

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20346
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GREGORY EUGENE AUGUST,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 93-0223-01)

(February 7, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Gregory Eugene August was convicted by a jury of conspiracy to commit bankruptcy fraud and committing bankruptcy fraud by making a material false statement under penalty

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of perjury, in violation of 18 U.S.C. §§ 152 and 371. He appeals his conviction, contesting the sufficiency of the evidence on both the conspiracy and the false statement charges, and also assigns error to the trial court's deliberate ignorance instruction to the jury. For the reasons set forth below, we affirm.

I

FACTS AND PROCEEDINGS

We begin with identification of the cast of characters in addition to August involved in this case: Diana August (Diana) is the spouse of Appellant; Sue Wittie is a bankruptcy lawyer who provided professional services to the Augusts; Tom Johnson was at all relevant times Wittie's legal assistant; Peter Johnson was Trustee in bankruptcy for the Augusts; Oscar J. Comeaux, Jr. is Diana's brother; Carol Ann Hopkins was at all relevant times an employee of the Galveston County, Texas, tax office; Janis Strapach was at all relevant times an employee of Independence One Mortgage Corporation; Kathlene Nelson was at all relevant times employed at Transworld Mortgage Corporation; and Jan Lindsey and James Hoover were at all relevant times special agents of the FBI.

The lengthy trial record is replete with detailed testimony from the above named persons; and, although we have carefully parsed the record and analyzed its testimony, we shall reiterate and refer to only such portions thereof as we deem necessary to support our observations and conclusions set forth in the analysis portion of this opinion below. For background purposes, then, we capulize the pertinent facts as follows.

In April 1988 Diana visited Wittie's office and completed a client information sheet on which she indicated that her husband was unemployed. Diana heard an explanation of the bankruptcy process from Wittie and took with her various schedules and forms to be completed, but did not retain Wittie as counsel at that meeting. Approximately two weeks later, August met with Wittie at her office, with Tom Johnson present. August retained Wittie, made a down payment and executed a power of attorney to Wittie. The Augusts had not completed the schedules and forms given to Diana by Wittie at their initial meeting, but August furnished copies of bills and other data to counsel. Tom Johnson completed a schedule and Wittie completed a statement of financial affairs based on information garnered at that meeting with August. Tom Johnson signed the Augusts' names to the Statement of Financial Affairs. August did not furnish to Wittie or Tom Johnson any trade names used by Diana or himself. He advised Wittie that he was unemployed but that Diana worked for Southwestern Bell. He also told Wittie that he had not been involved in a partnership or engaged in a business in the six-year period before 1988, that the spouses combined income for 1987 was \$20,000, and in 1986 was \$19,000; and he revealed no other sources of income. Wittie was told by August that they had one bank account at Bank Texas and two accounts at Communicators Federal Credit Union, but he disclosed no interest in property held by any other person; neither did he disclose any transfers of real or personal property to any other person.

A schedule of creditors holding security interests reflected

the Augusts' house as being mortgaged to Gibraltar Savings and Loan, but revealed no other creditors. A schedule of personal property reflected one bank account, being the Bank Texas account listed on the Statement of Financial Affairs. That schedule listed no corporate stock. Subsequent to August's office meeting, Tom Johnson compiled a list of creditors based on information furnished by the Augusts. The list reflected that First City Bank was suing the Augusts for non-payment of credit card debts, in which suit a default judgment had been entered in May 1988 to become final on June 6th of that year, as a result of which First City Bank would become a secured creditor.

On that date, June 6, 1988, the Augusts' bankruptcy petition was filed, having been signed by Tom Johnson's affixing the Augusts' names thereto. Thereafter Wittie wrote to the Augusts, advising of their responsibilities in the bankruptcy process and attaching a copy of the petition. In that letter Wittie instructed the Augusts to review the petition and make any changes they wished to make within 30 days, but none were made.

On August 8, 1988, Wittie and Diana attended a creditors' meeting but no one was there other than Trustee Peter Johnson. He placed Diana under oath and questioned her about the schedules; he also gave Wittie and Diana a "hard time" because Diana's signature did not appear on the petition. She swore to the veracity of the documents, however, and to her familiarity with the contents. The Augusts were discharged from their debts on October 24, 1988.

In 1993 the FBI contacted Wittie regarding the Augusts'

bankruptcy. Wittie was shown documents reflecting real estate transfers from the Augusts to Comeaux on August 12, 1987, and transfers from Comeaux back to the Augusts on June 2, 1989. Those exchanges had never been mentioned to Wittie by the Augusts.

