UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-20076

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GARY L. MCDUFF,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-93-161-1)

March 12, 1996

Before DAVIS, JONES, Circuit Judges and HINOJOSA*, District Judge.

Per Curiam:**

Defendant-appellant Gary Lynn McDuff (McDuff) appeals his conviction on two counts of engaging in a monetary transaction in criminally derived property in violation of Title 18 U.S.C. § 1957. McDuff presents five points of error related to the

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* District Judge of the Southern District of Texas, sitting by designation.

** Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

district court's instructions to the jury, a challenge to the sufficiency of the evidence, and a claim of improper comment by the prosecution. For the reasons that follow, we affirm.

I. BACKGROUND

McDuff and John F. Baker, Jr. (Baker) were indicted in May, 1993. Prior to trial, the district court on McDuff's motion severed the defendants and proceeded with McDuff's trial on two counts of violating § 1957. During trial, McDuff represented himself with the assistance of a Federal Public Defender as court-appointed standby counsel. A jury returned verdicts of guilty on both counts.

Among the facts elicited at the trial were the following. In 1985, McDuff, a homebuilder, joined with an acquaintance, Roger Miles Scott, Jr. (Scott), a building materials salesman, in forming a mortgage business named McDuff, Scott & Associates (MSA). MSA earned money through the purchase and sale of mortgage notes and enjoyed early financial success. MSA's success waned and by February, 1988, the company filed a chapter 11 bankruptcy petition. McDuff endeavored to maintain MSA's viability and sought operating capital from various sources.

McDuff owned a house he had purchased and remodeled. Scott had purchased a residential lot and had McDuff's construction business, Shiloh Homes, begin construction of a house on the lot. With McDuff's house and Scott's half-built house as the only

remaining potential sources of collateral to raise funds, McDuff called a real estate broker, Nick Gilbreath (Gilbreath), in April, 1988. McDuff offered Gilbreath a ten percent commission to find an investor willing to enter into a sell/lease back arrangement with the houses. Under McDuff's proposal, the investor would purchase the properties at half their appraised values with a lease agreement for ninety days. At the end of the ninety day period, the investor would sell the properties back for a $50,000 profit on each house.

Gilbreath contacted Laurence Zomper (Zomper), a real estate broker who led Gilbreath to the codefendant, Baker, who enlisted the participation of Cornerstone Savings Association (CSA), a federally insured financial institution. Baker was a former shareholder and director of CSA and still had ties with CSA's chairman, Jim Gilbert (Gilbert). Gilbreath, Baker, and Gilbert discussed terms of an agreement with McDuff.

Under the parties' first understanding of the terms, CSA would purchase the properties with a lease buy/back agreement within 90 days. Shortly before closing on the deal, Baker communicated to Gilbreath that, because of the state homestead laws, the purchase could not be made as planned but that a loan could be made to a corporation in good standing to purchase the properties. Gilbreath assumed that, even with an intermediary, Baker and CSA would still be the *de facto* purchasers and receive the profit from resale. Gilbreath suggested a holding company, Sigma Investments (Sigma), owned by him and his associate,

Michael Lubrano (Lubrano). Sigma's major asset was a thirty percent share in an apartment house investment, which had declared bankruptcy in February 1988 and was reorganized in May 1988. Under instruction from Baker, Gilbreath obtained a $15,000 check from McDuff, drawn on an account with insufficient funds, to inflate Sigma's cash holdings. Lubrano went to CSA's office and signed documents incorrectly stating assets of Sigma as substantial and liabilities as few. Despite objections from CSA loan department employees, Gilbert obtained approval of the loans to Sigma for the purchase of the houses. Gilbreath and Lubrano did not anticipate making any payments on the loan.

The closing on the loan on McDuff's house occurred on May 25, 1988. The previous day, McDuff and Lubrano opened an account under the name Consolidated Holdings. Checks drawn from this account required signatures of both Lubrano and McDuff, although Lubrano stated he often signed blank checks upon McDuff's request. Lubrano and Gilbreath testified that McDuff did not want to involve Scott in the transactions or allow Scott to have access to the funds. Proceeds from the loan on the sale of the McDuff house in the amount of $ 188,484, which represented a portion of the $ 275,000 sale price, went into the Consolidated Holdings account. From the Consolidated Holdings account Gilbreath and Lubrano were paid a ten percent fee and McDuff used $ 140,198.30 to purchase cashier's checks.[1] McDuff paid

[1]The transfer of the $ 140,198.30 is the transaction recited in the first count of the indictment.

creditors and obtained a dismissal of MSA's bankruptcy petition. At Baker's request, a $10,250 check from Consolidated Holdings was written to Zomper. Zomper, in turn, paid $8,250 to Baker.

