IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No.: 13-5931

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JEFFREY WHALEY
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE FROM THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

REPLY BRIEF OF
DEFENDANT-APPELLANT JEFFERY WHALEY

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I. THE DISTRICT COURT DEPRIVED MR. WHALEY OF A FAIR TRIAL WHEN IT DENIED HIM OF THE OPPORTUNITY TO RAISE HIS ADVICE OF COUNSEL DEFENSE.

The Government mischaracterizes Mr. Whaley's first argument on appeal. Mr. Whaley raised a substantive argument: the district court violated his due process rights when it deprived him of the opportunity to present his advice of counsel defense. Instead of addressing the substantive argument, the Government attempts to reframe the argument in procedural terms, suggesting that the district court properly denied severance and precluded hearsay evidence. (Gov't Brief at 105). These arguments fail on their own terms. More importantly, the arguments do not address the due process violation that resulted from the erroneous rulings.

Mr. Whaley sought to defend by claiming that he acted on the advice of Mr. Kerley, his title attorney and his co-defendant. (R. 53, Motion to Join Motion to Sever, PageID# 358). Since Mr. Whaley could not compel Mr. Kerley to testify, Mr. Whaley sought to introduce the exculpatory portions of his pre-indictment statement to law enforcement. Id. Naturally, prior to trial, Mr. Kerley objected to the introduction of this evidence in a joint trial, citing Bruton v. United States, 391 U.S. 123 (1968). Id.

Not only did the district court deny the motion to sever, it precluded the admission of the exculpatory portions of Whaley's statement, holding that it

constituted inadmissible hearsay. (R. 69, Order at PageID#538). Notwithstanding this ruling, Mr. Whaley sought to elicit testimony regarding his advice of counsel defense during his cross-examination of Special Agent Duke Speed. (R. 171, Trial Tr. at PageID#3081-82). The trial court again precluded the testimony regarding Mr. Whaley's exculpatory statements. Id. at PageID#3083. These rulings effectively prevented Mr. Whaley from presenting the best evidence of his advice of counsel defense – his spontaneous statement to law enforcement that occurred prior to his even knowing he was under investigation.

The hearsay ruling goes too far. Mr. Whaley took the stand and faced impeachment with his pre-indictment statement to law enforcement. (R. 169, at PageID#2582). Had he been permitted to raise his advice of counsel defense, he could have introduced the statement as a prior consistent statement for rehabilitation, as permitted under Federal Rule of Evidence 801(d)(1)(b). See United States v. Rubin, 609 F. 2d 51, 63 (2nd Cir. 1979).

In Rubin, a law enforcement agent testified regarding a statement the defendant gave during the course of an investigation. Id. at 57. After the defense attorney impeached the agent with the notes of his investigation, the Government sought to introduce the notes as substantive evidence. Id. at 58.

On appeal, the Rubin Court reasoned that, under the logic of Federal Rule of Evidence 106, the district court did not err in admitting the notes in their entirety as

prior consistent statements. The Second Circuit noted that it has "repeatedly recognized that where substantial parts of a prior statement are used in cross-examination of a witness, fairness dictates that the balance be received so that the jury will not be misled." Id. at 63 (citations omitted). Thus, it affirmed the introduction of the notes in their entirety. Id.

Here, however, prior to trial and during the course of his cross-examination of Agent Speed, the district court prevented Mr. Whaley from bringing up his exculpatory statements, even though the Government relied on other portions of the statement. At the very least, Mr. Whaley should have been permitted to introduce the unredacted portion of his statement for the non-hearsay purpose of rehabilitating his testimony through his prior consistent statement. But the district court clearly held prior to and during trial that the unredacted statement would not be introduced, so Mr. Whaley was prevented from raising this defense.

The Government makes much of Mr. Whaley's failure to raise the advice of counsel defense when he took the stand. The Government correctly observes that Whaley testified that Lee directed the conspiracy and never raised the advice of counsel defense. (Gov't Brief at 49, 106). But this is hardly surprising. The trial court precluded him from raising his advice of counsel defense, so he had no choice but to change strategy and place blame on Mr. Lee.

