UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 22-20290-CR-BLOOM(s)

UNITED STATES OF AMERICA

vs.

ERIC DEAN SHEPPARD

Defendant.
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UNITED STATES' MOTION TO
PRECLUDE DEFENSE CROSS EXAMINATION AND
ARGUMENT REGARDING ALLEGED VICTIM NEGLIGENCE

The United States, by and through the undersigned Assistant United States Attorney, moves to preclude the defense from cross examination and argument regarding alleged negligence by the lenders and loan processors responsible for administering loans that Defendant fraudulently obtained. The defense should also be precluded from inquiring regarding financial gain obtained by the lenders in offering CARES Act loans. The government intends to call as witnesses representatives from Cross River Bank, Northeast Bank, and the SBA (which administered Defendant's EIDL loans). These witnesses, in addition to PayPal and WebBank, are the victims of Defendant's fraud. Yet based on defense counsel's cross examination last week of the Paypal witness and documents provided by the defense in advance of the upcoming witness' testimony, the government has reason to believe that the defense intends to improperly delve in victim blaming as part of the defense. They should not be permitted to do so, as evidence of alleged lender negligence and profit is irrelevant to the question of Defendant's guilt and is inadmissible as a defense.

Argument

A. Courts Routinely Find Evidence of Lender Negligence is Inadmissible

The Eleventh Circuit has held that evidence of a lender's alleged negligence is not relevant and is properly excluded at trial. *United States v. Powell*, 509 F. App'x 958, 967 (11th Cir. 2013) ("Whether the lenders in this case knew or should have known that the loan applications were fraudulent is of no consequence to this action. It has no bearing on the essential element of [defendant's] conduct, namely her intent to participate in the mortgage fraud scheme."). "Likewise, whether the lenders negligently created an environment of lax lending standards is irrelevant. Contributory negligence is not a defense to the crime of fraud." *Id.* "[W]hatever role, if any, a victim's negligence plays as a bar to civil recovery, it makes little sense as a defense under a criminal statute that embraces 'any scheme or artifice to defraud.' A perpetrator of fraud is no less guilty of fraud because his victim is also guilty of negligence." *United States v. Svete*, 556 F.3d 1157, 1165 (11th Cir. 2009) (citations omitted).

More recently, in *United States v. Rabuffo*, 716 F. App'x 888, 899 (11th Cir. 2017), the Eleventh Circuit declined the defendants' argument to overturn their convictions for bank and wire fraud in an extensive mortgage fraud scheme based on the district court's exclusion of certain evidence at trial. The defendants' "arguments rest[ed] on the contention that bad conduct by [the mortgage company] and its employees undercut the government's case, and was relevant to whether they (and their co-defendants) committed bank fraud." *Id.* Specifically, and relevant here, the defendants "contend[ed] that they could not have committed bank fraud because, even if [the mortgage company] knew their mortgage applications contained false representations, the applications would have been approved anyhow," and their convictions should be overturned because the district court excluded such evidence at trial. *Id.* The Eleventh Circuit, however, rejected defendants' argument, affirmed the convictions and sentences, and held that "the lender's negligence, or even intentional disregard, cannot excuse another's criminal fraud." *Id.* at 900 (quoting *United States v. Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017)). In affirming the district court's decision to exclude the evidence, the *Rabuffo* court noted that "the gravamen of § 1344 is the 'scheme,' rather than the 'completed fraud,' and . . . the offense therefore does not require 'damage' or 'reliance.'" *Rabuffo*, 716 F. App'x at 899 (quoting *Loughrin v. United States*, 573 U.S. 351, 372 (2014)).

