IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10583

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

THOMAS J. SULLIVAN and H.J. "MICKEY" SALLEE,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CR-250-G)

August 17, 1995

Before SMITH and PARKER, Circuit Judges.[*]

JERRY E. SMITH, Circuit Judge:[**]

I.

Thomas J. Sullivan was a real estate and mortgage broker who owned and operated the Tristar Capital Corporation ("Tristar") in Dallas. His close friend, H.J. "Mickey" Sallee, was Chairman of

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[*] Judge Emilio M. Garza recused following oral argument and did not participate in the decision. This matter is decided by a quorum. See 28 U.S.C. § 46(d).

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 Pursuant to that rule, the court has determined that this opinion should not be published.

the Board of San Angelo Savings Association ("SASA"). In 1985, Sallee became a tenant in Tristar's building. In the summer of 1985, Sallee and Sullivan concocted a scheme to defraud SASA while deceptively improving the appearance of its financial condition so as to forestall action by federal banking regulators.

Michael Blubaugh, a Dallas real estate investor, was part owner of the real estate brokerage firm Harvey and Associates, of which Bill Lathrop, who was deceased at the time of trial, was a client. Lathrop owned and controlled Colonial Southern Investment Corporation.

Blubaugh and Lathrop approached Sallee to obtain over $8 million in loans from SASA. Sallee told them that in order to get the loans (labeled the Jacksboro 252 and Jacksboro 80 loans), they would have to take some property off of the hands of Tristar and SASA. Blubaugh and Lathrop were to recruit two straw borrowers, who would be given SASA loans to buy the overpriced Rowlett and Flower Mound properties by means of "land flips."

In the first transaction, Tristar purchased the Flower Mound property for $1,543,426, then, on the same day, resold it to straw man Arnold Pent for $2,558,250 (utilizing a $2,250,000 loan from SASA plus a $356,000 down payment, which came directly from the proceeds of the Jacksboro 252 loan). Lathrop paid Pent $50,000 and promised to indemnify him on the loan in exchange for Pent's service as straw man. Tristar used $695,410 of the proceeds from its profits from the Flower Mound land flip to buy, from SASA, certain investment properties, known in the savings and loan

industry as "real estate owned," that were having an adverse impact on SASA's ability to meet the regulatoars' capital reserves requirements.

In the second transaction, Charles Carson was recruited to buy the Rowlett property with a $960,000 loan from SASA. Lathrop paid Carson $10,000 and promised to indemnify him on his loan. In the Rowlett land flip, SASA bought the property for approximately $682,000 and resold it on the same day to Carson for $1.2 million (using the $960,000 loan from San Angelo, plus a $253,000 down payment from Blubaugh). San Angelo recorded a $382,000 profit on its books, notwithstanding the shaky $960,000 loan it had made to get the deal. San Angelo paid Tristar a $120,000 "commission" from the proceeds from the Rowlett loan, then, on this same day, made the Jacksboro 80 loan to Blubaugh and Lathrop for $4.8 million.

Sallee met with the SASA directors to obtain approval for the four loans, which he presented as unrelated, despite the fact that he had told Blubaugh and Lathrop that they could not have the Jacksboro 252 and 80 loans without also arranging to get the Rowlett and Flower Mound loans and buying those unattractive properties. Sullivan paid Sallee $478,000 for his part in the scheme.

II.

Count 1 of the indictment charged Sullivan and Sallee, under 18 U.S.C. § 371, with conspiracy to commit bank fraud against SASA, to commit bank bribery in the course of SASA's business, and to

make false accounting entries in SASA's books. The charged conspiracy ran from July 1985 through April 1987. Count 2 charged Sullivan and Sallee with bank fraud under 18 U.S.C. § 1344 for causing SASA to make the Flower Mound and Rowlett Loans. Count 3 charged them with bank bribery under 18 U.S.C. § 215(a) for conditioning the Jacksboro 252 and Jacksboro 80 loans on the purchase of the Flower Mound and Rowlett Properties. Count 4 charged the defendants with false accounting entries under 18 U.S.C. § 1006 for recording gains on the transfer of the investment properties to Tristar in order to deceive SASA's auditors and bank examiners. Count 5 charged Sullivan and Sallee with a false accounting entry for booking a $382,000 gain on the transfer of the Rowlett Property to Carson. The jury found both defendants guilty on all five counts.