Moreover, once Mr. Whaley took the stand, he had to choose between (1) risking a mistrial under Bruton by forcing the jury to consider the pre-indictment statement regarding the participation of his co-defendant; or (2) change course and place the blame on Lee. Since the Government adduced virtually no evidence regarding Mr. Whaley's knowledge of the fraudulent scheme or his fraudulent intent, he sensibly chose to change his theory of defense instead of giving the Government or his co-defendant the opportunity to move for mistrial. This decision does not excuse the trial court's preclusion of Mr. Whaley's preferred defense in the first place.

The course of the proceedings also highlights a broader problem with the failure to sever the case. The district court, in its pretrial order, recognized the possibility that Mr. Whaley could introduce the statement, but held he could only do so if he took the stand. (R. 69 at PageID#538). This forced Whaley to choose between his due process right to present his advice of counsel defense and his constitutional right not to testify. The Government's interest in judicial economy is not so weighty as to force Mr. Whaley to pick which constitutional right he wants to waive.

The cases cited by the Government are inapposite because none involve the foreclosure of a defendant's due process right to present his theory of defense. See United States v. McDaniel, 398 F.3d 540, 545-46 (6th Cir. 2005) (extra-judicial

statements not central to theory defense); United States v. Gallagher, 57 F. App'x 622, 628-29 (6th Cir. 2003) (defendant presented entrapment defense through his own testimony); United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996). As such, this case is readily distinguishable.

Since Mr. Whaley was never afforded the opportunity to present his advice of counsel defense, this Court should reverse the district court and remand this matter for a new trial.

II. THE GOVERNMENT FAILED TO ESTABLISH MR. WHALEY'S INTENT TO DEFRAUD.

Contrary to the Government's recitation of the facts, the evidence at trial showed that it was Mr. Lee, not Mr. Whaley, who orchestrated the fraudulent scheme at issue in this case. Therefore, the district court erred when it denied the Mr. Whaley's motion for judgment of acquittal.

Although the Government stresses that Mr. Whaley directed his bank to list the borrower's names as remitter on certain cashier checks and otherwise engaged in what it characterizes as deceptive activity, (Gov't Brief at 115-16), these actions were done at the direction of Mr. Lee, and they do not prove Mr. Whaley's intent to defraud. Mere false or fraudulent pretenses or representations are insufficient; there must be intent to deceive or cheat. See, e.g., United States v. Wynn, 684 F.3d 473, 478 (4th Cir. 2012). This requires the defendant to intend to cause "actual harm." Id.

"Misrepresentations amounting only to a deceit are insufficient . . . . [A] Defendant must specifically intend to lie or cheat or misrepresent with the design of depriving the victim of something of value." United States v. D'Amato, 39 F.3d 1249 (2nd Cir. 1994); United States v. Guadagna, 183 F.3d 122, 129 (2nd Cir. 1999); United States v. Starr, 816 F.2d 94, 98 (2d Cir.1987) ("Misrepresentations amounting only to a deceit are insufficient," as "the deceit must be coupled with a contemplated harm to the victim.").

There was simply no evidence that raised an inference Mr. Whaley intended to cause any loss or harm on the part of the banks. Thus, for the reasons explained in the Initial Brief, this Court should reverse the district court's denial of his judgment of acquittal.

III. THE DISTRICT COURT IMPERMISSIBLY PERMITTED THE INTRODUCTION OF EXPERT TESTIMONY THROUGH UNQUALIFIED LAY WITNESSES.

A witness can provide expert testimony or lay testimony. There is no middle ground. Lay testimony "'results from a process of reasoning familiar in everyday life, whereas an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field.'" United States v. Faulkenberry, 614 F.3d 573, 588 (6th Cir. 2010) (quoting United States v. White, 492 F.3d 380, 401 (6th Cir. 2007)).

