

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CASE NO. 05-10236

**UNITED STATES OF AMERICA
Plaintiff-Appellee**

v.

**ROBERT ANTONY XXX
Defendant-Appellant.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BRIEF OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

The Appellant, **Robert Antony XXX**, was tried and sentenced before the Honorable **John H. McBryde**, United States District Court Judge for the Northern District of Texas. The Honorable **Charles Bleil**, United States Magistrate Judge for the Western District of Texas conducted preliminary proceedings in this case.

The Appellant was originally represented below by **Andrew Platt** and was represented at trial by **Danny Duane Burns** and was represented at sentencing by **David Finn** and **F. Clinton Broden** of the law firm **Broden & Mickelsen**. Appellant is represented on appeal by Mr. Broden.

The Appellee, the United States of America, was represented below by **David L. Jarvis** and is represented on appeal by **Nancy Larson**, Assistant United States Attorneys for the Northern District of Texas.

F. Clinton Broden

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested.

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STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291, as this is an appeal from a final judgment entered by the United States District Court for the Northern District of Texas.

STATEMENT OF THE ISSUES

I. Whether a District Court errs in refusing to instruct a jury that, for purposes of the bank fraud statute, any alleged false representations to a financial institution had to be false at the time the representations were made.

II. Whether a District Court errs in allowing the government to argue that a defendant can be convicted of bank fraud even if the defendant does not have the intent to deceive the financial institution at the time he makes the representations in question to the financial institution.

III. Whether the evidence was sufficient to support the jury's verdict that Robert XXX intended to defraud Summit Bank *at the time* he applied for the funds in question.

STATEMENT OF THE CASE

I. Proceedings Below

Robert Antony XXX was charged in a one count indictment with bank fraud, in violation of 18 U.S.C. § 1344. *See* Excerpts at 3.¹ Mr. XXX was found guilty by a jury on October 5, 2004. *Id* at 4.

He was sentenced, on January 21, 2005, to six months imprisonment, five years supervised release and a \$100 special assessment and was ordered to pay restitution in the amount of \$390,000. *Id.* at 5.

On February 3, 2005, Mr. XXX filed a timely notice of appeal. *Id.* at 2.

II. Statement of the Facts

The facts of the case are simple and largely undisputed.

Progressive Tractor Corporation (“Progressive”) had a commercial instalment agreement providing a line of credit with Summit Bank which allowed Progressive to borrow money to purchase various equipment which it would then lease out or resell. *See* Rec. Sup. I:80-81. Randall Mathews was the owner of Progressive and Robert XXX did accounting work for Progressive. *Id.* at Sup. I:97-98.

¹Citations to the Record (“Rec.”) are to volume number:page number. Citations to the Record Excerpts (“Excerpts”) are to Tab number.

On May 12, 2000 at 10:23 a.m., Robert XXX faxed a request to Summit Bank indicating that Progressive wanted to purchase two articulated dump trucks from American Midwest Equipment Company for \$433,332.00 from Progressive's line of credit. Summit Bank would fund \$390,000 of the purchase price. *See* Sup. I:83 and Gov't Exhibits 2-3. Mr. XXX also faxed to Summit Bank, at the same time, a Progressive check made payable to American Midwest Equipment Company in the amount of \$411,655 as evidence of the intent to purchase the trucks once funding was received from Summit as well as a security document giving Summit a security interest in the two dump trucks (Serial No. 5365 and 5348). *Id.* at Sup. I:84-85 and Gov't Exhibits 4-5. Once these documents were received by Summit Bank, it placed \$390,000 in Progressive's operating account at the bank. *Id.* at Sup. I:85 and Gov't Exhibit 7.

It was later discovered by Summit Bank that the \$411,000 check to American Midwest Equipment Company never cleared Progressive's account. *Id.* at Sup. I:86. Upon inquiry, Mr. XXX admitted that Progressive owed the State of Texas back taxes that he was lead to believe by his boss, Randy Mathews, could be paid from a large account receivable due Progressive from U.S. Stone. Nevertheless, when the U.S. Stone account receivable was not received, Mr. XXX admitted that he used part of the \$390,000 Summit Bank funds to pay the back taxes. *Id.* at Sup. I:87, 93-94, 106, 131, 132-33, 141. Indeed, Mr. XXX wrote

two checks to the Texas Comptroller dated May 12, 2000 and totalling \$341,000 that cleared Progressive's bank account on May 26, 2000. *Id.* at Sup. I:91-92; Government Exhibits 6-7.²

Mr. XXX testified that *at the time he received the money from Summit Bank* his intent was to pay for the trucks and that he intended to use the U.S. Stone Money to pay the back taxes. *Id.* at Sup. I:130, 132-33, 138, 141. In fact, on cross-examination of Mr. XXX, the following exchange took place:

Q. [By Prosecutor] And at the moment at 10:22 in the morning when you faxed that [material to Summit Bank], your testimony is that was a true statement and you fully intended to do that.

A. My intent was to use that money to purchase those trucks.

Id. at Sup. I:138.

Randy Mathews testified at trial that, approximately 30 days after receiving the Summit Bank funds, Mr. XXX sought funding for the two dump trucks (Serial No. 5365 and 5348) from another bank, Deutsche Bank, and that Progressive ultimately purchased the dump trucks using that funding. *Id.* at Sup. I:100-01, 108. In other words, Mr. Mathews claimed that the trucks were double financed. Nevertheless Mr. XXX testified that he never purchased the trucks in question through Deutsche Bank. *Id.* at Sup. I:125-26. In fact, at sentencing, it

²A Summit Bank official testified at trial that Summit Bank would not have lent Progressive \$390,000 to pay back taxes. *See Rec.* at Sup. I: 92-93.

was learned that Deutsche Bank did *not* finance the trucks and that the trucks in question were simply never purchased when the Summit Bank money was used to pay the back taxes. *See* Sup. III:60; Defendant's Exhibit 3. It was also learned that, after Mr. XXX left Progressive, Mathews sold Progressive equipment out of inventory without repaying the banks that had security interests in the equipment. *Id.* at Sup. III:61-63.

SUMMARY OF THE ARGUMENT

The Eleventh Circuit's decision in *United States v. McCarrick*, 294 F.3d 1286 (11th Cir. 2002) is directly on point.

In this case, there was no evidence presented that Mr. XXX had the intent to defraud at the time he made the representations in question to Summit Bank. Indeed, it was undisputed that, at the time he made the representations in question to Summit Bank, he had every reason to believe that Progressive would receive a large payment owed from U.S. Stone that would be used to pay the tax monies outstanding to the State of Texas. It was only after the U.S. Stone account receivable was not received and *after* the loan from Summit Bank had been received that Mr. XXX admittedly used the Summit Bank money to pay the tax monies to the State of Texas rather than follow through with the purchase of the dump trucks. In other words, both the District Court and the government contributed to the jury believing that Mr. XXX could be convicted of bank fraud even if he did not have the intent to defraud Summit Bank at the time he made his representations to the bank.

The District Court erred by refusing to instruct the jury that, for purposes of the bank fraud statute, a representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity *at the time the representation is made*. Likewise, this error was compounded when the District

Court allowed the government to argue in its closing: “Whether you believe [Mr. XXX] intended to deceive Summit at 10:22 in the morning on May 12 of 2000 or form[ed] the intent later that day or later that month or through July...” he is guilty of bank fraud.

Moreover, to the extent the jury understood that it must determine whether Mr. XXX had an intent to defraud Summit Bank *at the time* he made his representations to the bank, the evidence was insufficient as a matter of law to support a finding that Mr. XXX had the intent to defraud at the requisite time.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT MR. XXX'S FALSE STATEMENT TO SUMMIT BANK HAD TO BE FALSE AT THE TIME THE STATEMENT WAS MADE.

II. THE DISTRICT COURT ERRED WHEN IT ALLOWED THE GOVERNMENT TO ARGUE IN ITS CLOSING THAT MR. XXX COULD BE CONVICTED OF BANK FRAUD EVEN IF MR. XXX DID NOT HAVE THE INTENT TO DECEIVE AT THE TIME HE MADE HIS REPRESENTATIONS TO SUMMIT BANK.

The district court's refusal to grant a requested jury instruction is reviewed for abuse of discretion. *See United States v. McClatchy*, 249 F.3d 348, 356 (5th Cir. 2001). Nevertheless, reversible error occurs when the charge, “examined in the full context of trial including the final arguments of counsel” has thwarted defendant's presentation of his defense. *United States v. Fooladi*, 746 F.2d 1027, 1030-31 (5th Cir. 1984), *cert. denied*, 470 U.S. 1006 (1985).

Here, the government alleged that Mr. XXX committed bank fraud by making a false representation to Summit Bank when he applied for the funds to buy the trucks in question. The jury was instructed that:

A representation is “false” if it is known to be untrue or is made with reckless indifference as to its truth or falsity.

Rec. at I:85. Nevertheless, Mr. XXX objected and requested that “at the time the representation is made” be added to the end of that sentence of the instructions. *Id.* at I:42, Sup. I:159, 182-83. Indeed, throughout trial, Mr. XXX admitted that

he misused the Summit Bank funds but argued that he did not commit bank fraud because, at the time he made his representations to the bank, he intended to use the funds to purchase the trucks in question. The District Court refused his request. *Id.* at Sup. I:159, 182-83.

