IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

11-cr-13-bbc

v.

TRACI GRAY,

Defendant.

- -

Defendant Traci Gray has moved for bail pending appeal, arguing that she meets the prerequisites for bail in this circumstance: she is not a flight risk, she is not a danger to the community and her appeal is taken not for the purpose of delay but to raise a substantial question of law or fact likely to result in reversal, an order for a new trial or a reduced sentence that does not include a term of imprisonment or is for a term shorter than the time that her appeal will take. 18 U.S.C. § 3143. The motion will be denied. Although defendant is not a flight risk or danger to the community, it is not likely that her conviction or sentence will be reversed.

Defendant argues that the appeal of her conviction and sentence raises substantial questions, that is, ones that could be answered either way. United States v. Eaken, 995 F.2d

740, 741 (7th Cir. 1993). As to her conviction, she maintains first that the government failed to show that she violated 18 U.S.C. § 1014, which requires proof that (1) the defendant made a false statement to a financial institution; (2) the defendant knew the statement was untrue when she made it; (3) the defendant made the untrue statement with the intent to influence the action of a lending institution; and (4) the accounts of the lending institution were insured by the FDIC. She says that the government did not put in enough evidence to prove the second element, knowingly making a false statement, or the third, making untrue statements with the intent to influence a financial institution.

Defendant says the jury could not have found her guilty of knowingly making a false statement because Brian Bowling, a co-conspirator, filled out the loan application that she signed and she had no chance to read the closing papers before signing them. She is wrong. She did not testify, so the jury never heard her version of the closing process. Instead, it heard from the closing agent, who testified that she reviewed each document with defendant and her co-defendant (a co-borrower on the loan), gave each of them an opportunity to ask questions and had each initial every page of the loan application. Bowling testified that he reviewed the numbers on the loan application with both defendants before the closing. Despite the fact that Bowling had been convicted and sentenced for mortgage fraud, the jury was entitled to believe his testimony.

Still asserting that the jury should not have found that she knew what she was doing

when she signed the loan application and closing papers, defendant disagrees with the government's assertion that she would have known that she was committing a crime. She admits that both "the loan application and the closing statement indicate in very small print that the parties acknowledge that filing a false document in this matter could be an 18 U.S.C. § 1014 violation," Dft.'s Br., dkt. #225, at 11, but she denies that these statements would have given her notice, because she never saw them. She points out that the loan application she signed at the closing, Exh. 1-1, is for a 30-year mortgage, whereas Exh. 4-3 is for a 50/30 mortgage. This discrepancy, she argues, is proof that she and her co-borrower never read the document because "[i]t would be impossible for [them] to sign two loan applications [with different mortgage arrangements] at the closing and be aware of the potential for a § 1014 violation." Dft.'s Br., dkt. #225, at 11. This is simply another argument that the jury rejected at trial, along with the rest of her defense that she did not know what she was signing. It was not unreasonable for the jury to do so.

Defendant argues also that the government failed to show that she possessed the necessary intent to influence a financial institution, because it did not prove that her sworn statements had the capacity to influence the lender. This is the same argument that defendant argued before and during trial and which she lost. The government did not have to show that the bank relied on the content of any statement or even that it was likely to rely on such content; it had to show only that the false statements were made with the intent to

obtain a loan from the bank. Therefore, the exact nature of the statements was irrelevant. In other words, the government did not have to prove that defendant's false statements about her income or about whether her co-defendant or her boyfriend would be living in the home had the capacity to influence the lending bank. Even if the bank did not care about the truthfulness of the loan applications it received because it planned to sell the loans immediately, it was proper for the jury to find that defendants submitted the application with the intent to influence the bank to give them a mortgage. That is enough for a § 1014 violation. United States v. Lane, 323 F3d 568, 582-83 (7th Cir. 2003) (rejecting lender's argument that because his false net worth statements were immaterial to bank's lending decision, he did not possess intent to influence bank's actions; § 1014 does not require showing of materiality).

Defendant's second challenge to her conviction is that the evidence at trial was insufficient to show that she entered into a conspiracy with her co-defendant and Brian Bowling. This challenge fails as well because the evidence she characterizes as insufficient can be reasonably interpreted as supporting the jury's decision. She is right when she says that the evidence *could* be read in her favor, but that is not the standard I must apply. In reviewing a challenge to the sufficiency of the evidence, a court must interpret the evidence in the light most favorable to the government. United States v. King, 126 F.3d 987, 993 (7th Cir. 1997) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Also, as the

government points out in its brief in opposition, defendant's argument is undermined by government exhibit 10-4, which is an email between defendant and her co-defendant that defendant forwarded to Bowling. Plt.'s Br., exh. #214, at 6. This email discusses the use of the co-defendant as a straw buyer to replace defendant's boyfriend, who had a bad credit record at the time.

Defendant raises a third challenge to her conviction, asserting that the court erred in denying her request to introduce reverse Rule 404(b) evidence. Defendant wanted to show that the bank was part of the fraudulent lending scheme. This, she contends, would have bolstered her argument that she was unknowingly caught up in a fraudulent money-making scheme engineered by Bowling with the bank. I have no doubt that defendant was caught up in a fraudulent scheme; no reputable lender would have ever considered giving her a mortgage loan of more than $270,000. It does not follow, however, that she did not commit the crime charged against her. As the jury found reasonably from the evidence, she knowingly made a false statement to a financial institution and she did it to obtain the mortgage loan. Whether the financial institution was also engaged in another kind of criminal behavior would not affect the determination of her guilt.

Finally, defendant argues that the court of appeals might find that her sentence is unreasonable because the court did not consider the § 3553(a) factors when sentencing her or her role in the offense compared to other similarly situated offenders and to her co-

defendant in particular. It is hard to imagine that the court of appeals would find unreasonable a sentence that is below the sentencing guidelines. Even if that possibility existed, I explained the reasons for the sentence I imposed on defendant and I took into consideration the § 3553(a) factors and her role in the offense as compared to other offenders and to her co-defendant.

As defendant points out in support of her motion, she will have served her entire sentence before her appeal can be heard. Unfortunate as this is, it is not a sufficient reason to grant her motion. The statute makes it plain that a sentencing court may grant a motion for bail pending appeal only if the defendant meets all of the statutory requirements. Defendant meets only two of the three; she cannot show that her appeal raises a substantial question of law or fact.

ORDER

IT IS ORDERED that defendant Traci Gray's motion for bail pending appeal under 18 U.S.C. § 1343 is DENIED.

Entered this 20th day of September, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge