

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20264
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH KARL KIMLER,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR-H-93-17-1)

(February 17, 1995)

Before POLITZ, Chief Judge, JONES and BARKSDALE, Circuit Judges.

PER CURIAM:*

Kenneth Karl Kimler appeals his conviction for mail fraud and trafficking in counterfeit goods. Finding no error, we affirm.

Background

Kimler was president of Troy Pipe Supply, Inc., a pipe wholesaler located in Willis, Texas. From 1980 to 1993 Troy

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

engaged in a scheme in which identifying marks were removed from pipe purchased for resale, and the pipe was either restenciled to a higher industry standard, which commanded a higher price, or was falsely restenciled to conform to a customer's order. The false stenciling was buttressed by altered mill test reports (MTRs)¹ accompanying the pipe which reflected the false specifications or points of origin.

Kimler was indicted for 14 counts of mail fraud and for one count of trafficking in counterfeit goods, and, after a jury trial, was convicted on all but one mail fraud count. He was sentenced to 51 months imprisonment, three years supervised release, and the statutory assessment. He timely appealed.

Analysis

Kimler challenges the sufficiency of the evidence. We review such assignments of error by viewing the evidence in the light most favorable to the verdict.² Having done so, if we conclude that a rational juror could have found all elements of the charged offense proven beyond a reasonable doubt, the conviction must be affirmed.³ In the case at bar, there being no motion for acquittal at close of the evidence, our review is limited to a determination whether there was a manifest miscarriage of justice, i.e., a record "devoid

¹Mill test reports are prepared by pipe manufacturers and detail the chemical and physical properties of a pipe. These reports follow a pipe upon transfer and are relied upon by end users in arriving at design and safety parameters.

²**United States v. Roberson**, 6 F.3d 1088 (5th Cir. 1993).

³**Id.**

of evidence pointing to guilt."⁴

Kimler challenges the sufficiency of the evidence of his intent to deceive or defraud via use of the mails.⁵ Those are factual determinations for the trier-of-fact and the jury's findings thereon are not to be lightly overturned.⁶

The testimony of several former employees of Troy Pipe established that Kimler directed his employees to make fraudulent pipe markings and to alter MTRs. Thomas Squires, a former accountant for Troy, testified that Kimler altered inventory descriptions to fit customer orders and directed employees to dispose of incriminating paperwork. Yard employees John Braquet, Geoffrey Berger, and William Borders testified that pipe markings routinely were altered with Kimler's express knowledge, and Kimler's secretary, Gayle Barosh, attested that Kimler was involved in the alteration of the accompanying MTRs. Matthew Crews, a salesman for Troy, stated that Kimler directed the changes that were to be made to the MTRs.

The most telling testimony came from two of Kimler's close associates at Troy, Glenn "Bud" Baker and Merle Lynn Obermiller. Both testified extensively and explicitly about how Kimler trained them to alter both pipe markings and accompanying MTRs. Both attested to Kimler's falsification of MTRs. Finally, testimony

⁴**United States v. Ruiz**, 860 F.2d 615, 617 (5th Cir. 1988) (citations omitted).

⁵**United States v. Moore**, 37 F.3d 169 (5th Cir. 1994).

⁶**United States v. O'Keefe**, 722 F.2d 1175 (5th Cir. 1983).

from all witnesses left no doubt that Kimler micromanaged Troy Pipe, was involved in every phase of the operation, and had encouraged the employees to conceal his criminal scheme from the authorities. The testimony overwhelmingly demonstrates that Kimler knew of and had the specific intent to deceive and defraud by altering pipe specifications and then knowingly selling that pipe without disclosure of the alterations.

The evidence also supports the charge that Kimler intended to traffic in counterfeit goods. Mario Ferraz testified that pipe sold by Troy as ostensibly coming from his company in Brazil was actually counterfeit. Baker and Berger testified that Kimler knew that this pipe was counterfeit, clearly demonstrating his knowledge and intent to traffic in counterfeit goods.⁷

Kimler discounts as unreliable all adverse testimony, alleging, *inter alia*, that some of the witnesses had been less than truthful in the past, had poor relations with him, or had histories of drug use. These contentions are unpersuasive; they challenge credibility determinations that are the exclusive province of the jury as the ultimate arbiter of the credibility of witnesses.⁸ As we "must accept all credibility choices that tend to support the jury verdict,"⁹ Kimler's challenges founder.

Kimler also asserts that Obermiller's testimony was incredible as a matter of law because it was given in exchange for a lenient

⁷See **United States v. Baker**, 807 F.2d 427 (5th Cir. 1986).

⁸**United States v. Garcia**, 995 F.2d 556 (5th Cir. 1993).

⁹**United States v. Silva**, 748 F.2d 262, 266 (5th Cir. 1984).

plea bargain. For testimony to be considered "incredible," it must contain "facts that the witness physically could not have observed or events that could not have occurred under the laws of nature."¹⁰ The mere fact that Obermiller's testimony was obtained as a result of a plea bargain is not enough, in and of itself, to render it incredible as a matter of law.¹¹

Finally, Kimler contests the sufficiency of the government's evidence that he used or caused the use of the mails to further his scheme to defraud.¹² Barosh testified that invoices from and checks to Troy were routinely sent and received through the mails, and the testimony of two witnesses from defrauded parties established that the mails were used in the normal course of the pipe wholesale business. Kimler counters that the witnesses could not testify positively that the invoices and checks that were the subject of the indictment were mailed. He maintains that this prevents a finding that the mails were used in furtherance of his scheme.

We are not so persuaded. It is too well settled to admit of debate that the government need only show that "an individual does an act [in furtherance of a scheme to defraud] with the knowledge that the use of the mails will follow in the ordinary course of business."¹³ In light of the testimony about the regular use of the

¹⁰**United States v. Osum**, 943 F.2d 1394, 1405 (5th Cir. 1991).

¹¹**United States v. Gadison**, 8 F.3d 186 (5th Cir. 1993).

¹²**United States v. Green**, 964 F.2d 365 (5th Cir. 1992).

¹³**United States v. Shaid**, 730 F.2d 225, 229 (5th Cir.), cert. denied, 469 U.S. 844 (1984).

mails in the ordinary course of Troy's business, the jury reasonably could infer that, given both his micromanagement of Troy and his extensive experience in the pipe wholesale business, Kimler knew that the mails would be used in furtherance of his scheme.

Kimler's convictions and sentences are AFFIRMED.