During the document preparation phase of the bankruptcy, the Augusts never indicated to Tom Johnson that there were any creditors holding secured interests in anything other than their homestead. Neither did they advise Johnson that they were making mortgage payments on property other than their homestead.

Comeaux had loaned August \$1,500 but was not aware that the Augusts' property had been transferred to him until the day he was required to re-transfer the property to them. Comeaux was aware that the Augusts owned two lots in Galveston, Texas, and two rental houses, one on Touchstone Street and one on Connorvale Street. Comeaux never received rental income from the houses, made no repairs to the properties, paid no taxes on the properties, and made no mortgage payments on the properties. To the contrary, Diana paid taxes on the two lots in Galveston for 1987-1989. The Augusts mortgaged the Connorvale Street property in November 1987, which mortgage remained in their name and was never placed in the name of Comeaux. All payments of principal, interest and escrow from 1987 to 1989 were made by the Augusts. Similarly, the Touchstone Street property had been mortgaged in 1976 to Transworld Mortgage Corporation and was never transferred to Comeaux. The Augusts made all payments relevant to that mortgage too.

In a May 1993 interview, Special Agent Lindsey was told by

Diana that she and August had purchased the Connorvale and Touchstone properties prior to the purchase of their residence, and that August owned the lots in Galveston. Diana admitted signing the transfer deeds to Comeaux but claimed that the purpose of the transfers was to reduce maintenance expenses. She also admitted denying the ownership of property other than that listed on the bankruptcy petition when questioned by the Trustee. Among other things, Special Agent Hoover demonstrated that the Augusts' income tax returns contained entries reflecting ownership of partnership interests and income therefrom; ownership and profitable sale of corporate stock, and depreciable real estate with rental income therefrom. Examination of checks reflected payments on mortgages and taxes as well.

Following denial of the motions for acquittal, August was convicted by the jury and this appeal followed.

II

ANALYSIS

A. Deliberate Ignorance Instruction

August first contends that the evidence did not support instructing the jury on deliberate ignorance. We find August's contention unconvincing.

The government insists that August waived this issue by objecting to the deliberate ignorance instruction on a different ground at trial. We disagree. At trial, the government requested that the court add an instruction on deliberate ignorance on the ground that the evidence justified such an instruction. August

objected on the ground that the instruction on knowledge was sufficient for the jury to determine whether he had acted knowingly. The court overruled August's objection and instructed the jury on deliberate ignorance, noting that it was doing so based on the evidence. In the context of the government's reason for wanting the instruction and the judge's reason for giving the instruction, August's objection identified the ground of his objection sufficiently for the court to understand that August did not agree that the evidence supported the instruction. August thus preserved his appellate argument that the evidence did not support the instruction. See United States v. Devine, 934 F.2d 1325, 1342 (5th Cir. 1991), cert. denied, 112 S. Ct. 954 (1992).

We review a district court's instructions to determine "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." United States v. Investment Enters., 10 F.3d 263, 268 (5th Cir. 1993) (citation omitted). "Before a deliberate ignorance instruction may properly be given, the evidence at trial must raise two inferences: `the defendant was subjectively aware of a high probability of the existence of the illegal conduct; and . . . the defendant purposely contrived to avoid learning of the illegal conduct.'" Id. (citation omitted). The instruction "serves `to inform the jury that it may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge.'" Id. at 269 (citation omitted). A trial court may instruct a jury

on deliberate ignorance, however, even if the government proceeded on the theory that the defendant had actual knowledge of illegal activity. United States v. Peña, 949 F.2d 751, 757 (5th Cir. 1991).

The court instructed August's jury:

You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

The evidence supports that instruction. August met with Wittie and Tom Johnson only once and did not attend the creditors meeting. He and Diana never appeared together at any meetings. Neither of the Augusts signed the bankruptcy petition or the accompanying schedules. A reasonable juror could have concluded that August was aware that the information he and Diana had provided would lead Wittie and Tom Johnson to prepare an incomplete petition and that August had contrived to avoid actual knowledge.

B. Sufficiency of the Evidence: Conspiracy

August next contends that the evidence was insufficient to support his conviction of conspiracy. Specifically, he argues that the government failed to prove that he had agreed with Diana to commit bankruptcy fraud. August's contention is unavailing.

We shall affirm a jury verdict so long as there is evidence sufficient to allow a reasonable jury to find a defendant guilty beyond a reasonable doubt. We view the evidence and all inferences

from the evidence in the light most favorable to the verdict. United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), aff'd 462 U.S. 356 (1983).