B. <u>Whether a Victim is Sophisticated or Not is Immaterial to the Intent to Defraud</u>

In the Eleventh Circuit, as in other circuits, the government need not prove that a fraud scheme was calculated to deceive only persons of ordinary prudence and comprehension, as fraud statutes protect the naïve as well as the sophisticated, and it is immaterial whether only the most gullible victims would have been deceived. *Svete*, 556 F.3d at 1165 ("Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty. Either way, the defendant has criminal intent."); *see also United States v. Hendrick,* 663 F. App'x 788, 790 (11th Cir. 2016) (holding that the wire fraud statute "prohibits '*any* scheme or artifice to defraud,' no matter how fanciful and without regard to whether a person of ordinary prudence and comprehension would rely upon the misrepresentation") (*citing Svete*, 556 F.3d at 1169); *United States v. Masino,* 2021 U.S. App. Lexis 22615, 26*-27* (11th Cir. 2021) (affirming a wire fraud conviction and holding that "the government did not need to prove that the victims were actually tricked—or even that a person of ordinary prudence would have been tricked by defendants' scheme"); *United States v. Teers,* 591 F. App'x 824, 844 (11th Cir. 2014) ("[T]he negligence of the victim in failing to discover a fraudulent scheme cannot be a defense to bank or wire fraud ….").

The susceptibility of a victim to a fraud scheme, including a victim financial institution, is irrelevant to a defendant's guilt or innocence. As explained by the Fourth Circuit in *United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000): "The susceptibility of the victim of the fraud, in this case, a financial institution, is irrelevant to the analysis: If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. These are criminal statutes, not tort concepts." Whether the institutional victim's internal controls or personnel were sufficient to detect and prevent fraud is irrelevant to the crimes charged in this case, and inadmissible as a defense.

C. Victim Negligence is Irrelevant for Assessing the Materiality of a False Statement

The federal mail fraud, wire fraud, and bank fraud statutes generally require a misrepresentation or concealment of *material* fact. *See Neder v. United States*, 527 U.S. 1, 22-25 (1999). In assessing whether a misrepresentation of fact was material, the Eleventh Circuit has time and time again rejected the argument, commonly made by defendants in fraud cases, that victim negligence is somehow relevant to materiality. The materiality requirement does not permit defendants to backdoor victim negligence into a case because materiality is an objective, rather than subjective, test. *See Svete,* 556 F.3d at 1165 (holding that "the focus of the mail fraud statute … is on the violator, [therefore] the purpose of the element of materiality is to ensure that a defendant actually intended to create a scheme to defraud….and whatever role, if any, a victim's negligence plays as a bar to civil recovery, it makes little sense as a defense under a criminal statute that embraces 'any scheme or artifice to defraud.'"); *United States v. Scott,* 701 F.2d 1340, 1344-45 (11th Cir. 1983) (rejecting defendant's assertion that loan officers' testimony that they were not actually influenced by defendant's false statements was evidence that the defendant lacked the *intent* to influence).

The materiality requirement is not concerned with whether a decisionmaker relied on a false statement, but instead materiality focuses on whether a false statement "has a tendency to influence or is capable of influencing a decision." *United States v. Neder,* 197 F.3d 1122, 1128 (11th Cir. 1999); *see also United States v. Swearingen,* 858 F.2d 1555, 1558 (11th Cir. 1988) (holding that a bank's actual reliance on false statements is not determinative of materiality; materiality turns on "whether the false representations were capable of influencing the Bank's actions").

Along similar lines, the Eleventh Circuit has held that actual reliance is not a requirement for materiality. *See Powell,* 509 F. App'x at 967 ("Whether the lenders in this case knew or should have known that the loan applications were fraudulent is of no consequence to this action."); *see also Neder,* 197 F.3d at 1129 ("[T]he issue is whether a statement has a tendency to influence or is capable of influencing a decision, and not whether the statement exerted actual influence, a false statement can be material even if the decision maker did not actually rely on the statement.")

As noted above, the Eleventh Circuit in *Rabuffo* rejected the argument, commonly made by defendants in fraud cases, that victim negligence is somehow relevant to materiality. As the *Rabuffo* court observed, the materiality requirement does not allow defendants to backdoor victim negligence into a case because materiality is an objective, not subjective test. *Rabuffo*, 716 F. App'x at 899-900 (holding that defendants' contention that they could not have committed bank fraud if the negligent or complicit mortgage processer knew that the statements were false "misse[d] the mark" because materiality focuses on the violator's intent); *see also Lindsey*, 850

F.3d at 1015 ("A false statement is material if it objectively had a tendency to influence, or was capable of influencing, a lender to approve a loan."). The materiality requirement is not concerned with a statement's subjective effect, but instead on a statement's objective reliability. *Svete*, 556 F.3d at 1165; *see also Neder*, 527 U.S. at 24–25 ("The common-law requirement[ ] of 'justifiable reliance' ... ha[s] no place in the federal fraud statutes.").

