IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40250
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CATHERINE DOUCET,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(6:93-CR-60038)

(November 23 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Catherine Doucet appeals her conviction of, and sentence for, knowingly and intentionally making a materially false statement to a federal bank in connection with a loan application, in violation of 18 U.S.C. § 1014. We affirm the conviction but vacate the sentence.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Following her jury trial, Doucet received a twenty-four-month term of incarceration, a three-year term of supervised release, and a $50 special assessment. The presentence investigation report ("PSR") established a base offense level of 6 pursuant to U.S.S.G. S 2F1.1(a), which was increased nine levels pursuant to § 2F1.1(b)(1)(J). Referring to application note 7B, the PSR suggested that a downward departure might be warranted because, although the alleged intended loss was $495,371, the actual loss was zero, and thus the intended loss "may overstate the seriousness of [Doucet's] conduct."

Doucet objected to the PSR, asserting that a downward departure was warranted because she had been paying the note in question on a monthly basis. The district court overruled her objection and found that "although there was no actual loss . . . the intended loss equals [$495,371], the amount of the loan application." The court also found that the intended loss amount did not overstate the seriousness of Doucet's conduct.

The underlying facts are as follows: Dr. and Mrs. Eugene Padgett executed three collateral mortgage notes secured by a mortgage on Dr. Padgett's medical clinic facility. Those notes eventually were acquired by the Washington State Bank. Padgett discontinued using the mortgaged building and rented it to Doucet. The Padgetts subsequently entered into a purchase agreement with Doucet whereby she agreed to buy the building by a certain date and

to rent it until that time for a monthly payment of $5,965.13.

The bank learned of the purchase agreement and was concerned because the Padgetts' mortgage prohibited the sale, transfer, or lease of the property without the bank's consent. The bank, the Padgetts, and Doucet entered into negotiations regarding additional collateral and the potential purpose of the property. Doucet began making the monthly rental payments directly to the bank, to be applied against the Padgetts' loan balance.

The bank subsequently determined that additional collateral was needed. Doucet began negotiating directly with the bank to assume the loan. The negotiations resulted in a loan agreement that provided, inter alia, that Doucet and the Padgetts would negotiate a new promissory note for the outstanding balance due, the Padgetts would remain liable on the loan, Doucet would pay a number of fees and prearranged payments against the loan balance, she would execute a new collateral mortgage to secure the loan and pledge $400,000 in life insurance to the bank, and the Padgetts would give the bank a first mortgage on their family residence.

Doucet and the Padgetts signed a new note to the bank for the balance due on the mortgaged property. In connection with the negotiations, Doucet submitted two financial statements that indicated that she was owed $2.5 million as a note receivable by Credit Power, Inc., and would be receiving $150,000 quarterly under that note.

II.

Doucet contends that the government failed to prove that her financial statements were made for the purpose of influencing the bank's action because, under Louisiana law, she "could have assumed the already existing loan of Dr. Padgett." She also contends that the government failed to prove that her statements were false at the time she made them. Doucet also contends that the district court erred in determining that her statement was material. Her arguments are unavailing.

To evaluate the sufficiency of the evidence, this court examines the evidence in the light most favorable to the prosecution, making all reasonable inferences and credibility choices in favor of the verdict. United States v. Vasquez, 953 F.2d 176, 181 (5th Cir.), cert. denied, 112 S. Ct. 2288 (1992). The evidence is sufficient if a reasonable trier of fact could have found guilt beyond a reasonable doubt. The jury is solely responsible for determining the weight and credibility of the evidence. United States v. Martinez, 975 F.2d 159, 161 (5th Cir. 1992), cert. denied, 113 S. Ct. 1346 (1993). This court, therefore, will not substitute its own determination of credibility for that of the jury.

Doucet was convicted under 18 U.S.C. § 1014, which requires that the government prove beyond a reasonable doubt that (1) the defendant made a false statement to a federally insured financial institution; (2) the defendant made the false statement knowingly; (3) for the purpose of influencing the financial institution's

actions; and (4) the statement was false as to a material fact. United States v. Williams, 12 F.3d 452, 456 (5th Cir. 1994). "A false statement is material if it is shown to be capable of influencing a decision of the institution to which it was made." Id. Materiality is a legal determination that this court reviews de novo. Id.

Doucet's argument that Louisiana law controls is patently frivolous. She was tried in federal court for the violation of a federal criminal statute.

Doucet contends that her conduct was not within the ambit of § 1014 because she was assuming an already existing loan. Section 1014 provides:

> Whoever knowingly makes any false statement or report . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, affirmative action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

A material false statement made in connection with a loan assumption arrangement is violative of § 1014. See United States v. Chaney, 964 F.2d 437, 442 (5th Cir. 1992). Furthermore, Doucet, the Padgetts, and the bank signed a three-party loan agreement that provided that Doucet and the Padgetts would make a new loan with the bank. The argument fails.

Doucet also argues that the question of materiality is a mixed question of fact and law, and thus the district court erred by

determining materiality as a question of law without submitting it to the jury. In support of her position, she cites jurisprudence from the Ninth and Eleventh Circuits. This circuit adheres, however, to the rule that a determination of materiality is a question of law for the district court, although such a determination rests on a factual evidentiary showing made by the prosecution. Williams, 12 F.3d at 456; United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980).

Doucet's arguments that the statements were not false at the time they were made and were not material are unavailing. Regarding materiality, bank president Craig Brignac testified that he specifically requested current financial statements from Doucet. A letter from the bank's attorney to the bank regarding the status of negotiations with Doucet mentions that Doucet's attorney was waiting for her to produce the financial statements. The financial statement subsequently was sent to the bank's attorney.

Brignac further testified that the bank was extremely reluctant to enter into any financial arrangements with Doucet until it was convinced by her financial statements that she was financially capable of retiring the outstanding debt. Brignac further testified that if he had known that the information on Doucet's financial statement was false, he "wouldn't have brought the application to [the] bank board, [but] would have denied the loan." Doucet's financial statements were material because, as demonstrated by the testimony of Brignac, the statements influenced his and the bank's decision. See Williams, 12 F.3d at 456.

Doucet also argues that the government failed to prove that she knew the information in the financial statement was false at the time she submitted it. The crux of her argument is that "there was no direct evidence presented by the prosecution that [she] submitted a false statement 'knowingly'." She contends that the testimony of Hubert Ashman, the president of Credit Power, was insufficient to establish the "knowing" element because "someone else in Mr. Ashman's company" could have signed "the document saying that [Doucet] would receive $2,500,000." Her argument borders on being frivolous.

The financial statements Doucet furnished the bank indicated that Credit Power owed her $2.5 million as a note receivable. Those statements also indicated that Doucet was due quarterly payments of $150,000 on the note from Credit Power. An information sheet attached to the financial statements declared that Doucet would "be receiving $150,000.00 per quarter from Note Receivable, Credit Power, Inc. until $2,500,000.00 is paid to me in full."

Doucet's accountant, Cynthia Guidry, testified that she prepared the financial statements for Doucet and that when she prepared them, the word "estimated" was written beneath the heading of "Financial Statement." Although the originals had the word "estimated" on them, the financial statement submitted to the bank did not.

Further, regarding the $2.5 million note receivable, Guidry testified that she had no specific documentation to substantiate the $2.5 million figure, and that is why she put "estimated" on the

top of the financial statement. She further testified that Doucet provided her with the amount and that the only documentation she had possession of referred to $1 million and $2 million amounts. On redirect, Guidry testified that she was not sure where she came up with the $2.5 million figure and that based upon her reading of the documents, she could not see where they supported Doucet's assertion that she was to receive $150,000 quarterly.

Hubert Ashman, the president of Credit Power, testified that he was a mortgage broker and became involved with Doucet because she was attempting to fund a number of projects. He further testified that the only money Doucet ever deposited with him was $50,000, which was a bond to secure a $1,000,000 loan for her. A document memorializing that arrangement was signed by Ashman.

Ashman also testified that there was another signed agreement that if Doucet provided $100,000, she could secure a $2,000,000 loan. The $100,000 deal never occurred, because Doucet did not pay the $100,000.

