

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

LACEY PHILLIPS and ERIN HALL,

Defendants.

OPINION AND ORDER

11-cr-12-bbc

What does it mean to knowingly make a false statement for the purpose of influencing a bank? Defendants Lacey Phillips and Erin Hall were convicted of conspiring to violate 18 U.S.C. § 1014, which makes it a crime to knowingly make a false statement for the purpose of influencing any FDIC-insured institution, and of making or aiding or abetting the making of false statements for the same purpose. Defendant Hall contends that he is entitled to a new trial at which he would be able to show that Brian Bowling, the mortgage broker who arranged the mortgage loans at issue, had led defendants to believe, mistakenly, that the program allowed them to combine their incomes and leave defendant Hall off the application. Defendant Phillips has joined in the motion. Defendants argue that if the court had not denied them the opportunity to make this showing, the jury could have found that

neither defendant “knowingly” made a false statement.

Although defendants say that they are raising an argument based on mistake-of-fact, their argument is one of mistake-of-law on which they cannot prevail. I will deny it, as well as their other arguments for a new trial under Fed. R. Crim. P. 29(c) or for judgment of acquittal under Fed. R. Crim. P. 33.

A. Background

Defendants Erin Hall and Lacey Phillips were charged in a two-count indictment with conspiring to violate 18 U.S.C. § 1014 and with violating the same statute. They went to trial on September 12, 2011 and were found guilty by the trial on both counts of the indictment.

The crimes grew out of the two defendants’ efforts to buy a house together. They had a particular house in mind but needed a source of financing. Their first stop was at a local bank, where they met with no success. The loan officer told them that their combined income was not sufficient to obtain a mortgage of the size they needed and that defendant Hall’s prior bankruptcy would be a significant obstacle to their obtaining a mortgage of any size. He urged them to wait a few years, save money and return when they were in a better situation financially. Instead, defendant Hall sought out Brian Bowling, a mortgage broker he had come to know from cutting his hair. Bowling told defendants that he could get them

a “stated income” loan by having only defendant Phillips apply for the loan, with her good credit rating and no bankruptcy in her past, and increasing the amount of her income by combining it with defendant’s Hall income. In the application that defendant Phillips signed, her income was shown as either \$7500 or \$8000 a month. In reality, she and defendant Hall together earned less than \$4000 a month from his job as a barber and hers as a hair stylist. The same application listed defendant Phillips’s job as sales manager at a business called Star Connection. Although she had worked there on a part-time basis in the past because her brother owned the company, she was not working there when she signed the loan application.

Defendant Phillips signed the loan application with the false information. Defendant Hall was present when she did so.

Immediately after defendants were arrested for their alleged crimes, they admitted to the FBI that they knew about the loan application that Bowling prepared and knew that it included an inflated amount of income for Phillips as well as an inflated job title at her brother’s company.

B. Defendants’ Motion for New Trial

1. Denial of right to introduce evidence

a. Specific intent

Defendants raise a number of arguments in support of their motion for new trial. They contend first that the court erred in preventing them from arguing their lack of specific intent, which they say is a prerequisite to a finding of guilty under § 1014. Second, they say that they should have been allowed to adduce evidence that Bowling had misled them into making the statements they did, thinking that the statements when applying for a stated income loan.

18 U.S.C. § 1014 has four essential elements: the defendant made a false statement to a financial institution; he knew the statement was not true when he made it; he made it with the intent to influence the action of the financial institution; and the accounts of the financial institution were insured by the Federal Deposit Insurance Corporation. The statute contains no requirement of materiality; the government need not prove that the false statement would have influenced the action of the financial institution. Nevertheless, before trial and during trial, both defendants devoted significant effort to arguing that they did not have the requisite specific intent to harm the financial institutions. I held this irrelevant. Because there is no materiality requirement in § 1014, it makes no difference to the applicant's culpability whether the defrauded bank knew that statements in the application were false. United States v. Lane, 323 F.3d 568, 582-83 (7th Cir. 2003) (district court acted properly in precluding defendant from introducing evidence relating to financial institution's involvement in refinancing or its knowledge that defendant did not have net worth shown

on refinancing documents because § 1014 does not require that false statement be material); see also United States v. Wells, 519 U.S. 482, 491 (1997) (term “false statement” does not include materiality). Defendants cite a number of cases in which courts held that the government had to show specific intent to obtain a conviction under § 1014, but those cases predate Wells and have been put to rest by the decision in that case.