The loan on Scott's house was structured to accommodate the actual purchase of the property for $100,000 and funding to complete construction with a $180,000 line of credit. On June 13, 1988, Sigma executed the note and deed on the Scott house. The proceeds from this sale also went into the Consolidated Holdings account. A check for $34,002 was drawn from the account with a memo stating it was for MSA.[2] Zomper was paid a $5000 fee from which Baker was paid $3000. Several draws from the line of credit were made for construction totaling around $100,000. Only about half of that amount went into the Consolidated Holdings account and the remainder stayed with Gilbreath and Lubrano. The Scott house showed few signs of additional construction.

Over the next few months, MSA's situation did not improve. Sigma failed to make any payments to CSA and defaulted on the loans. CSA proceeded to foreclose on the two properties. An employee from CSA, Richard McCabe (McCabe), testified that he spoke with McDuff during the foreclosure process. McCabe stated that McDuff told him the loans were for MSA, that the loans could not be made directly because homestead laws would prevent foreclosure. From McCabe's recollection of McDuff's statements,

[2]This transfer is the transaction recited in the second count of the indictment.

Gilbreath and Lubrano were to receive twenty percent of the loan proceeds and Baker and Gilbert were also to receive twenty percent of the loan proceeds.

II. JURY INSTRUCTION CLAIMS

McDuff's first three grounds for this appeal surround the district court's instructions to the jury. Rule 30, Fed. R. Crim. P. states in part that "[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating directly the matter to which the party objects and the grounds of the objection." Rule 52(b) states in part that "[p]lain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." As McDuff failed to timely object to the court's instructions, we would review for plain error. U.S. v. Restivo, 8 F.3d 274, 278-79 (5th Cir. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 54 (1994).

Under the plain error standard, there first must be error, which is defined as "a deviation from a legal rule in the absence of a valid waiver." U.S. v. Calverley, 37 F.3d 160, 162 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct 1266 (1995). Next, the error must be "plain," so obvious that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." U.S.v Frady, 456

U.S. 152, 102 S.Ct. 1584, 1592 (1982). And, the defendant carries the burden to show that the error affected substantial rights. Normally, this means the error must be prejudicial, affecting the outcome of the proceeding. Calverley, 37 F.3d at 164 (citing U.S. v. Olano ___ U.S. ___, 113 S.Ct. 1770, 1778 (1993)). Upon a demonstration of plain error, an appellate court is empowered to exercise remedial discretion. "The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings'." Olano at 1779. Noting this standard, we turn to the first three points of error.

A. Failure to Include Elements of Bank Fraud

In the first ground raised, McDuff contends that the district court erred in failing to instruct the jury on the elements of bank fraud, which was the "specified unlawful activity", of the money laundering charges. "Generally, failure to instruct the jury on every essential element of the offense is error." U.S. v. Williams, 985 F.2d 749, 755 (5th Cir.), cert. denied, ___ U.S. ____, 115 S.Ct 1266.

McDuff was charged and convicted for engaging in monetary transactions in criminally derived property under § 1957.[3] In

[3] Title 18 U.S.C. § 1957 provides in pertinent part:

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived

addition to reading the statute to the jury, the court charged the jury on the elements of this offense as follows:

> For you to find the defendant Gary L. McDuff guilty of the crimes charged in Counts One and Two of the indictment, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:
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> FIRST, the defendant knowingly engaged or attempted to engage in a monetary transaction;
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> SECOND, the defendant knew that the transaction involved criminally derived property;
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> THIRD, the criminally derived property must be of a value greater than $ 10,000;
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> FOURTH, the criminally derived property must also, in fact, have been derived from a specified unlawful activity; and
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> FIFTH, the monetary transaction must have taken place in the United States.

> property that is of a value greater than $ 10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).
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> * * *
>
> (c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.
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> (d) The circumstances referred to in subsection (a) are--
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> (1) that the offense under this section takes place in the United States...
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> * * *
>
> (f) As used in this section--
>
> (1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument...by, through, or to a financial institution...
>
> (2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and
>
> (3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

The district court's instructions on the elements tracked the wording of the statute.[4] McDuff asserts that this was insufficient. McDuff maintains that, since the "specified unlawful activity" in this case was bank fraud[5], the court should have instructed the jury on the elements of that offense or defined it in some manner.

For support, McDuff points to U.S. v. Lovett, 964 F.2d 1029 (10th Cir.), cert. denied, 506 U.S. 857, 113 S.Ct. 169 (1992). Considering a double jeopardy challenge to separate convictions for a § 1957 offense charged with a § 2314 offense (interstate transportation of fraudulently obtained funds), the Tenth Circuit concluded "that the elements of the particular 'specified unlawful activity'... are essential elements that the prosecution must prove in order to establish a violation of § 1957." Id. at 1041-42. McDuff concedes the statement is dictum, but avers that a similar conclusion is mandated in the present context. McDuff further suggests that § 1957 is akin to the Racketeer Influenced Corrupt Organizations Act,(RICO) § 18 U.S.C. § 1962(c), and cites a pattern jury instruction for offenses under RICO which provides

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[4] As this Court has previously stated, “[W]e are generally not inclined to reverse on the basis of instructions which accurately state the law and to which there was no objection simply because the court did not provide more guidance as to the meaning of the offense.” U.S. v. Saks, 964 F.2d 1514, 1522 (5th Cir. 1992).

[5] Title 18 U.S.C. § 1344 proscribes, in pertinent part, any scheme “to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.”

that, if the predicate racketeering acts are not separately charged, the elements for those offenses are to be given as part of the "racketeering activity" instruction. In this case, bank fraud was not separately charged in the indictment. McDuff also calls our attention to a jury note which he says manifested some confusion. The jury inquired: "Is it illegal to use a third party to obtain a loan?" The court responded: "The court has provided the instructions on the law you are to follow during your deliberations."

Undeniably, McDuff's convictions were warranted only if the government proved that a "specified unlawful activity", bank fraud, had occurred in this case. The Court notes that when the district court asked for objections to the proposed jury instructions, McDuff had Tom Berg, his standby counsel, present his objections. Standby counsel objected to the government's proposed instructions on "willfulness" by stating that it was not an element of the money laundering statutes, but it was of bank fraud. An exchange with the trial judge ensued in which standby counsel stated McDuff's position that he was not denying there was bank fraud, but rather that he had participated in it or had knowledge of it. The excerpt is as follows:

> MR. BERG: I think it's an element of bank fraud, but I don't think it's an element of a money laundering offense, the way it's viewed in this offense.
>
> THE COURT: I think that's right. <u>And as I understand the positions being taken by all counsel here, Mr. McDuff is not denying that</u>

> there was a bank fraud. He's denying his participation and knowledge about it.
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> MR. BERG: Correct.
>
> THE COURT: But he's not challenging the existence of the bank fraud, so "willfully" would not be an element on what either side is contending. Okay.
>
> MR. KELT: And they're willing to pull it out, Your Honor.
>
> THE COURT: With all parties' agreement, page 13 is revised to take out the final paragraph. All right. ... (19 R. 1061-62)(emphasis added)

McDuff, at trial as he does in his brief before this Court, seems to have conceded that bank fraud had occurred. The government argues that therefore there was no error in failing to state the elements of bank fraud because, as noted previously in this opinion, this Court has stated that "error is defined as a deviation from a legal rule in the absence of a valid waiver". Calverly, 37 F.3d at 162. The government's position that no error occurred because of waiver is strong despite McDuff's references to statements in closing arguments which he states showed that there was no clear concession that bank fraud had occurred.

The government further responds that even without a waiver by McDuff any omission in the jury instructions did not amount to plain error. We agree. Even if error occurred and was clearly evident, it certainly was not substantial. The absence of an essential element from the instructions is not tantamount to

reversible plain error. U.S. v. Herzog, 632 F.2d 469, 472 (5th Cir. 1980). As Herzog counsels, when a review of the entire transcript reveals that no prejudice could have resulted from the omission, the error shall be disregarded. Id. A review of the transcript here reveals "undisputed" and "indisputable" evidence of bank fraud. Id[6] The evidence precludes the possibility that McDuff's convictions were based upon any "specified unlawful activity" other than bank fraud.[7] Therefore, we conclude that error, if any, was not prejudicial.