The District Court's failure to properly instruct the jury was compounded when the government argued at closing: "Whether you believe [Mr. XXX] intended to deceive Summit at 10:22 in the morning on May 12 of 2000 or form[ed] the intent later that day or later that month or through July..." he is guilty of bank fraud. *Id.* at Sup. I:169. Although Mr. XXX objected to this argument by the government, the District Court simply responded by stating: "I'm going to give the jury the instructions on the law, and they'll be guided by the legal instructions I give them."

This Court has made clear that, in regard to false statements, "[t]he relevant facts must be false when the statement is made, not before or after that time." *United States v. Shah*, 44 F.3d 285, 294 n.16 (5th Cir. 1995) ("The [district] court went on [when instructing the jury], 'A statement is false if it was untrue when made and then known to be untrue by the person making it.' This instruction represents a correct and adequate statement of the law.").³

³Indeed, there are a myriad of cases, requiring that, for a violation of the wire, mail or bank fraud statutes, the government is required to show that, *at the time* a defendant allegedly made false statements or representations he knew that they were false. *See, e.g., United States v. Fredette*, 315 F.3d 1235, 1242 (10th Cir.), *cert. denied*, 538 U.S. 1045(2003); *United States v. Phath*, 144 F.3d

Although *Shah* dealt with a conviction under 18 U.S.C. § 1001 rather than 18 U.S.C. § 1344, other courts have dealt with this issue in the context of 18 U.S.C. § 1344. For example, in *United States v. Brennan*, 832 F. Supp. 435, 440 (D. Mass. 1991), *aff'd*, 994 F.2d 918 (1st Cir. 1993), the Court held that, in order to sustain a conviction under 18 U.S.C. § 1344, the government was required to prove that the alleged false statement was known by the defendant to be false “when made.” Similarly, in *Phath*, the First Circuit, following a bank fraud conviction, defined “false statements and misrepresentations” as “any statement or assertion which concerns a material fact and which, *at the time it was made*, was either known to be untrue or was made with reckless indifference to its truth or falsity.” *Phath*, 144 F.3d at 148 (emphasis added). Likewise, the Eighth Circuit Pattern Jury Instruction in cases in which a defendant is charged with violating 18 U.S.C. § 1344 recommends that the jury be charged that a representation is false if it is “untrue *when made*.” See <http://www.juryinstructions.ca8.uscourts.gov> at pg. 274.

Directly on point is the Eleventh Circuit’s recent decision in *United States v. McCarrick*, 294 F.3d 1286 (11th Cir. 2002). There, the defendant McCarrick was charged with a violation of 18 U.S.C. § 1344. *Id.* at 1288. He had obtained

146, 148 (1st Cir. 1998); *United States v. Milton*, 8 F.3d 39, 46 (D.C. Cir. 1993), *cert. denied*, 513 U.S. 919 (1994); *United States v. Begnaud*, 783 F.2d 144, 146 (8th Cir. 1986).

a bank loan, *inter alia*, to purchase certain equipment for his automobile repair business. *Id.* He had submitted a sale-proposal and acceptance for equipment he was to purchase from Terry McVittie to the bank and the bank gave him a check made payable to both he and McVittie which he (McCarrick) deposited into his account. *Id.* at 1288-89. Shortly thereafter, McCarrick’s business “experienced serious financial difficulties, and he canceled the order with [McVittie]” and used the money to “keep his business afloat.” *Id.* McCarrick argued on appeal that the evidence was insufficient to convict him of bank fraud. *Id.*

The Eleventh Circuit noted that “[t]he government's sole allegation of fraud in [the] case [was] that, at the time McCarrick signed the loan documents, he had no intention of buying the spray paint booth, as he represented.” *Id.* at 1290. On the other hand, McCarrick argued, as did Mr. XXX in the instant case, that the evidence showed that everything on the documents he signed with the bank was truthful because, at the time he signed the documents, he intended to purchase the equipment at issue. *Id.* at 1291. “Any wrongdoing he may have committed, McCarrick contend[ed], occurred subsequent to the signing of the loan documents, and [was] insufficient to support the jury's inference that he intended to defraud the SBA *at the requisite time.*” *Id.* (emphasis added). The Eleventh Circuit, **when presented with almost the exact fact scenario as the instant case**, agreed:

No evidence was presented of events occurring prior to McCarrick's signing of the loan documents that related to his alleged intent to defraud. The evidence at trial consisted entirely of events that occurred subsequent to the signing of the loan documents. *The government concedes that any criminal intent McCarrick formed after signing the loan documents cannot support his convictions on the crimes charged in the indictment, which require that McCarrick have acted with intent to defraud the SBA at the time of the signing of the loan documents.*

Id. (emphasis added). In the instant case, however, the government argued exactly contrary to what it conceded in *McCarrick*.⁴

In short, the government essentially argued the jury to that anytime a person uses bank funds inconsistent with their original purpose, a person has committed bank fraud *regardless* of when the intent to engage in the inconsistent use takes place. This is not the law and the District Court refused to make that clear to the jury. Thus the government's closing argument was error and the District Court's error in refusing to sustain Mr. XXX's objection to that argument was then compounded when it denied Mr. XXX's requested jury instruction on the issue. Independently or cumulatively, these errors require that Mr. XXX be granted a new trial.

