IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

11-cr-13-bbc

v.

TRACI GRAY and
SAMANTHA JOHNSON,

Defendants.

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After her conviction on one count of conspiring to make false statements for the purpose of influencing a federally insured lender and one count of making a false statement for that purpose, in violation of 28 U.S.C. § 1014, defendant Traci Gray filed a motion for judgment of acquittal under Fed. R. Crim. P. 29 or for a new trial under Fed. R. Crim. P. 33 that her co-defendant, Samantha Johnson, joined. Defendants argue that the government failed to prove one of the essential elements of § 1014, specifically, that defendants had the requisite intent to influence the actions of a lending institution. They argue also that the evidence was insufficient for the jury to find them guilty. Neither argument is persuasive.

## BACKGROUND

Defendants were charged in a two-count indictment returned on January 19, 2011. Count one charged them with conspiring with Brian Bowling and others to knowingly make false statements for the purpose of influencing the action of Fremont Investment & Loan, a federally insured institution, in connection with a residential loan application. The loan application in question was for a mortgage on a house that defendant Gray wanted to purchase for herself, her boyfriend, Vincent Anderson, and her four children. Because Anderson had a bad credit rating and Gray's income was too low, in and of itself, to qualify for a mortgage, her friend and co-defendant, Samantha Johnson, agreed to co-sign the loan application. From the trial evidence, it appears that defendant Johnson participated in the scheme to help her friend Gray obtain a mortgage, help another friend (Shannon Hinrichs) sell a house she had built but was unable to sell and earn a finder's fee from Hinrichs.

At the relevant times, Bowling was a mortgage broker, operating a company known as Platinum Concepts. He has since been convicted of wire fraud, involving mortgage loan applications, and sentenced to a term of imprisonment of 51 months.

Neither defendant Gray nor Johnson testified at the trial. The jury found them guilty of both counts of the indictment.

A. Failure to Prove Essential Elements of Charge

Defendants' first argument can be disposed of fairly quickly. Section 1014 requires the government to prove (1) that defendants made a false statement to a financial institution; (2) that they knew the statement was not true when they made it; (3) that they made the statements with the intent to influence the action of a lending institution; and (4) that the accounts of the lending institution were insured by the Federal Deposit Insurance Corporation. Defendants contend that the third element requires the government to show that the false statement has the capacity to influence the lender and that the government failed to make this showing. They are wrong about what the government must show. Materiality is not an element of either charge, which means that the government is not required to show that the false statements or omissions had any effect on the lender or would have been likely to have had an effect. It need show no more than that the defendants intended their statements or omissions to affect the lender's actions. Thus, all it had to prove to establish the third element is that defendants signed the false statements, knowing them to be untrue and intending that they be used to persuade a lender to approve their application for a mortgage loan.

B. Validity of Jury's Verdict

Reduced to its essentials, defendants' second argument is that the jury should not

have believed the government's evidence at trial. This is a difficult argument to win. A disappointed defendant challenging a jury verdict must show that no reasonable jury could have reached the same decision. United States v. Farris, 532 F.3d 615, 618 (7th Cir. 2008) (holding that reversal of criminal conviction is warranted "only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt"). Reversal requires more than simple disagreement with the jury's credibility decisions. United States v. Kimoto, 588 F.3d 464, 473 (7th Cir. 2009) (it is province of jury to "'parse the facts, to weigh the credibility of each witness and to disregard the testimony of witnesses it found to be less credible'") (quoting Carter v. Chicago Police Officers, 165 F.3d 1071, 1081 (7th Cir. 1998)). A reviewing court is authorized to "set aside credibility determinations only if they are clearly erroneous, which occurs 'only if the [fact finder] has "chosen to credit exceedingly improbable testimony."'" United States v. Smith, 576 F.3d 681, 687 (7th Cir. 2009). See also United States v. Cardona-Rivera, 904 F.2d 1149, 1152 (7th Cir.1990) (holding that testimony will be found exceedingly improbable only if it is "internally inconsistent" or "implausible on its face").

Defendant Gray views the evidence as showing that she was a novice who went to Brian Bowling for help in obtaining a home loan, that it was Bowling who was responsible for filling out all of the loan applications and that she relied on his experience and knowledge. She maintains that Bowling acted on his own to inflate defendants' earnings on

the loan application, omit any indication of a second mortgage, add an imaginary bank account balance of $50,000 and lie about Johnson's ownership of her own house and her intentions to live in the new house with defendant Gray. Defendant Gray points out that she and her co-defendant put in extensive evidence of Bowling's lack of credibility and to her own inability to understand complex financial matters. She argues that she was "certainly not sophisticated enough to pull off this type of scam on her own." Def. Gray's Br., dkt. #152, at 7.