For a conspiracy in violation of 18 U.S.C. § 371, the government must prove "that the defendant entered into an agreement with at least one other person to commit a crime against the United States and that any one of these conspirators committed an overt act in furtherance of that agreement." "The government must also prove that the defendant knew of the conspiracy and voluntarily became part of it."

United States v. McCord, 33 F.3d 1434, 1439 (5th Cir. 1994) (concluding and internal citations omitted).

August was convicted of conspiring with Diana to knowingly transfer and conceal property in anticipation of bankruptcy, knowingly concealing property belonging to their bankruptcy estate, and knowingly making a false statement under penalty of perjury.

Lindsey testified that Diana had told him that she (Diana) had signed the deeds transferring the couple's property to Comeaux and did so for the purpose of reducing maintenance expenses. Comeaux testified that until 1989 he had not been aware of the 1987 transfers to him of the three August properties, even though he averred that August had suggested using property as collateral for a loan. He further testified that he paid no taxes or maintenance expenses on the properties. Hopkins testified that Diana paid the taxes on the Galveston lots from 1987 to 1989. The mortgage company employees, Strapach and Nelson, testified that the Augusts' mortgages were never transferred to Comeaux and that the Augusts made all of their own payments from 1987 to 1989. The jury could

have inferred that the Augusts had agreed to transfer the property to Comeaux in anticipation of their 1988 bankruptcy; that August knowingly participated in the agreement; and that both of the Augusts committed overt acts in furtherance of the conspiracy.

The jury could have inferred from the same evidence that the Augusts had conspired to conceal the existence of real property belonging to their bankruptcy estate. Additionally, Hoover testified that the Augusts' income tax returns for 1987, 1988, and 1989 listed income from August's ownership interest in "Ma" Bell; rental income; and income and capital gains derived from the ownership and sale of stock. The returns also reflect that the Augusts took deductions allowed to homeowners. According to Hoover, both of the Augusts signed the returns. Trustee Peter Johnson testified that the information in the tax returns regarding the Augusts' ownership of real estate and stocks should have been included in the bankruptcy schedules. The jury could have concluded that the Augusts conspired to conceal the existence of real and personal property belonging to their estate; that August knowingly participated in the agreement; and that August committed overt acts in furtherance of the conspiracy.

Wittie and Tom Johnson testified that the Augusts had provided them with the information that they in turn placed in the bankruptcy petition and accompanying schedules. According to Wittie and Johnson, the Augusts did not inform them of any trade names; did not inform them that August was involved in a business enterprise; did not disclose interests in any real property other

than their residence; did not inform them of any creditors other than the financial institution holding the mortgage on their home; and did not inform them of any stock ownership. Wittie testified that she had sent the Augusts copies of the petition and schedules and directed them to make any changes they wished to make, yet they made no changes. Peter Johnson testified that Diana must have averred at the creditors' meeting that the papers had been signed under oath and that they included all of the Augusts' assets and liabilities. The jury could have inferred that the Augusts had agreed to provide Wittie and Tom Johnson with selective information only that would cause them to make false statements on the Augusts' petition, largely by omission; that August knowingly participated in the agreement; and that August committed overt acts in furtherance of the conspiracy.

C. Sufficiency of the Evidence: Material False Statement

August contends finally that the evidence was insufficient to support his conviction of making a material false statement in relation to a bankruptcy case. Specifically, he argues that the government did not prove that he knew of the contents of the bankruptcy petition and accompanying papers. We disagree.

A person who "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a). A person who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2(b). "[O]ne

who has been indicted as a principal may be convicted on evidence showing that he merely aided and abetted the commission of the offense." United States v. Laury, 985 F.2d 1293, 1300 n.2 (5th Cir. 1993) (citations and internal quotations omitted).

To convict a defendant of aiding and abetting under 18 U.S.C. § 2, the government must prove (1) that the defendant associated with the criminal venture, (2) participated in the venture, and (3) sought by action to make the venture succeed. The defendant must share the principal's criminal intent and engage in some affirmative conduct designed to aid the venture.

United States v. Gallo, 927 F.2d 815, 822 (5th Cir. 1991) (citations omitted). The same evidence that establishes conspiracy may establish the elements of aiding and abetting. Id.

August was indicted on theories of direct participation, aiding and abetting, and causing false statements to be made. The evidence that supports August's conviction of conspiracy to make a false statement also supports his conviction of making a false statement. The jury could have inferred from such evidence that August and Diana both gave incomplete and false information to Wittie and Tom Johnson, who actually prepared the bankruptcy filing documents containing false statements about the Augusts' finances.

AFFIRMED.