D. The Relevant Inquiry is of the Defendant's Intent, Not the Victim's Negligence

In the instant case, the relevant inquiry is whether: (i) Defendant submitted fraudulent loan applications; (ii) whether Defendant had the requisite intent to defraud the SBA, PPP lenders and processors, and financial institutions holding the accounts into and through which fraudulent loan proceeds were deposited or transferred; and (iii) for the purpose of certain counts, whether the information that Defendant submitted and withheld from the SBA, PPP lenders and processors, and financial institutions had the natural tendency to influence or was capable of influencing them. Hindsight challenges to any of these institutional victims' internal controls are irrelevant, a waste of time, and create the risk of jury confusion. *See* Fed. R. Evid. 404(b).

Accordingly, this Court should prohibit Defendant from introducing evidence or making arguments concerning any supposed victim negligence, including any criticism of a PPP lender, processor, or SBA's internal controls, as well as the internal controls of banks and financial institutions whose accounts were used to receive or transfer fraudulent loan proceeds. *See United States v. Biesiadecki*, 933 F.2d 539, 544 (7th Cir. 1991) (upholding exclusion of testimony that "would have improperly shifted the jury's attention away from the knowledge and intent of [defendant] and focused instead on the beliefs of the victim of the alleged scheme to defraud").

For similar reasons, the Court should exclude any evidence or arguments concerning the SBA's guarantees to PPP lenders as a defense to the alleged fraud. The government does not know on what basis the defense would try to introduce evidence or make arguments concerning this guarantee, but any such evidence or argument would be irrelevant to the case, a waste of time, and tend to confuse and mislead the jury, and as such it should be excluded. Even in civil cases, where a victim's negligence might be relevant to damages, evidence of financial compensation (insurance) is inadmissible to prove negligence or wrongdoing. Fed. R. Evid. 411. This is even more true in the criminal context of the instant case, where victim negligence is irrelevant, and should therefore be excluded.

E. The Court should preclude the defense from introducing evidence and arguments concerning any profit by the above-referenced victims.

The Eleventh Circuit has held that "[w]hether the lenders were motivated by profit or did, in fact, profit from [defendant's] efforts is equally immaterial." *Powell*, 509 F. App'x at 967. "[T]he government can convict a person for mail or wire fraud even if his targeted victim never encountered the deception—or, if he encountered it, was not deceived.'" *Id.* (quoting *United States v. Svete*, 556 F.3d 1157, 1166 (11th Cir.2009) (en banc) (internal quotations and citations omitted)); *see also Rabuffo,* 716 F. App'x at 900 ("Our precedent thus establishes that whether [the victims] . . . would have or in fact did rely on the fraudulent statements contained in the mortgage applications does not undermine the fairness of the trial or the jury's findings."); *United States v. Gray,* 367 F.3d 1263, 1269-70 (11th Cir. 2004) (finding defendant guilty of mail fraud the moment the defendant mailed a letter with fraudulent misstatements, noting that even had victim not received the letter defendant would still be guilty of mail fraud). Therefore, the Court should exclude any evidence or arguments concerning any profits the victim lenders may have made as a result of the loans that are at issue in this conspiracy.

The undersigned AUSA has conferred with Defendant's counsel, who indicated that the Defendant opposes this motion *in limine*.

Conclusion

Accordingly, the defense should be prohibited from delving into improper argument regarding victim negligence or financial gain/profit motive, whether through cross examination or the introduction of evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 4, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send Notices of Electronic Filing to all counsel of record. A copy of this motion is also being served on counsel of record in person.

s/Aimee Jimenez
Aimee C. Jimenez
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