IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40675

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN AURELIO CUDA and JAMES RICHARD CUDA,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Texas

July 7, 1995

Before DAVIS, SMITH, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

John Aurelio Cuda and James Richard Cuda appeal their convictions, after a jury trial, of mail fraud, bank larceny, and conspiracy to commit bank larceny. They raise numerous issues, the most significant being the existence of probable cause to arrest, an alleged violation of the Speedy Trial Act, and the application of the amended Bank Robbery Act of 1934, 18 U.S.C. § 2113. They also challenge several evidentiary rulings, the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sufficiency of the evidence on all counts, and the enhancement of their sentences. Because we find that the officers had probable cause, the addition of a corporate defendant extended the time of the running of the Speedy Trial clock, the Bank Robbery Act covers the Cudas' conduct, and the other arguments are meritless, we affirm.

I.

James and John Cuda preyed on the elderly. Their modus operandi was to buy lists of people who responded to mailings such as sweepstakes entries and then contact them by mail or phone with "investment" opportunities that offered too-good-to-be-true returns and were run by shell corporations. While the deals wore the veneer of respectability, they inevitably failed, leaving their investors with large losses. Typically the Cudas targeted the elderly, persons often with large amounts of cash to invest and limited ability to protect themselves.

The Cudas' latest machinations came to a close on May 6, 1993, when Beaumont police arrested them after they had attempted to assist an octogenarian close an approximately $100,000 account at a local bank. Bank employees had became suspicious after John Cuda, accompanied by an elderly woman, Mrs. Dickson, had asked that Mrs. Dickson's account be closed and a cashier's check be made out to Home Equity Consulting Group ("Home Equity"). Believing that the somewhat feeble-minded woman, whom they knew well, was being swindled, the employees called the police.

The police, after a short investigation, arrested John Cuda, when they determined the elderly woman did not appear competent. They also arrested James Cuda, who had been waiting in a car outside the bank. They impounded the Cudas' vehicle and seized two briefcases, which contained, along with other documentary evidence detailing the Cudas' business dealings, a lead sheet on Mrs. Dickson that stated "Thursday go see," "Jumbo CD $100,000," and "Talk Texan to her."

After arresting the Cudas, the police contacted the FBI, which in turn discovered that the Cudas were connected with four fraud cases in California. Further investigation revealed that James had been arrested in Florida for defrauding an elderly woman but that those charges had been dismissed, as the state statute under which James had been charged was declared unconstitutionally vague. See Cuda v. State, 639 So. 2d 22 (Fla. 1994).

Because of the interstate nature of these activities, a federal indictment was sought. The Cudas were charged with mail fraud, 18 U.S.C. § 1341, bank larceny, 18 U.S.C. § 2113(a), and conspiracy to commit bank larceny, 18 U.S.C. § 371. The scope of the indictment covered not only the Cudas' dealings in Texas, but also those in Florida and California. Two of their corporations, Rancho Santa Fe Developing Corporation and Home Equity, were also charged in superseding indictments.

At trial, the government's proof consisted primarily of documents concerning the Cudas' corporate "family" and the testimony of and about several people who had lost money in

ventures with the Cudas. The theory of the government's case was that the Cudas were frauds; they, in part using the U.S. mail, had swindled numerous elderly victims by convincing them to invest in sham ventures; and the Cudas had attempted to do the same to Mrs. Dickson, thus committing bank larceny. The Cudas' defense was that their businesses were legitimate, their investments sound, and they relied in good faith upon professionals in the field. Losses, if any, were caused by a downturn in the California real estate market. Their deal with Mrs. Dickson was the same. The jury returned a guilty verdict on all counts.

II.

The Cudas first contend that their initial arrest was a violation of their Fourth Amendment rights, as they argue that the police lacked probable cause to believe that a crime was being committed. Our review of such claims is well established. Probable cause to arrest "exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to cause a person of reasonable caution to believe that an offense has been or is being committed." United States v. Rocha, 916 F.2d 219, 238 (5th Cir. 1990), cert. denied, 500 U.S. 934 (1991); see also Beck v. Ohio, 379 U.S. 89, 91 (1964). While the existence of probable cause is a question of law, reviewed de novo, United States v. Hernandez, 825 F.2d 846, 849 (5th Cir. 1987), cert. denied, 484 U.S. 1068 (1988), we view the evidence in the light most favorable to the prevailing party. United States v. Ponce, 8

F.3d 989, 995 (5th Cir. 1993).

Here, the police were responding to a call from bank personnel who were familiar with Mrs. Dickson's feeblemindedness. The police thus knew that Mrs. Dickson was of questionable mental competence and that a stranger was "assisting" her in making a large withdrawal from her account. Their independent investigation confirmed these facts.