b. Mistake-of-fact

Defendant’s second argument is that they were not allowed to present what they call their mistake-of-fact defense. In their view, they should have been allowed to testify about what Brian Bowling told them about stated income loans. Had they been able to do this, they say, they would have been able to show that any statements they made about their income were not false but mistaken. They say that Bowling told them that under a stated income loan it was not necessary for them to list defendant Hall on the mortgage loan application. Rather, they could omit him as a co-borrower but include his income with defendant Phillips’s to increase the total income shown on the application. Under defendants’ theory, they did not know they were making statements that were false in this situation. They believed Bowling when he told them it was completely legal under the stated income loan program for defendant Phillips to apply for the mortgage loan on her own behalf but still include defendant Hall’s earnings with her own.

Defendants characterize this argument as one of mistake-of-fact, but it is really a mistake-of-law argument. As a general rule, mistakes of law are no defense to a criminal prosecution. United States v. Dimitrov, 546 F.3d 409, 414 (7th Cir. 2008) (“[t]he rule that ‘ignorance of the law will not excuse’ is deep in our law”) (quoting Lambert v. State of California, 355 U.S. 225, 228 (1958)). In effect, defendants are contending that they believed from Bowling’s conversations that it was legal for them to lie about the information they provided. Accordingly, because they were applying for stated income loans and because Bowling misinformed them about the requirements for such loans, they did not knowingly make the statements the government says are false. This contention cannot stand up to scrutiny. Even if I accept defendants’ allegation that they understood that the loan application would contain only an income statement showing the combined amount of Hall’s and Phillips’s income, they still lied on the application. Defendant Phillips did not earn alone as much as she and defendant Hall earned together. Defendants may have been mistaken about the legal effect of the false statement but they cannot say they did not know it was false.

Of course the income statement in the application did not show just the amount of defendants’ combined income. It showed an income figure more than twice defendants’ combined income, along with a statement to the effect that defendant Phillips was a sales manager earning \$8000 a month. Defendants would avoid the effect of this information by

alleging that Bowling inserted it without defendants' knowledge and that defendant Phillips never saw these statements before signing the loan application. These allegations are foreclosed by the jury's verdict.

It was not error to deny defendants the opportunity to introduce evidence to support their theory that neither defendant believed that the statements Phillips verified were actually "false" because of their reliance on Bowling's statements that inflated income statements were legal when applying for stated income loans. The theory rests upon proving a mistake of law, which is no defense to the crimes charged.

It is implicit in the jury's verdict that it found that defendant Phillips saw the statements before she verified them and that she knew they were inaccurate. The evidence was sufficient to uphold this finding. It is equally implicit in the verdict that the jury found that defendant Hall was aware of the false statements that Phillips was verifying and that he was responsible for them as a co-conspirator and as an aider and abettor.

b. Government's failure to disclose useful evidence to defendants

Defendants maintain that they are entitled to a new trial because the government did not disclose to them that Brian Bowling did not tell the government until the week before trial that he had explained to defendants his plan to inflate their income on their loan application. He calls this a violation of the rule in Giglio v. United States, 405 U.S. 150

(1972), that suppression of evidence affecting the credibility of a witness whose reliability may be determinative of guilt or innocence justifies a new trial whether or not the prosecutor acted in bad faith.

It is a far cry from the facts in Giglio, where the prosecutor had promised an important witness he would not be prosecuted if he cooperated with the government but never told the defendant of the promise, to the situation in this case in which defendants are complaining only about not being told that a witness had only recently remembered more inculpatory information about the defendants. The government had no obligation to advise defendants of this new information, even if, as defendants argue, defendants could have used the late disclosure of the information to suggest that it was newly fabricated.

c. Error in instructions

Defendants argue that the court failed to instruct the jury correctly. Instead of saying that the jury had to find that “defendant knowingly made false statements,” it gave the jury the Seventh Circuit jury instruction on the elements of the crime. Under this instruction, the jury was told that it had to find that defendants “made a false statement” *and* that they “knew the statement was not true at the time it was made.” Defendants argue that the way the instruction was phrased, it allowed the jury to convict them even if they never knew that the loan application did not contain any false information about defendant Phillips’s income.

The argument makes little sense. To find defendants guilty, the jury had to find that they made a false statement on the loan application and that they knew the statement was false. If the jury had believed either that they had nothing to do with the making of the false statement or that they did not know the statement was untrue when it was made, it would not have found them guilty.