III.

A.

Defendants assert that the district court improperly allowed Coopers & Lybrand accountant Robert George, Federal Home Loan Bank Board examiner Charles S. Taylor, and Webb to testify as experts, when the government had failed to give notice as required by FED. R. CRIM. P. 16(a)(1)(E). The government claimed these to be fact witnesses. We review the admission of evidence for abuse of discretion. United States v. Speer, 30 F.2d 605, 609 (5th Cir.), cert. denied, 115 S. Ct. 603 (1994).

A lay witness may testify as to those opinions or inferences

that are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." FED. R. EVID. 701. Such testimony may embrace an ultimate issue of fact and still be admissible. FED. R. EVID. 704.

The three witnesses had independent knowledge from examination of SASA's books prior to the litigation. Their testimony went to the defendants' motive for concealing the relatedness of the Flower Mound and Jacksboro 252 Loans and the Rowlett deal and Jacksboro 80 Loan, a fact in issue. Their testimony concerning the propriety of booking profits consisted of inferences rationally based upon their personal knowledge of SASA's records at the time they inspected them, and therefore was admissible under FED. R. EVI. 701. We have upheld the admission of similar lay opinion testimony from witnesses who might have been qualified to testify as experts.[1]

The defendants challenge Webb's qualifications to testify as an expert on regulatory accounting. As discussed above, Webb testified as a fact witness rather than an expert. Defendants argue that the jury may have perceived him as an expert witness, placing a prejudicial amount of emphasis on his testimony. This is unlikely, as Webb admitted on cross-examination that he is not an expert in regulatory accounting.

The hypothetical questions posed to the witnesses were proper

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[1] See, e.g., FDIC v. Mmahat, 907 F.2d 546, 551 (5th Cir. 1990) (no error where trial court allowed witnesses to give opinion testimony without having been listed as experts before trial, as the testimony was admissible under rule 701), cert. denied, 499 U.S. 936 (1991).

under rule 701, as they served to illustrate the witnesses' state of mind at the time they were influenced by defendants' fraudulent conduct. The testimony in question is analogous to evidence upheld in Eisenberg v. Gagnon, 766 F.2d 770, 780-81 (3d Cir.), cert. denied, 474 U.S. 946 (1985). There, the plaintiffs sought to elicit testimony by an attorney who had reviewed private offering memoranda for adequacy of disclosure, and explained in response to a hypothetical question that he would not have found the disclosure material adequate if the additional facts had been known to him. The court wrote:

> Since Monteverde personally observed the preparation of the offering memoranda and scrutinized them for adequacy of disclosure, and possessed the qualifications to draw legal conclusions from them, his testimony as to how he would have viewed the undisclosed facts was not an impermissible answer to a hypothetical question by a non-expert, but remained a lay inference from his prior personal experience and observation.

Id. at 781.

The testimony of George and Taylor regarding how concealed facts))here, that the Flower Mound and Jacksboro 252 Loans and the Rowlett and Jacksboro 80 Loans were linked))would have affected their actions in reviewing SASA's books is the same kind of evidence that was allowed in Eisenberg. We find no abuse of discretion.

B.

Sallee and Sullivan argue that the district court erred in admitting government exhibit 298 into evidence over defense objection. Exhibit 298, a document produced by the Ticor Title

Insurance Company, was introduced by the government during its cross-examination of defense witness Darby, SASA's closing attorney for the Flower Mound and other loans.

At trial, the government argued that Sallee and Sullivan had used the document to deceive SASA's board into approving the loan and to conceal from the auditors that the sale by Tristar to Pent was a land flip. The defendants stress the fact that the government introduced the document during cross-examination of a defense witness, rather than during the direct examination of Jon Hooper, associate counsel of Ticor's successor, who testified about many other Tricor documents. They assert that this was a deliberate strategy forwarding the government's plan of intentionally using evidence it knew was false.

The document states that the effective date of the commitment is October 9, 1985, but "10/21/85" also appears in a string of data printed at the top of the page. The defendants, in their motion for a new trial, contended that the document was not created until October 21, 1985, and that the SASA board therefore could not have relied upon it when it approved the Pent loan on October 16. They supported this assertion with an affidavit from Hooper opining that the date at the top indicated a date of generation and that the document therefore could not have been created prior to October 21. The defendants also argued that the appearance of the words "pro forma" on the document rendered it a legal nullity, "only a meaningless internal draft."

The district court denied the motion for new trial. We review

a district court's admission of documentary evidence for abuse of discretion. United States v. Dockins, 986 F.2d 888, 895 (5th Cir.), cert. denied, 114 S. Ct. 149 (1993).

Although defendants cite several authorities defining a "pro forma" document as a "meaningless internal draft" or an "accounting, financial, and other statement[] or conclusion[] based upon assumed or anticipated facts," they provide no evidence that the meaning of the term is so commonly known that its inconspicuous presence on a document would serve as a red flag to a reviewing official. This is especially relevant in light of the fact that most of the members of SASA's board were not particularly experienced or expert in financial matters.

Significantly, Hooper's affidavit, attached in support of the motion for new trial, states that he did not know what was intended by adding "pro forma" to the document, which he described as a commitment. If the associate counsel for the title company that produced the document did not understand the meaning of the words, there is no reason to assume that the members of SASA's board immediately would have recognized the commitment as being illusory or hypothetical based upon the appearance of that phrase. The words "pro forma" do little to undermine the government's claim that the document was used to deceive the board.

Nor is it obvious when the document was created. Although the Hooper affidavit states that it could not have been issued prior to October 21, a reasonable jury could have believed otherwise. The effective date of the commitment was listed as October 9, 1985. We

find no abuse of discretion in the admission of the document into evidence or in the denial of a new trial on the basis of that admission. Nor do we find support in the record for defendants' allegation that the government knowingly and intentionally misrepresented the contents of the document.

C.

Sallee and Sullivan allege that the prosecutors made unsworn statements implying that defense witnesses Darby, Burrus, Sullivan, and Williams were lying in their responses to cross-examination questions. The quoted excerpts provided by defendants do not rise to the level of testimony by the prosecution, nor do they seem prejudicial. These claims are meritless.

D.

The district court admitted Blubaugh's testimony about coconspirator Lathrop's statements regarding a meeting with Sallee and Sullivan. Blubaugh testified that he met with Lathrop in September or October 1985 to discuss the Jacksboro 252 and 80, Rowlett, and Flower Mound loans after Lathrop had met with Sallee and Sullivan. Lathrop told Blubaugh that Sallee and Sullivan had expressly conditioned the Jacksboro 252 and 80 loans on Lathrop and Blubaugh's finding straw borrowers and purchasers for the Rowlett and Flower Mound properties. Lathrop said that he saw the linking requirement as blackmail and that he did not want to buy the Rowlett and Flower Mound properties, but felt that he had to, and

indicated that the properties were of little value. Defendants argue that the admission of these statements was error, claiming that there was no proof))outside of the statements themselves))that they were made by a coconspirator in furtherance of the conspiracy.

This circuit has not yet ruled on the question specifically reserved in Bourjaily v. United States, 483 U.S. 171 (1987): whether some independent evidence, or evidence "aliunde," is necessary to establish the predicate for admission of hearsay as a coconspirator statement. The required predicate finding))a FED. R. EVID. 104 determination to be made by the district court by a preponderance of the evidence))is that the statement was made "by a coconspirator of a party during the course and furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E).

Although Bourjaily permits a court to consider the contents of the hearsay statement itself in making the determination of predicate facts, this court has never determined whether the hearsay statement alone can establish them. When the issue has been raised, we have found that the existence of independent evidence on the facts of the particular case made it unnecessary to decide the issue.[1] Here, defendants claim that the question is squarely before us, quoting the district court's statement that it was unaware of an independent corroboration requirement.

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[1] See, e.g., United States v. Fragoso, 978 F.2d 896, 901 (5th Cir. 1992), cert. denied, 113 S. Ct. 1664 (1993); United States v. Ramirez, 963 F.2d 693, 702 (5th Cir.), cert. denied, 113 S. Ct. 388 (1992); United States v. Devine, 934 F.2d 1325, 1347 (5th Cir.), cert. denied, 502 U.S. 929 (1991); United States v. Lechuga, 888 F.2d 1472, 1479 n.5 (5th Cir. 1989); United States v. Gentry, 839 F.2d 1065, 1074 (5th Cir. 1988).

The government argued at the bench conference that independent proof of the predicate facts did exist in the form of the concert of action linking the two loans. We agree. The documentary evidence in this case, showing where the money and land went and when, does provide some evidence of the conspiracy. Therefore, we need not reach the evidence aliunde issue.[2]

E.

We review the sufficiency of the evidence to determine whether, "in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). Defendants make several specific challenges to the sufficiency of the evidence supporting their convictions.

The first of these centers on Blubaugh's testimony, the centerpiece of the government's case with regard to the conspiracy count. Blubaugh testified that he and Lathrop allowed Sallee and Sullivan to bully them into obligating themselves, through nominee borrowers, for over $3 million in additional loans and into purchasing worthless properties as conditions of obtaining the $9.3

[2] Although we do not address the issue, we note that every circuit to decide it since Bourjaily has required evidence aliunde to establish the predicate facts, although there has been some disagreement as to the quantity required. See, e.g., United States v. Beckham, 958 F.2d 47, 51 (D.C. Cir. 1992); United States v. Sepulveda, 15 F.3d 1161, 1181-82 (1st Cir. 1993); United States v. Daly, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); United States v. Clark, 18 F.3d 1337, 1341-42 (6th Cir.), cert. denied, 115 S. Ct. 152 (1994); United States v. Zambrana, 841 F.2d 1320, 1344-45 (7th Cir. 1988); United States v. Silverman, 861 F.2d 571, 577 (9th Cir. 1988); United States v. Gordon, 844 F.2d 1397, 1402 (9th Cir. 1988); United States v. Hernandez, 829 F.2d 988, 993 (10th Cir. 1987); United States v. Byrom, 910 F.2d 725, 736 (11th Cir. 1990).

million Jacksboro 252 and 80 loans. Furthermore, Blubaugh testified that the agreement was reached in late September or early October 1985 and that the prices of the Rowlett and Flower Mound properties already had been determined at that time.

The defendants argue that this testimony was "incredible as a matter of law" in light of defense evidence tending to prove that Sallee and Sullivan had not been made aware of the Rowlett property until late October 1985. This is essentially a complaint about the weight the jury accorded the evidence presented it and is meritless.

Next, Sallee and Sullivan assert that the government failed to support count 3 because the tying of loans, without more, is insufficient as a matter of law to constitute bank bribery. Loan tying, they assert, is a violation of civil law only. See 12 U.S.C. § 1972.

This argument fails, as there was proof of much more than simple loan tying. Title 12, section 1972 prohibits banks from tying loans or other banking services to one another, regardless of the merits of the individual business arrangements, and provides for civil penalties in the manner of an antitrust statute.

In count 3, it was alleged that Sallee demanded and exacted the purchase of the Flower Mound and Rowlett properties for $2.5 and $1.2 million, respectively, in return for SASA's making the Jacksboro 252 and 80 loans. Because these prices far outstripped the objective value of the Flower Mound and Rowlett properties, and because Sallee received, in his personal capacity, funds from

Tristar that were part of that company's profits from the land flips, the bank bribery statute's requirement that a bank officer or director corruptly solicit or demand any "thing of value" intending to be influenced in connection with the institution's business was met. See 18 U.S.C. § 215(a). Defendants' scheme is similar to many others that have been prosecuted under the statute.[3]

Defendants argue that the false entry counts, 4 and 5, are unsupported by sufficient evidence because no evidence was presented showing who had altered the dates on the loan application forms for the Pent, Crabtree, and Carson loans. This argument is misdirected; counts 4 and 5 had to do with improperly booked profits on the investment properties and Rowlett sales from SASA. The falsified dates on the loan applications were not charged in these counts.

