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United States Court of Appeals
Tenth Circuit

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ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>STEPHEN C. CARMAN,<br>Defendant-Appellant. | No. 89-3312<br>(D. C. No. 88-10096-01)<br>(D. Kan.) |

ORDER AND JUDGMENT*

Before MOORE, SETH and ANDERSON, Circuit Judges.

Defendant-appellant Stephen C. Carman was convicted, after a jury trial, on five counts of willful misapplication of bank funds in violation of 18 U.S.C. § 656. Defendant moved before trial to dismiss the indictment on the ground that essential elements of the offense were not alleged. This motion was denied. On appeal the defendant urges that the indictment was deficient because it did not allege an intent to injure or defraud. No other point is advanced.

Defendant was an officer of Farmers State Bank in Selden, Kansas. Bank deposits were insured by the Federal Deposit

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Insurance Corporation. Defendant's indictment stems from five separate nominee loans he allegedly authorized in 1984. Count III of defendant's indictment reads, in pertinent part:

> "On or about January 6, 1984, in the District of Kansas,
>
> STEPHEN C. CARMAN,
>
> being an officer and employee of the Farmers State Bank of Selden, Kansas, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, did willfully misapply moneys of the bank, . . . by authorizing the making of a loan by the bank to Mike Peterson . . . knowing the proceeds of the loan were not for the benefit of Mike Peterson, but that Mike Peterson would give, turn over and make available the proceeds of the loan to Gary Withers, all in violation of 18 U.S.C. 656."

The remaining counts allege similar nominee loan transactions and substantially track the language of Count III. How the misapplication of funds is accomplished is described. In each instance the names are stated, as are the dates and amounts of the loans and the fact that the bank's deposits were insured. The details of each loan are thus fully described. In each the <u>willful</u> <u>misapplication</u> is charged. The misapplication of funds is the crime. The nominee loans were made to circumvent the loan limits placed on the bank and applicable to the person who was ultimately to receive the loan proceeds.

Defendant contends that the trial court erred in denying his motion to dismiss the indictment on the ground that it failed to state an offense. His only point as to the indictment is that it is defective because it failed to allege the words "with an intent to injure or defraud" which he asserts is a required mental element under 18 U.S.C. § 656 although not therein stated. There is no assertion that he was in any way misled as to the nature of the offense or impaired in his defense. Had he needed further details, a motion for a bill of particulars was, of course, available to him.

We find no merit in defendant's argument. Fed. R. Crim. P. 7(c)(1) requires that an indictment "be a plain, concise and definite written statement of the essential facts constituting the offense charged." An indictment is sufficient under Rule 7 if it (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the accused of what he must be prepared to defend against, and (3) enables the accused to plead a judgment under the indictment as a bar to any subsequent prosecution for the same offense. Russell v. United States, 369 U.S. 749, 763-64; United States v. Staggs, 881 F.2d 1527, 1530 (10th Cir.); United States v. Rivera, 837 F.2d 906, 916-19 (10th Cir.); United States v. Kilpatrick, 821 F.2d 1456, 1461 (10th Cir.), aff'd sub nom., Bank of Nova Scotia v. United States, 487 U.S. 250.

We have held that an indictment is generally sufficient if it sets forth the offense in the words of the statute so long as the statute adequately states the elements of the offense. United States v. Salazar, 720 F.2d 1482 (10th Cir.), cert. denied, 469 U.S. 1110. 18 U.S.C. § 656 provides in relevant part:

> "Whoever, being an officer . . . or connected in any . . . [federally] insured bank . . . willfully misapplies any of the moneys, funds or credits of such bank . . .

> shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ."

The statutory elements of 18 U.S.C. § 656 are (1) the willful (2) misapplication (3) of money, funds or credits (4) of a federally-protected bank. United States v. Harenberg, 732 F.2d 1507, 1511 (10th Cir.).

In this case, defendant's indictment fully tracks the statutory elements specifically charging him with the "willful misapplication" of bank moneys as set forth under § 656. Additionally, as indicated, the date and amount of each nominee loan, the named parties and how the misapplication was done are described. It is correct, as defendant contends, that proof of intent to injure or defraud is necessary to establish the criminal intent to support a conviction, and this was done. _See_ Hernandez v. United States, 608 F.2d 1361 (10th Cir.). However, the absence of such language does not render the indictment deficient where, as here, defendant was charged with the statutory mental element of "willful misapplication." This is a statement of intent--willfully misapply--the funds. _See_ United States v. Previti, 644 F.2d 318, 319 (4th Cir.) (an indictment under § 656 which fails to allege "intent to defraud" is sufficient where it alleges a "willful misapplication"); United States v. Young, 618 F.2d 1281 (8th Cir.). We conclude that this indictment sufficiently charges the essential elements so as to apprise defendant of the nature of the charges against him to allow him to prepare and defend his case.

Defendant also asserts that the trial court erred in allowing the government to introduce evidence that in 1983 and 1984, he directed the preparation of fictitious minutes of board meetings which never occurred. The trial court found that this evidence was admissible under Fed. R. Evid. 404(b) solely to show defendant's intent to commit the crime charged.

The trial court's determination to admit evidence of other crimes under 404(b) will not be reversed by this court absent an abuse of discretion. United States v. Record, 873 F.2d 1363, 1373 (10th Cir.). Fed. R. Evid. 404(b) provides:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

In United States v. Suntar Roofing Inc., 897 F.2d 469, 479 (10th Cir.), we stated:

> "A defendant is protected from unfair prejudice if the evidence is relevant and offered for a proper purpose, if the probative value is not substantially outweighed by its potential for unfair prejudice, and if the court, upon request, instructs the jury to consider the evidence only for the proper purpose for which it was admitted."

<u>See</u> Huddleston v. United States, 485 U.S. 681, 691.

Defendant's primary contention is that the evidence was not offered for a relevant purpose because evidence of fictitious board meetings has no tendency to establish the requisite criminal intent for the nominee loans in question. He does not contest that the minutes were false; rather, he urges that there was no evidence that these minutes were prepared by him or at his direction during 1984, the year the nominee loans for which he was charged were made. Additionally, defendant argues there was no evidence to support the assertion that the preparation of false minutes was part of any plan or indicative of specific criminal intent.

After reviewing the record, we hold that the trial court's decision to admit the fictitious minutes was for and relevant to a proper purpose under 404(b). It is true, as defendant contends, that the relevance requirement under 404(b) cannot be met by introducing evidence of prior bad acts of the defendant's other associates. United States v. Cardall, 885 F.2d 656 (10th Cir.). However, this is not the case here. The record refutes defendant's contention that there was no evidence establishing that the false minutes were prepared by him or at his direction in 1984. Mrs. Hickert, a bank employee, testified that she prepared, at defendant's direction, false minutes of board meetings which allegedly occurred in 1983 and 1984. Rec. Vol. II at 72. There was testimony from both an FBI agent and a FDIC bank examiner that defendant admitted preparing the false board minutes. Id. at 172, 185.

Further, we believe that the trial court properly determined that the evidence of fictitious board minutes was "extremely" probative of defendant's intent to commit the crime charged. To convict the defendant it was necessary for the jury to find that he acted with an intent to deceive or injure the bank by making nominee loans which exceeded the bank's lending limits. The government argued that such evidence was relevant to show how the defendant's conduct, in preparing fictitious minutes without the knowledge of the board of directors, sought to make the loans in question difficult to detect. We have little doubt that if this evidence was part of a plan to mislead bank examiners or directors it would be highly probative of defendant's unlawful intent. Finally, the trial court gave the jury proper precautionary instructions and reminded them of the limited purpose for which the evidence could be used.

The judgment of the trial court is AFFIRMED.

Entered for the Court

Oliver Seth
Circuit Judge