Testifying at trial, the police officer, who talked to Mrs. Dickson at the bank, politely described her demeanor as "confused." The investigation also revealed that the Cudas were from out of state and were promoting large investment opportunities through the mail and that some of the documentation misspelled John Cuda's name. Indeed, one form letter that John Cuda showed the police stated that Mrs. Dickson was giving Home Equity a check for $1,000,000. That letter was signed by Mrs. Dickson and dated May 6, the day of the arrest. Finally, an officer testified that James Cuda was waiting outside the bank in a rental car, parked in a "get away position."

While we do not stress any one of these facts, we find, under these circumstances, that the police had probable cause. In the totality of the circumstances and judged from the point-of-view of an experienced officer in the field, these facts would lead a reasonable person to believe that the Cudas were attempting to defraud Mrs. Dickson.

III.

The Cudas complain that the government failed to bring them to trial within the time limits set forth in the Speedy Trial Act, 18 U.S.C. §§ 3161-74. Specifically, they contend that the government exceeded its seventy-day limit by indicting them on May 19, 1993, and not bringing them to trial until April 5, 1994. Our review of speedy trial issues necessarily requires a careful analysis of both the total time period and the days excludable under the Act. Moreover, "[w]e review the facts supporting a Speedy Trial Act ruling using the clearly erroneous standard and the legal conclusions de novo." United States v. Bermea, 30 F.3d 1539, 1566 (5th Cir. 1994), cert. denied, 115 S. Ct. 1113 (1995).

The correct computation of the speedy trial clock here depends upon the application of 18 U.S.C § 3161(h)(7), which allows an exclusion of "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." The Supreme Court, in a footnote, has interpreted this section to mean that "[a]ll defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant." Henderson v. United States, 476 U.S. 321, 323 n.2 (1986). We have adopted this rule, albeit first in a footnote, see United States v. Welch, 810 F.2d 485, 488 n.1 (5th Cir.), cert. denied, 484 U.S. 955 (1987), but latter more explicitly, see Bermea, 30 F.3d at 1567. Accord United States v. Jones, No. 94-10091, 1995 U.S. App. LEXIS 14591, at *4 n.4 (5th Cir. June 14, 1995) (citing Bermea, 30 F.3d

at 1567).

Under this rule, no speedy trial violation occurred. While the government concedes that the seventy-day deadline would have ended on August 1, 1993, the indictment was dismissed two days earlier. This event stopped the clock. § 3161(h)(6). Seventeen days later, the government reindicted the Cudas and added two new defendants, which were corporations controlled by them. At this point, the allowable time period for the set of defendants became seventy days. As the bulk of time between August 1993 and July 1994 was excluded because of pending motions, see § 3161(h)(1)(F), the clock was further tolled and did not run over the limit. See Jones, 1995 U.S. App. LEXIS 14591, at *4. In sum, as the accepted rule is that the time for all codefendants is measured by the last defendant whose time will run out, the government avoided violating the Act by adding the new defendants.

IV.

The Cudas argue that the evidence was insufficient as a matter of law to support their convictions on all three counts. We have carefully reviewed the record and disagree. Under our deferential standard of review))examining the evidence in the light most favorable to the verdict and upholding the conviction if a rational trier of fact could have found the essential elements of the offenses beyond reasonable doubt))we find the evidence on the mail fraud and the conspiracy to commit bank larceny counts was more than sufficient. See United States v. Cardenas-Alvarez, 987 F.2d

1129, 1131 (5th Cir. 1993). As the question of the proper application of the bank larceny statute, however, presents a closer question, we review that analysis in some detail.

The amended Bank Robbery Act of 1934 provides, in relevant part, that

> [w]hoever enters or attempts to enter any bank . . . with the intent to commit in such bank . . . any felony affecting such bank . . . and in violation of any statute of the United States, or any larceny shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2113(a) (emphasis added). This entry provision was "inserted in the statute to cover the situation where a person enters the bank for purpose of committing a crime, but is frustrated for some reason before completing the crime." Prince v. United States, 352 U.S. 322, 328 (1957). Therefore, the "heart of the crime is the intent to steal." Id. The Cudas were indicted under this subsection.

Successful larceny is also made an explicit crime under the Act, albeit under a different subsection. Section 2113(b), in part, provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any saving and loan association shall be fined under this title or imprisoned not more than ten years, or both.

That subsection proscribes not only the common-law definition of larceny but also the crime of false pretenses. Bell v. United States, 462 U.S. 356, 361 (1983). False pretenses is defined as where "a thief, through his trickery, acquired title to the

property from the owner." Id. at 359. Of significance here is that in a prior case, Jerome v. United States, 318 U.S. 101, 103-04 & n.4 (1943), the Court indicated that the word "larceny" in § 3112(a) refers to the criminal acts proscribed by § 3112(b). See also United States v. Clark, 776 F.2d 623, 626 (7th Cir. 1984) (holding that § 2113(a) incorporates definition of larceny in § 2113(b)), cert. denied, 470 U.S. 1006 (1985); United States v. Registe, 766 F.2d 408, 410 (9th Cir. 1985) (holding that § 2113(a) covers larceny by false pretenses).

Accordingly, even though Cuda's plan was unsuccessful, and he did not "take[] and carr[y] away" the money as required by the text of § 2113(b), section 2113(a) still reaches his conduct. John Cuda's actions at the Beaumont bank constitute an attempt to commit larceny by false pretenses and thus satisfies the definition of larceny under § 2113(a) and (b).[1] He misrepresented to the bank officials that Mrs. Dickson wanted to withdraw significant funds and that the check should be made payable to Home Equity. As the bank officials discovered, however, Mrs. Dickson had no such specific intent and did not understand the transaction she allegedly was requesting. In that situation, Mrs. Dickson's presence did not make Cuda's pretenses true, but rather was the very trick he was using to mislead the bank into giving him the

[1] The crime defined by § 2113(a), however, is technically not attempted larceny. To read the statute so presents the incongruous result that a successful larcenist faces a 10-year sentence under § 2113(b), while the unsuccessful larcenist faces a 20-year maximum sentence under § 2113(a). Instead, the distinguishing characteristic between the two sections is that § 2113(a) requires a showing of an improper intent before entering the bank, while § 2113(b) does not. See Robinson v. United States Bd. of Parole, 403 F. Supp. 638, 642 (W.D.N.Y. 1975).

money.

Moreover, the government's evidence and Cuda's past conduct more than support the inference that they intended to commit such a larceny upon Mrs. Dickson before entering the bank. It is uncontroverted that John Cuda's actions were within a bank.[2] Therefore, the government's showing here was sufficient to meet the elements of § 2113(a), and we hold that the evidence was sufficient to find the Cudas guilty of bank larceny.

V.

Finally, the Cudas raise numerous evidentiary objections. They protest that the district court improperly admitted extrinsic offense testimony of other people who lost money by investing with the Cudas. As the jury found, however, the frauds about which the victims testified were part of a single mail fraud scheme. Therefore, that testimony is not extrinsic, but rather is admissible as direct evidence of the unitary scheme.

The Cudas also object to the testimony of Paul Gonzales, a former news reporter. In 1985, Gonzales had gone undercover to investigate "boiler room" operations that offered scam investments in commodity futures. His employers were the Cudas. The government concedes that Gonzales's testimony is extrinsic but responds that it is admissible nonetheless to show the Cudas' fraudulent intent, see FED. R. EVID. 404(b), and that its probative value was

[2] Under the plain language of § 2113(a), the phrase "affecting such bank" does not modify the phrase "any larceny." Accordingly, we do not explicitly analyze whether the Cudas' actions "affected" the bank.

not substantially outweighed by its prejudicial effect. We agree.

The Cudas also complain that much of the victims' testimony is inadmissible hearsay. The Cudas argue that Diane Wooten, the daughter of one victim, had no personal knowledge of her mother's financial dealings, and her testimony regarding those dealings was inadmissible hearsay. As this evidence was merely cumulative of the testimony of other victims, however, we find that any hearsay contained in her testimony was harmless. See FED. R. CRIM. P. 52(a).

The testimony of Glen Norris, an economic crimes investigator for the State of Florida, was based upon either admissible documents under the business records exception, FED. R. EVID. 803(6), or opinion evidence of an expert witness in the area of economic crimes. Nor did the district court abuse its discretion in allowing Norris to testify about various missives between James Cuda and one victim, and several promissory notes and deeds. These documents were not admitted to prove the truth of the matters asserted, but to show the victim's relationship with James Cuda and demonstrate their misleading nature.

The Cudas object to the fact that a bank teller was permitted to give her opinion of Mrs. Dickson's mental state. As this witness had regular dealings with her, such testimony was properly admitted as lay opinion evidence under FED. R. EVID. 601 and 701. The Cudas argue that the district court abused its discretion in denying their motion to have Mrs. Dickson examined by a psychiatrist, especially as the district court permitted the government to proffer the testimony of Dr. Bowling that she suffered from senile

dementia.

We, however, do not find that the district court abused its discretion, as requiring a witness to undergo a psychiatric examination is a significant intrusion on privacy and dignity. See United States v. Jackson, 576 F.2d 46, 49 (5th Cir. 1978) (noting that a psychiatric examination "may seriously impinge on a witness's right to privacy"). At the time of trial, Mrs. Dickson was eighty-six years old, residing in a nursing home, and under the court-ordered guardianship of her granddaughter. Moreover, such an intrusion was unnecessary here, as there was an abundance of lay testimony regarding Mrs. Dickson's deteriorating condition.

Finally, the Cudas argue that the district court erred in sentencing them by including $750,000 that Mrs. Harvey purportedly lost in determining their offense level. This amount, however, was properly included, as the Cudas were convicted of a single mail fraud scheme, part of which included the venture in which Mrs. Harvey lost her money.

AFFIRMED.