⁴Mr. XXX also notes that, in *United States v. Cihak*, 137 F.3d 252, 262 (5th Cir.), *cert denied sub. nom.*, *Bloch v. United States*, 525 U.S. 847 (1998), this Court confirmed that the offense of bank fraud is complete "once the funds leave the control of the bank." Given this holding in *Cihak*, it is difficult to square the government's closing argument in this case that, although the funds left Summit on May 12, 2000, the bank fraud could have taken place "later that month or through July..."

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE JURY'S FINDING THAT MR. XXX INTENDED TO DEFRAUD SUMMIT BANK AT THE TIME HE APPLIED FOR THE FUNDS IN QUESTION ON MAY 12, 2000.

The Due Process Clause of the Fifth Amendment to the United States Constitution requires the government to prove beyond a reasonable doubt every element of a crime with which a person is charged. *See In re Winship*, 397 U.S. 358, 365 (1970). In ruling on a sufficiency of the evidence challenge, a court must examine trial evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in favor of the verdict. *Glasser v. United States*, 315 U.S. 60 (1942). Evidence is sufficient if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt based upon the evidence presented at trial. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).⁵

It is well understood that the “intent to defraud” is an element of bank fraud. *See, e.g., United States v. Chendeka*, 253 F.3d 815, 819 (5th Cir. 2000). As discussed above, the intent to defraud must exist at the time the representations are made. Here there was insufficient evidence to support this determination to the extent the jury understood that it must make this determination.

⁵Mr. XXX is entitled to the “rational juror” standard of review because his trial counsel filed a post trial motion for a new trial and judgement of acquittal. *See United States v. Thomas*, 12 F.3d 1350 (5th Cir. 1994).

Indeed, as also discussed above, the United States Court of Appeals for the Eleventh Circuit faced almost the same fact scenario in *McCarrick* except that evidence of an intent to defraud at the time the bank funds were obtained were stronger in that case. at 1290. There, McCarrick testified that, at the time he signed the loan documents, he intended to purchase the equipment at issue. *McCarrick*, 294 F.3d at 1291. Nevertheless, there was evidence introduced by the government at trial to support its contention that McCarrick did not intend to buy the equipment at the time he signed the loan documents. First, McCarrick's business bounced approximately twenty checks after the loan was authorized, but before the proceeds were disbursed at the closing. Second, McCarrick canceled his order for the equipment only four weeks after McVittie (the equipment seller) ordered it from the manufacturer, even though McVittie told him it would probably take four-to-six weeks to deliver. Third, McCarrick's girlfriend signed McVittie's name on the loan check which McCarrick then deposited into his business account. *Id.* at 1291. Ultimately, the Eleventh Circuit concluded that the evidence was “insufficient to support the jury's inference that he intended to defraud the [financial institution] *at the requisite time*” and reversed the defendant’s bank fraud conviction. *Id.* (emphasis added). It also noted that “[e]ven if we assume that, in depositing the check into [his] business account, McCarrick wrongfully intended to use the money for general business expenses

until the spray paint booth arrived-and then to pay for the booth from the commingled funds when it did arrive-it simply does not follow that he did not intend to purchase the spray paint booth at the time he signed the loan documents.” *Id.* at 1291-92.

Here, of course, evidence of an intent to defraud at the time the representations were made to Summit is even weaker than the evidence at issue in *McCarrick*. In the instant case, it was undisputed that, at the time the representations were made to Summit Bank, Progressive had every reason to believe it would receive a large payment from U.S. Stone that would be used to pay the tax monies owed. In contrast, in *McCarrick*, there was no evidence introduced as to how, at the time the defendant made his representations to the financial institution and received the loan proceeds, he had intended to pay the operating expenses which were ultimately paid by the loan proceeds in order to “keep his business afloat.” *Id.* at 1289.

In sum, the evidence of an intent to defraud “at the requisite time” is even weaker in this case than the evidence in *McCarrick*. The evidence is simply insufficient to support the verdict in this case.

CONCLUSION

For the foregoing reasons, Mr. XXX's conviction should be reversed or, in the alternative, the case should be remanded for a retrial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on July 20, 2005, I caused two paper copies and one electronic copy of the foregoing Brief of Defendant-Appellant to be mailed by United States mail, postage prepaid, to Nancy Larson, Assistant United States Attorney, 801 Cherry Street, Suite 1700, Fort Worth, Texas 76102-6897

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