Opinion testimony of lay witnesses is strictly limited under Rule 701 of the Federal Rules of Evidence. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Fed. R. Evid. 701; United States v. Nixon, 694 F.3d 623, 627 (6th Cir. 2012). If an opinion "results from a process of reasoning which can be mastered only by specialists in the field," it is expert testimony. White, 492 F.3d at 401. "Mortgage underwriting standards are beyond the experience of the typical juror." United States v. Spencer, 700 F.3d 317, 321-22 (8th Cir. 2012).

With respect to the SunTrust transactions, the Government does not dispute that Barbara DeMichele had no personal knowledge of the facts or circumstances underlying the approval of the loans at issue. (Gov't Brief at 98). Indeed, as the Government candidly admits, the purpose for calling her was to establish materiality by adducing testimony regarding the general underwriting practices of SunTrust. *Id*. at 98-100.

Thus, despite the fact that she had not reviewed any of the SunTrust loans before approval, Ms. DeMichele was permitted to testify that the loans would not have been approved if the true nature of the down payment had been known.

(R.166, PageID#1958-1959, 1980-1982, 2010-2011; R.167 PageID#2031-2032, 2062-2063). She also opined on the most critical issue: whether the statements regarding the source of "cash from borrower" were "material." (R.167, PageID#2121).

The Government all but concedes that it *could have* located and called employees with actual knowledge of the underwriting and processing of these particular loans, but, since the Nashville office had closed, the Government "*elected* to call another SunTrust employee who had been employed in the underwriting department during the relevant time." *Id.* at 98 (emphasis added). The reasonableness of this course of action is not the issue. The issue is whether the Government could, without qualifying its witnesses as experts, elicit technical and specialized testimony regarding the "product guidelines used to underwrite those loans," (Gov't Brief at 11), instead of calling lay witness with personal knowledge of the processing of these particular loans.

The introduction of this testimony violates the Federal Rules of Evidence. The testimony concerned the intricacies of applying the particular lending practices and underwriting standards of SunTrust to the loans at issue in this case. This involved offering an opinion regarding a highly-technical field of knowledge, which is appropriate testimony for an expert, but not for a lay witness. The Government complains that it would be too onerous to require it to qualify an

expert on this issue. (Gov't Brief at 97 n.15). But the solution is *not* to proffer "an expert in lay witness clothing." Fed. R. Evid. 701 (advisory committee notes). The solution is to call lay witnesses with personal knowledge of the loans in question.

In addition to violating the Federal Rules of Evidence, calling these witnesses deprived the defendants of the opportunity to question the lay witnesses with personal knowledge of the loans on the materiality of the false statements. As argued in the Brief of Defendant-Appellant Kerley, the "willingness of banks to issue 'liars' loans' during the real-estate boom is notorious." (Kerley Brief at 33). Yet, because the Government called witnesses with no personal knowledge of the underwriting of the loans in question, the defendants could not probe these witnesses about the particularly permissive lending practices used by the employees who processed the loans.

If, as the defendants claimed, they could have established that the loans would have been processed and approved regardless of the purported falsehoods on the applications and HUD statements, then the statements could not be deemed material. However, by using stealth experts instead of a lay witnesses, the Government took that argument off the table. Contrary to the claims of the Government, this violation of the Federal Rules of Evidence is by no means harmless.

Accordingly, this Court should reverse the judgment and sentence of Defendant-Appellant Whaley and remand this matter for further proceedings.

CONCLUSION

Based upon the foregoing, the judgment and sentence entered by the District Court should be vacated and the matter remanded for new trial.

Dated: May 14, 2014.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), the undersigned certifies that this brief complies with the type-volume limitations of said rule. Exclusive of the exempted portions in said rule, the brief, which was prepared using Microsoft Word, contains 2,093 words.

/s/ Andrew B. Greenlee, Esq.
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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was filed electronically on May 14, 2014, and that a copy was made upon opposing counsel through the Court's CM/ECF system.

/s/ Andrew B. Greenlee, Esq.
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