B. Motion for Judgment of Acquittal

Both defendants have moved for judgment of acquittal, on slightly different grounds. Defendant Hall contends that the evidence was insufficient to find them guilty, but this is a doomed cause. The evidence adduced at trial showed that he was involved in all steps of the loan application process: he was the one that approached Brian Bowling for help with the loan after learning from another banker that his and Phillips's combined income was insufficient to obtain a loan on the house they wanted; he admitted to the FBI that he knew about the loan application that Bowling prepared and knew that it included an inflated amount of income for Phillips as well as a false job and title at her brother's company.

Defendant Hall argues that Brian Bowling's testimony was not credible, but the jury found to the contrary and its decision is the one that counts. A court can overturn a conviction because of the asserted incredibility of the government's witness only if it can find

that no reasonable jury could have believed the witness, such as when the acts described would have been physically impossible under the laws of nature to perform or when the witness could not have observed the things about which he is testifying. United States v. Farris, 532 F.3d 615, 619 (7th Cir. 2008). I have no reason to make that finding in this case.

Moreover, defendant Hall's own testimony was not credible in many respects. It is not surprising that the jury chose to believe Bowling's testimony over Hall's. Defendant Hall testified that before he went to the closing, he did not know the final sale price of the house he was buying, the terms of the loan, the interest rate, the monthly mortgage payments or the amount of the down payment. He also testified that he did not make any effort to find out any of these "details" during the closing. Such lack of interest from a businessman like defendant Hall is not believable.

Defendant Phillips argues that the evidence was insufficient to sustain the jury's verdict. Specifically, she asserts that the evidence was insufficient to show that she actually signed the loan application at the closing. She says that the government's expert witness, James Larson, testified that it was not necessary for loan applications to be signed at the closing, whereas another government witness, Cindy Dammen, who conducted the loan closing involving defendants, said that it was. Also, Marci Meyers, an employee of Bowling's first told an investigating agent that she "guessed" she had signed defendant Phillips's loan

application for her, but later withdrew that statement on the witness stand. However, she did say that she had forged signatures on loan applications on other occasions at Bowling's request. Finally, the loan closing officer had no specific recollection that defendant Phillips had signed the application.

Arguing insufficiency of the evidence in support of acquittal is an uphill battle. All of the presumptions weigh in favor of sustaining the jury's verdict. In this case, defendant Phillips has no chance at all. She testified that she could not recall signing any specific documents at the closing but did not deny signing any documents at all. She admitted that the signature on the form 1003 looked like hers and defendant Hall testified that the signature was hers.

Moreover, although Marci Meyers might have had an incentive to shade her testimony in favor of the government so that she would not be prosecuted, Cindy Dammen had no such motive. She had no connection with Bowling or his mortgage brokerage other than handling loan transactions like the one at issue. She testified that defendant Phillips signed every loan document in her presence. Her testimony was confirmed by Brian Bowling and by Shannon Hinrichs, the seller, who was present at the closing.

Defendant Phillips also argues that she never read the loan documents before she signed them and never knew that the form 1003 contained false statements. The jury did not believe this; it believed Bowling when he testified to his discussions with both defendants

about how the loan application would show an inflated income amount and would not show that defendant Hall was a co-borrower, although his income would be added to defendant Phillips's to increase the amount shown on the application. Given defendants' experience with the bank officer, they knew that they did not qualify for a loan; it was not unreasonable for the jury to believe that they would have asked questions about how they could qualify for the loans Bowling found for them and that Bowling would have explained his actions to them in advance of the closing.

Bowling testified that he had talked to defendant Phillips's brother about filling out a form "verifying" that she worked for him as a sales manager earning \$8000 a month, although she had only worked part-time for her brother and only in the past. It was reasonable for the jury to believe Bowling's testimony on this point and to infer from it that defendant Phillips would have known from this that she was submitting false information in her loan application.

The jury verdict was supported by credible evidence. Defendant argues that there were too many inconsistencies in the evidence to allow a jury to find her guilty beyond a reasonable doubt, but she is wrong. There were inconsistencies, as there are in almost every trial, but none of them amount to a reason to overturn the jury's finding.

ORDER

IT IS ORDERED that the motions for new trial and judgment of acquittal filed by defendants ErinHall and Lacey Phillips are DENIED.

Entered this 28th day of October, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge