore initials after the cardholders' names such as "FDIC" and "USDA," indicating that the cards were for official government-related travel expenses for employees of agencies such as the Federal Deposit Insurance Corporation and the United States Department of Agriculture.

Due to the suspicious nature of the imprints, FBI Special Agent Harris ("SA Harris") asked Cloud to stall Lowe by telling her that processing the imprints would take a few days longer than expected. During this period, the FBI discovered that all ten of the credit cards represented by the imprints had been recently stolen from shipments of renewal cards that were travelling through Houston airports. SA Harris instructed Cloud to tape record his future conversations with Lowe.

When the processing had still not been completed over one week later, Lowe called Cloud to find out what was causing the delay. The government introduced this and other taped conversations into evidence. At no time during these conversations did Lowe actually confess to knowledge that the cards were stolen.

The government argued to the jury that the tapes contained thinly veiled references which revealed that Lowe knew that the cards were stolen and that she intended to defraud the true cardholders. In particular, the government pointed to comments by Lowe that she received the imprints from "big time people" who could provide many more cards in the future. She also told Cloud that she needed the cards to be processed expeditiously, stating, "I don't want them people coming up there with them [inaudible] guns, see I ain't going to let them mess with me." The government contends this remark reveals that Lowe knew the cards were stolen because legitimate factoring would not cause her to fear violence.

Cloud arranged a phone conversation between Lowe and FBI Special Agent Harris, who posed as the catering employee who was supposed to factor the imprints. In this conversation, Lowe revealed that she knew the credit cards were corporate cards, stating that such cards were desirable because they had "an open-end[ed] line of credit" which made it less likely that the large charges would be rejected. She stated that "these people are paying they're [sic] own money to pay on these credit cards to make sure that there's no problems on 'em . . . ." The government argued that this statement indicates that Lowe knew the cards were stolen because the testimony of Terry Gearhart, a Citicorp security specialist, revealed that credit card thieves commonly make a large payment called a "booster check" to ensure that stolen new cards or stolen renewal cards are properly activated. Lowe also bragged that she could provide SA Harris with "ten different credit cards every week" and warned that continued stalling could result in Cloud getting "his God damn ass blowed up." Lowe also told SA Harris not to worry about the cards being full because "these are brand new cards" and stating "we know what these cards are."

On November 16, 1992, SA Harris and Cloud called Lowe to inform her that the cash advances had been successfully processed. They arranged to have another undercover FBI agent, Special Agent Galbraith ("SA Galbraith"), hand over the cash to Lowe at the Dallas airport the next day.

During the taped conversation between SA Galbraith and Lowe, Lowe assured SA Galbraith that there would never be a risk of rejected charges on the cards she supplied because she and her business associates would supply "fresh numbers" once a certain dollar limit was reached. She explained this modus operandi by stating, "you see Visa and Mastercard can follow anything, you know they can follow the numbers, so what you want to do is a fresh batch of numbers. Once these numbers have been already used, they're gone-- you get new, brand new numbers in." She also assured SA Galbraith that "[n]obody's using the cards except for you, no one period." At a certain point in the conversation, SA Galbraith signalled to another FBI agent and Lowe was arrested.

Lowe contends that she did not know that the credit cards were stolen and that she therefore lacked the requisite intent do defraud. Essentially, she claims that she was an innocent middleman and that the evidence equally supports her theory of innocence. She asserts that because the evidence is in equipoise, it is insufficient to prove, beyond a reasonable doubt, that she possessed the requisite mental state of fraudulent intent. For the reasons elaborated below, we disagree.

III. 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 that the evidence

established guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Mergerson, 4 F.3d 337, 341 (5th Cir. 1993), cert. denied, 114 S. Ct. 1310 (1994). We must consider the evidence in the light most favorable to the government, including all reasonable inferences that can be drawn from the evidence. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Sagaribay, 982 F.2d 906, 911 (5th Cir.), cert. denied, 114 S. Ct. 160 (1993); United States v. Pigrum, 922 F.2d 249, 253 (5th Cir.), cert. denied, 500 U.S. 936 (1991). 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. United States v. Pofahl, 990 F.2d 1456, 1467 (5th Cir.), cert. denied, 114 S. Ct. 266 (1993); Pigrum, 922 F.2d at 254. In short, evidence is sufficient to sustain a conviction if, when viewed in the light most favorable to the government, it would permit a rational trier of fact to find the defendant guilty beyond a reasonable doubt. United States v. Salazar, 958 F.2d 1285, 1291 (5th Cir.), cert. denied, 113 S. Ct. 185 (1992); United States v. Sacerio, 952 F.2d 860, 863 (5th Cir. 1992).

Our standard of review is the same whether the evidence is direct or circumstantial. United States v. Tansley, 986 F.2d 880, 884-85 (5th Cir. 1993). Furthermore, we review a trial court's denial of a motion for judgment of acquittal by the same

standard. United States v. Turner, 960 F.2d 461, 465 (5th Cir. 1992).

IV. ANALYSIS

Lowe argues that the evidence in the record is insufficient as a matter of law for a rational jury to find, beyond a reasonable doubt, that she possessed an intent to defraud. We disagree.

If we resolve all ambiguities in the evidence in the light most favorable to the government, a rational jury could have inferred that Lowe knew the credit cards were stolen and that the natural and probable consequences of her acts would be the commission of fraud against the true cardholders. See United States v. O'Banion, 943 F.2d 1422, 1429 (5th Cir. 1991) (noting that natural and probable consequences of an act can reveal requisite specific state of mind); United States v. Maggitt, 784 F.2d 590, 593 (5th Cir. 1986) (same). Thus, while much of the government's case against Lowe is based upon circumstantial evidence, circumstantial evidence may be enough, standing alone, to support a criminal conviction. United States v. Aggarwal, 17 F.3d 737, 740 (5th Cir. 1994); United States v. Brechtel, 997 F.2d 1108, 1116 (5th Cir.), cert. denied, 114 S. Ct. 605 (1993); O'Banion, 943 F.2d at 1429; United States v. Aubrey, 878 F.2d

825, 827 (5th Cir.), cert. denied, 493 U.S. 922 (1989); United States v. O'Keefe, 722 F.2d 1175, 1181 (5th Cir. 1983).

In the present case, the jury discredited Lowe's claim of ignorance regarding the stolen nature of the credit cards. This determination of credibility-- and hence, intent-- was a question within the province of the trier of fact. O'Keefe, 722 F.2d at 1181; United States v. Zweig, 562 F.2d 962, 963 (5th Cir. 1977). In prosecutions for crimes such as credit card fraud, which require proof of a specific mental state, direct evidence of the defendant's mental state will be rare indeed. Thus, it is generally necessary for the trier of fact to reach its conclusion of guilt or innocence based upon the inferences drawn from circumstantial evidence. The evidence in this case revealed that: (1) the credit card numbers Lowe supplied to the FBI undercover agents were from stolen cards; (2) the card imprints were unsigned; (3) the card imprints did not contain a written dollar limit; (4) the card imprints were accompanied by a handwritten note from "B. Lowe" with instructions regarding the amount to be drawn from each card; and (5) Lowe feared for her personal safety and the safety of the undercover agents. Furthermore, the evidence revealed that Lowe knew: (1) the cards were unused; (2) her source could obtain a large number of new cards each week; (3) the cards were activated by advance payments; (4) the cards would be factored only once or twice and then discarded; and (5) several of the cards were for corporate use only. Under these circumstances, it was reasonable for the

jury to infer that Lowe knew the cards were stolen and intended by her actions to defraud the true cardholders.

V. CONCLUSION

For the foregoing reasons, we AFFIRM.