It is not enough for defendants to argue simply that they put in evidence of lack of credibility. As the cases cited above hold, credibility determinations are for the jury, which is free to decide that a witness is credible as to particular testimony, even if that witness has been found guilty in the past of crimes involving dishonesty and false statements. In this case, Bowling admitted his lies on the loan applications that he prepared on defendants' behalf and he was corroborated on important points by witnesses who did not have prior convictions. I cannot say that to the extent the jury found Bowling credible, it relied on "exceedingly improbable" evidence that was implausible on its face.

Although defendants maintain that they were too unsophisticated to pull off a scam, that they were never shown the final form of the loan applications before the loan closing, that they signed documents they had no opportunity to read and that all the false statements were engineered by Bowling without defendants' knowledge, they cannot show that it was

error for the jury to reject these arguments. Defendants never testified to these matters or to anything else, whereas the jury had ample evidence from other witnesses from which it could find in favor of the government. First of all, the government never charged defendants with pulling off the scam on their own; it charged them only with conspiring with Bowling and each other to knowingly make false statements for the purpose of influencing a lender and, separately, to knowingly make false statements. Second, it was undisputed that defendants signed papers that contained all manner of false statements about their income levels, their intent to occupy the house jointly, their employment histories and defendant Johnson's present and former addresses.

Third, the jury heard testimony about the extensive negotiations that preceded the closing. It knew from this testimony that both defendants were not planning to occupy the house, although that was what they said on the loan application and other documents. Instead, Gray was to occupy it with her boyfriend, Vincent Anderson, and her four children, while Johnson would remain at her house, which she had purchased through Habitat for Humanity. Fourth, the jury heard evidence that both defendants had signed a form at the closing telling the lender that Vincent Anderson was defendant Gray's nearest relative not living with her, which was not true. In fact, he was planning to occupy the new house with her. Fifth, the jury learned that both defendants signed a form HUD-1 that did not mention the $32,000 loan forgiveness they had received from Richard Hinrichs or cash payments he

had made to them, such as money for draperies and other items. Although defendants point out correctly that this form is not one that could have influenced the lender because it is submitted only to the Department of Housing and Urban Affairs, it is additional evidence of defendants' willingness to sign a document containing false statements, if doing so would help defendant Gray buy a house.

Sixth, the jury might have inferred Gray's guilty knowledge of the false statements on her loan application from her actions after the closing, when she took the $5000 check from Richard Hinrichs that he gave her, obtained a cashier's check from Hinrichs's bank and then deposited the cashier's check at her own bank. There could be an innocent explanation for this act (Gray may have wanted to have a cashier's check to deposit so that she could draw on the proceeds immediately), but the jury was entitled to believe that the act showed guilty knowledge, particularly in the absence of any testimony from Gray to the contrary.

Defendants place great weight on the evidence of the pre-closing meeting that they had with Bowling and point to evidence showing that the meeting took place on October 3, 2006, more than a month before the November 15 closing, supporting their claim that they never saw or discussed the final documents before the closing because they did not exist at that time. This, they say, is proof that Bowling was lying when he described a later meeting closer to the time of the closing, but the evidence is not so clear-cut. It was not unreasonable for the jury to have believed Bowling on this point, particularly when two other witnesses,

Shannon Hinrichs and her father, Richard Hinrichs, testified that such a meeting took place at about the same time as Bowling described.

Defendants note that the earlier date of the meeting and their alleged lack of knowledge of the terms of the application are bolstered by the testimony of Bowling's assistant, Marcy Meyers. Meyers testified that Gray called her on November 10, 2006, only five days before the closing, asking for information about the application. According to defendants, this is evidence that Bowling had never gone over the final terms of the documents with them.

Even if defendants are right about the date of the pre-closing meeting and about not having any advance knowledge about the terms of the loan applications, the jury was not required to find from this that defendants never knew that the documents contained false statements. The closing agent testified that she went over the documents, page by page, and instructed defendants to initial every page of the loan application and to sign the application on four different pages (pp. 3-6). The false information would have been obvious to any reader of these forms, making it implausible that neither defendant noticed any of it during the initialing and signing of the pages.

In summary, defendants have failed to show that the jury acted unreasonably in finding them guilty. To the contrary, it performed its duty of determining whether the witnesses were credible, in whole, in part or not at all. It did not err in believing Bowling's

testimony despite his prior conviction and admitted false statements because his testimony was not implausible on its face and it was corroborated by other witnesses. In the end, the jury weighed the evidence and came to the reasonable conclusion that defendants made false statements in the papers they submitted to Fremont Investment & Loan, that defendants knew the statements were untrue when they made them, that they made the statements with the intent to influence Fremont and that Fremont's accounts were insured by the FDIC. Their motions for judgment of acquittal or for a new trial will be denied.

ORDER

IT IS ORDERED that the motion for judgment of acquittal under Fed. R. Crim. P. 29 and the motion for new trial under Fed. R. Crim. P. 33 filed by defendants Traci Gray and Samantha Johnson are DENIED.

Entered this 4th day of August, 2011.

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