Ashman further testified that a number of documents, including his letterhead and an attestation to a long-term relationship with Doucet and her good character, purportedly signed by him, were not authentic. He did not agree that Doucet could sign the bogus documents on his behalf, nor did he sign them himself. Further, he did not know whether Doucet actually had prepared them.

At no time did Ashman testify regarding a $2.5 million deal or that his company, Power Credit, would be paying Doucet $150,000 per quarter. The only evidence regarding that quarterly payment was a

letter of February 5, 1991, which Ashman testified he did not write, sign, or authorize. A reasonable trier of fact could have found guilt beyond a reasonable doubt. See Vasquez, 953 F.2d at 181.

III.

Doucet contends that the district court submitted an improper jury charge that expanded the scope of the charge originally set forth in the indictment. In essence, Doucet argues a variance between the indictment and proof. The thrust of the argument is that the indictment referred only to an application for a loan, while the jury charge referred to an assumption of the loan and a commitment to assume the loan. The argument is a rehash of her contention that false statements given in connection with an assumption of a loan are not criminal under § 1014. As previously discussed, that argument is unavailing.

When a variance between an indictment and proof is alleged, a defendant must show that the variance prejudiced "substantial rights." United States v. Massey, 827 F.2d 995, 1003 (5th Cir. 1987). The indictment and proof must coincide to protect a defendant from surprise and the risk of a second prosecution for the same crime. United States v. Manotas-Mejia, 824 F.2d 360, 365 (5th Cir.), cert. denied, 484 U.S. 957 (1987).

The indictment specifically referred to the $495,371 financial transaction between Doucet and the bank. Additionally, the indictment specifically stated that the material false statement

was Doucet's representation that she was owed $2.5 million by Credit Power. This was the precise transaction litigated at trial. There is no error regarding the conviction.

IV.

Doucet contends that the district court erred by determining that the amount of the intended loss for sentencing purposes was $495,371. She is correct.

This court reviews the determination of loss under the clearly erroneous standard. United States v. Chappell, 6 F.3d 1095, 1101 (5th Cir. 1993), cert. denied, 114 S. Ct. 1232 and 1235 (1994). When reviewing the calculation of an intended loss, as in this case, we look to actual, not constructive, intent. United States v. Henderson, 19 F.3d 917, 928 (5th Cir.), cert. denied, 115 S. Ct. 207 (1994).

We distinguish between cases in which "the intended loss for stolen or fraudulently obtained property is the face value of that property" and those in which the intended loss is zero because "the defendant intends to repay the loan or replace the property." Id. If a defendant intends to repay a fraudulently obtained loan, a district court should not use intended loss as the basis for sentencing. Id. Therefore, a district court must determine whether a defendant actually intended to cause a loss to a bank, and if so, the amount of that loss.

Only if the amount of the intended loss is greater than the actual loss should it be used to determine a sentence. Id. If

both the actual and intended loss approach zero, a district court may then choose to exercise its discretion and depart upward from the sentencing range because the determined loss significantly understates the seriousness of a defendant's conduct. Id. at 928 n.12; § 2F1.1 (comment.) n.7.

The district court determined that the actual loss was zero but that the intended loss was $495,371, "the amount of the loan application." The court did not make a specific finding regarding Doucet's actual versus constructive intent regarding the amount of the intended loss, nor determine whether Doucet intended to repay the loan (although the loan was never actually made).[1]

Because the district court did not comply with Henderson and determine whether Doucet intended to repay the loan, it may have erred by simply stating that the amount of the intended loss was $495,371, the face value of the loan. Therefore, we vacate the sentence and remand for a finding on Doucet's actual intent regarding the loss. See Henderson, 19 F.3d at 928. This may be a case in which both the intended and actual loss approach zero and where an upward departure might be warranted. That remains for the district court to evaluate, however, following the determination of Doucet's intent.

The judgment of conviction is AFFIRMED. The judgment of sentence is VACATED and REMANDED for resentencing.

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[1] Doucet had been paying approximately $6,000 per month directly to the bank to be applied against the Padgetts' loan, the loan she was to assume. The government concedes this fact.