B. Adequacy of Instruction on Whether McDuff Knew that Bank Fraud Had Occurred

In the second ground of error presented, McDuff argues that the court's instruction concerning McDuff's knowledge was ambiguous and offered inadequate guidance. The court charged the jury on this element with the following instruction:

> The government must prove only that the defendant knew that the property involved in the monetary transaction constituted, or was derived, directly or indirectly, from proceeds obtained by some criminal offense. It need not prove that he knew the precise nature of the criminal offense from which the proceeds derived.

McDuff contends that, without any guidance on the elements of bank fraud coupled with the above instruction, the jury could not determine whether McDuff knew bank fraud had occurred. McDuff maintains the result was that the jury was encouraged to convict

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[6] The ample evidence of bank fraud is outlined in the Background section, *supra*, and further discussed in the *Sufficiency of the Evidence* section, *infra*. We therefore do not repeat the facts here.

[7] *See* U.S. v. Miller, 22 F.3d 1075, 1080 (11th Cir. 1994).

on a lower level of knowledge than was required by the statute.

The statute requires that a defendant know the transaction involves "criminally derived property." Under § 1957(f)(2), "criminally derived property" simply means proceeds obtained from a criminal offense.[8] The government's presentation of evidence focused upon bank fraud to the exclusion of any other "specified unlawful offense." Therefore, the jury could convict McDuff only if it found that McDuff knew bank fraud had occurred.

We must consider the surrounding context in determining whether the instruction was likely to have caused any confusion. Saks, 964 F.2d at 1522. In reviewing the entire transcript, we conclude that it did not.

C. Directed Verdict from an Instruction

McDuff next contends that a portion of the instructions improperly directed a finding on the element of property being derived from specified unlawful activity. The court stated:

> In this case, the government alleges that funds transferred by the defendant, Gary L. McDuff, in Counts One and Two of the Indictment are the proceeds of bank fraud, which I instruct you is a specified unlawful activity.

McDuff maintains that this excerpt removed from the jury's consideration the question of whether bank fraud had occurred.

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[8] While a defendant must know the property is criminally derived, a defendant need not know the property was "specified unlawful activity." Subsection (c) of § 1957 provides:

> In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

While a trial court may not direct such a fact finding, we do not conclude that this instruction constituted a directed verdict.[9] The plain understanding of this instruction would not be confusing to the reasonable juror. The district court simply instructed the jury that bank fraud is a "specified unlawful activity." This is a correct statement of the law.[10] The instructions did not remove an element of the offense from the jury's consideration. There was no error.

III. SUFFICIENCY OF THE EVIDENCE CLAIM

McDuff challenges the sufficiency of the evidence to establish his knowledge of the bank fraud.[11] Section 1957 requires the government to prove that the defendant knew the property was obtained from a criminal offense.[12] The government was also required to prove that the transactions involved money derived from a “specified unlawful activity,” in this case bank fraud. For this point, we review the evidence in the light most favorable to the verdict. U.S. v. Bustamante, 45 F.3d 933, 936

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[9]See U.S. v. Bass, 784 F.2d 1282, 1284 (5th Cir. 1986).

[10] For the meaning of "specified unlawful activity," § 1957(f)(3) refers to § 1956. Under § 1956(c)(7)(A), through § 1961, bank fraud is a "specified unlawful activity."

[11] McDuff, as previously noted, concedes that there was sufficient evidence to support a finding that bank fraud occurred. See Defendant-Appellant's Brief p.33, n.8.

[12]See U.S. v. Baker, 19 F.3d 605, 614 (11th Cir. 1994)

(5th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 473 (1995).[13] "Further, this court accepts all credibility choices that tend to support the jury's verdict." U.S. v. Gallo, 927 F.2d 815, 820 (5th Cir. 1991).

The government presented evidence that the loans were obtained from CSA under false pretenses. McDuff sought the loans as operating capital for MSA. The loan documentation reflected that Sigma obtained the loans for the *purchase* of the McDuff house and for the *purchase and completion* of the Scott house. Gilbreath and Lubrano through Sigma never had any interest in taking possession of the houses, nor any intent to repay the loans. Gilbreath testified that McDuff knew that the $15,000 check he wrote to Sigma, was intended to enhance Sigma's financial condition. McDuff knew that the check was drawn on an account with insufficient funds. In addition, McCabe testified that McDuff knew that Gilbreath, Lubrano, Baker, and Gilbert, a bank officer, were receiving percentages of the loan proceeds. This evidence, as well as other evidence presented at trial, was sufficient for the jury to conclude that McDuff knew the transactions named in the indictment involved the proceeds of a criminal activity, which was bank fraud.

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[13] This Court will uphold a conviction as long as a rational trier of fact could have found that the evidence established the elements of the crime beyond a reasonable doubt. The jury is free to choose among reasonable constructs of the evidence, which need not exclude every reasonable hypothesis of innocence. Bustamante, 45 F.3rd at 936.

IV. IMPROPER COMMENT CLAIM

As a rebuttal witness, the prosecution called Baker to testify and asked him whether McDuff had subpoenaed him and whether Baker was charged in the same indictment for money laundering. McDuff contends that this exchange improperly suggested to the jury that McDuff bore the burden of proving his innocence.[14] We initially note that the trial court allowed

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[14]The exchange that McDuff states shifted the burden of proof is as follows:

Prosecutor: Please state your name.
Baker: John F. Baker, Jr.
Prosecutor: Mr. Baker, isn't it true that you were subpoenaed by the defense in this case?
Baker: Did I receive a subpoena?
Prosecutor: You were subpoenaed by the defense?
Baker: I have not received a subpoena.
Mr. McDuff: Your Honor, objection.
The Court: Overruled. Please proceed.
Baker: I was asked to testify. I didn't get a piece of paper.
Prosecutor: Alright. And you were asked to testify by Mr. McDuff?
Baker: Yes.
Prosecutor: And isn't it also true you met with Mr. McDuff earlier this week and spoke about your potential testimony at that time?
Baker: That's true.
Prosecutor: And isn't it also true you were charged in the same indictment as Mr. McDuff on two separate counts of money laundering, being the -
Mr. McDuff: Your Honor, I object. This is not relevant.
The Court: Overruled.
Prosecutor: - being the receipt of a check for $8,250 and another check for $3,000?
Baker: Yes, ma'am.(20 R. 3-4)

these questions over objection from McDuff. Additionally, we note that the district court in its initial instructions to the jury told the jury that the burden of proof was on the government, that the defendant did not have to prove his innocence and was not required to present evidence on his own behalf. At the end of the trial in the charge to the jury, the district court again instructed the jury that the law never imposes upon the defendant the burden of calling any witness or producing any evidence, that the defendant was presumed to be innocent, and that the burden of proof was on the government.

It is improper to comment upon a party's failure to call a witness equally available to both sides. U.S. v. MMR Corp.(LA), 907 F.2d 489, 501-02 (5th Cir. 1990), cert. denied, 499 U.S. 936, 111 S.Ct. 1388 (1991). Even if we were to assume that the prosecution's questions of Baker were improper, we would then have to determine "whether the prosecutor's remarks cast serious doubt upon the correctness of the jury's verdict." Id. at 501 (citing U.S. v. Goff, 847 F.2d at 165 (5th Cir.), cert. denied 488 U.S. 932, 109 S.Ct 324 (1988)). In assessing this, each case must turn on it's own particular facts.

In this case, McDuff was successful in seeking a severance prior to trial in part so that Baker could be called to the stand for exculpatory testimony. In its opening statement the government, without objection, stated that Baker was a

codefendant in the case. McDuff never summoned Baker to the stand. Based on the trial court's instructions, the fact that there was not an explicit reference to McDuff's failure to call a witness, and the evidence presented at trial, we cannot say that the prosecutor's questions cast serious doubt on the correctness of the verdict. We find no reversible error.

V. CONCLUSION

We for the foregoing reasons conclude that McDuff's convictions on both counts of engaging in a monetary transaction in criminally derived property in violation of Title 18 U.S.C. §1957 should be AFFIRMED.