Defendants also argue that the false entry convictions are unsupported by sufficient evidence, because the funds from the Flower Mound and Rowlett loans had already been dispersed to the sellers of those properties before they were rechanneled to purchase the investment properties from SASA. To support this claim, defendants cite the testimony of their banking expert, Charles L. Williams, who stated at trial that funds dispersed to the seller cease to be loan proceeds because they are the seller's sale proceeds.

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[3] See, e.g., United States v. McElroy, 910 F.2d 1016, 1022 (2d Cir. 1990) (upholding bank bribery conviction for reciprocal loan arrangement).

This argument might be persuasive if the Rowlett and Flower Mound loans had been arms-length transactions that were objectively attractive for the lending bank. The amounts of those loans far outstripped the value of the properties securing them, however. SASA purchased the Rowlett property for $682,136.53 on November 12, 1985, the same day it sold it to Carson for $1.2 million, $950,400 of which was from the loan made by SASA. SASA loaned Pent $2.2 million to buy the Flower Mound property, which had been purchased by Tristar for a mere $1.5 million the very same day.

The existence of inflated appraisals supporting the Rowlett and Flower Mound loans does not change the fact that they were objectively very bad risks, making it inappropriate to book a profit from the sale of the investment properties. Accordingly, all of defendants' challenges to the sufficiency of the evidence fail.

F.

Sallee and Sullivan argue that the district court erred by refusing to give their tendered nominee loan jury instruction, which would have advised the jury that it is not illegal to borrow money from a savings and loan institution "for the purpose of loaning it to another person where the named borrower is both financially capable and fully understands that it is his . . . responsibility to repay, even if [savings and loan] officials know he . . . will turn the proceeds over to a third party." We review the refusal to include a defendant's requested jury instruction for

abuse of discretion. United States v. St. Gelais, 952 F.2d 90, 93 (5th Cir.), cert. denied, 113 S. Ct. 439 (1992). Generally, a defendant is entitled to an instruction "as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63 (1988).

The district court was correct in refusing to submit the instruction. The government's theory of the case was not that the positions of Carson and Pent as nominee borrowers was per se illegal, but rather that the conspirators used them as straw men to hide the true nature of the linked transactions from the SASA board, auditors, and regulators. There was insufficient evidence for a reasonable trier of fact to conclude that Carson and Pent were "honest" nominee borrowers, brokering a legitimate loan in order to make a profit.

G.

Finally, Sallee and Sullivan argue that the court erred in finding them jointly and severally liable for over $11 million in restitution. We review an award of restitution under the Victim and Witness Protection Act de novo to determine that it is legal, and for abuse of discretion to determine that the particular award was appropriate. United States v. Chaney, 964 F.2d 437, 451-52 (5th Cir. 1992). The FDIC's affidavit, upon which the trial court relied in ordering restitution, based the $11 million figure on the combined loss from all four loans.

The FDIC calculated the loss on the Jacksboro 80 loan as of June 13, 1994, at $4,138,132.46. SASA foreclosed on the Jacksboro 80 loan with a bid price of $2,538,900 on November 5, 1991, charging off $1,740,767.54 of principal plus $798,132.46 of accrued interest. Two months later, the property was reappraised for $1,460,000, resulting in a further charge-off of $1,599,232.46. Adding these figures, the FDIC arrived at a total loss of $4,138,132.46.

Sallee and Sullivan challenge this calculation. First, they allege that the use of the January 1992 appraisal harmed them by allowing SASA to charge off losses that occurred after it had taken over the property again, rather than giving defendants credit for the full value of the property at the time it was repossessed, as required by United States v. Holley, 23 F.3d 902, 914 (5th Cir.), cert. denied, 115 S. Ct. 635 (1994), and United States v. Reese, 998 F.2d 1275 (5th Cir. 1993). Next, defendants claim that it was error for the district court not to credit them for the amount of loan fees received by SASA from Crabtree.

The government has conceded[4] that these claims are meritorious and that the district court's calculations were in error. Accordingly, we remand for a redetermination of the proper amount of restitution in light of Holley and Reese.

IV.

[4] This concession is set forth in the government's request for leave of court to file a 50-page answering brief.

The convictions of defendants Sallee and Sullivan are AFFIRMED. The sentences are VACATED and REMANDED for a redetermination of the amount of restitution.