UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITES STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

______________________________________/

DEFENDANT'S ADDITIONAL PROPOSED JURY INSTRUCTIONS

Defendant Eric Dean Sheppard, pursuant to Rule 30(a) of the Federal Rules of Criminal Procedure, respectfully submits the following additional proposed jury instructions and requests that they be given at the trial in the above-captioned case. Pursuant to Rule 30(b) of the Federal Rules of Criminal Procedure, the Defendant requests that it be informed prior to closing arguments which instructions the Court will accept and which it will reject.

Dated: January 9, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 9, 2024, the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

/s/ *Jayne C. Weintraub*
Jayne C. Weintraub

THEORY OF DEFENSE NUMBER 1 (INTENT) [1]

Mr. Sheppard contends that he was unaware of any misrepresentations and false statements in the government loan applications and supporting materials submitted on behalf of his companies and, therefore, he did not have the intent to defraud any lending institution or governmental agency. Mr. Sheppard contends that he did not knowingly participate in any scheme to defraud the lenders or the SBA of money and therefore he is not criminally responsible for any misstatements in the applications or false information in supporting documents. If you find that Mr. Sheppard acted without knowledge of misrepresentations and false statements or without the intent to defraud a lender as to any particular count(s), you must find Mr. Sheppard "Not Guilty" on such count(s).

Specifically with respect to the forged 1065 tax returns, the Defendant is charged with the crime of Wire Fraud for their submission in connection with PPP loan applications. Mr. Sheppard contends he was unaware of any forgery or the submission of any forged or falsified tax returns submitted constituting the Wire Fraud charges involving the PPP program. If you find that Mr. Sheppard did not knowingly submit forged tax returns, you must find Mr. Sheppard "Not Guilty" of such counts.

[1] This specific instruction was given in this District, by the Honorable Judge J. Cohn in United *States v Steven Stoll et al*, Case 0:10-cr-60194-JIC-2.

THEORY OF DEFENSE NUMBER 2. (AGGRAVATED IDENTITY THEFT)

With respect to the charges of Aggravated Identity Theft, Mr. Sheppard contends that PayPal, Northeast and Cross-River never requested, needed, or reviewed the purported 1065 tax returns and further that the PPP lenders that did not need or rely upon the accountant's name, signature or PTIN number - *i.e.*, the stolen identity in connection with the loans or attempted loan. Therefore, if you do not find that the accountant's identity was the "crux" or "key mover" in the alleged fraud, you must find Mr. Sheppard "Not Guilty" of such counts.

The Defendant is charged with Aggravated Identity Theft regarding the bank letter for the wire fraud charge involving the HM-4 EIDL loan. Mr. Sheppard contends that Mr. Barrios signed the letter. If you do not find that Mr. Barrios's name was forged, you must find Mr. Sheppard "Not Guilty" on this count. In addition, with respect to the same charge, Mr. Sheppard contends that SBA never requested, needed, or reviewed the bank letter and further that the SBA did not need or require Mr. Barrios' signature i.e., his allegedly stolen identity, or the name or the signature or name of any bank officer, in connection with the EIDL loan. Therefore, if you do not find that Mr. Barrios' identity was the "crux" or "key mover" in the alleged fraud, you must find Mr. Sheppard "Not Guilty" of such count.

The Defendant is charged with Aggravated Identity Theft regarding the lease for the wire fraud charge involving the HM-4 EIDL loan, Mr. Sheppard contends that Mr. Salem did sign the lease, and that Mr. Sheppard believed that Mr. Salem signed the lease based on Mr. Vasilas telling him that. If you do not find that Mr. Salem's signature was forged or if you find that Mr. Sheppard believed that that Mr. Salem signed the lease, you must find that Mr. Sheppard is "Not Guilty" on this count. In addition, with respect to the same charge, Mr. Sheppard contends that the SBA never requested, needed, or reviewed the lease and further that the SBA did not need or require Maged Salem's name or signature i.e., his allegedly stolen identity, or the name or the signature or name of any tenant representative, in connection with the EIDL loan. If you do not find that Maged Salem's identity was the "crux" or "key mover" in the alleged wire fraud, you must find Mr. Sheppard "Not Guilty" of such count.

United States v. Schaller, 401 Fed. Appx. 419, 422 (11th Cir. 2010) (quoting United States v. Ruiz, 59 F.3d 1151, 1154 (11th Cir. 1995)) ("A criminal defendant has the right to have the jury instructed on her theory of defense, separate and apart from instructions given on the elements of the charged offense"); Id. ("A trial court may not refuse to charge the jury on a specific defense theory where the proposed instruction presents a valid defense and where there has been some evidence adduced at trial relevant to that defense."); United States v. Arias, 431 F.3d 1327, 1340 (11th Cir. 2005) (quoting United States v. Lively, 803 F.2d 1124, 1126 (11th Cir.1986)) ("[T]he defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility."); Id. (quoting Ruiz, 59 F.3d at 1154) ("In reviewing the evidence adduced, the court must view the evidence in the light most favorable to the accused.").

GOOD-FAITH DEFENSE

"Good faith" is a complete defense to a charge that requires intent to defraud. Mr. Sheppard isn't required to prove good faith. The Government must prove intent to defraud beyond a reasonable doubt.

An honestly held opinion or an honestly formed belief cannot be a fraudulent intent, even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness can't establish fraudulent intent.

But an honest belief that a business venture would ultimately succeed doesn't constitute good faith if the Defendant intended to deceive others by making representations the Defendant knew to be false or fraudulent.

Pattern Jury Instruction. 17 modified

United States v. Goss, 650 F.2d1336 (5th Cir. 1981), failure to give this instruction as a theory-of-defense charge, when requested to do so, is error if there is any evidentiary foundation to support the Defendant's claim. Note, however, that there must be some evidentiary basis for the request. If the usual instructions are given defining willfulness and intent to defraud, that will ordinarily suffice in the absence of evidence of good faith. United States v. Boswell, 565 F.2d1338 (5th Cir. 1978), reh'g denied, 568 F.2d1367 (11th Cir. 1978), cert. denied, 439 U.S. 819, 99 S. Ct. 81, 58 L. Ed. 2d 110 (1978); United States v. England, 480 F.2d1266 (5th Cir. 1973), cert. denied, 414 U.S. 1041, 94 S. Ct. 543, 38 L. Ed. 2d 332 (1973); United States v. Williams, 728 F.2d1402 (11th Cir. 1984).

On or About; Knowingly; Willfully - Generally

You'll see that the indictment charges that a crime was committed "on or about" a certain date. The Government doesn't have to prove that the crime occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

[The word "willfully" means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids before you can find that the person acted "willfully," the person need not be aware of the specific law or rule that [his] conduct may be violating.]

Pattern, 91A

ANNOTATIONS AND COMMENTS

The Definition of willfulness in this instruction can be used in most cases where willfulness is an element. For crimes requiring a particularized knowledge of the law being violated, such as tax and currency-structuring cases, use 9.1 B's definition of willfulness.

The committee in its most recent revisions to the pattern instructions has changed the approach to how "willfully" should be charged in the substantive offenses which include it as an essential element of the offense. The previous editions of the pattern instructions included the following definition that historically has been used in most cases:

The word "willfully," as that term has been used from time to time in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Although this definition has been useful as a general definition that encompasses many different aspects of the legal concept of "willfulness" in a concise and straightforward manner, the Committee has concluded, along with every other Circuit Pattern Instruction Committee that has considered the issue, that the definition is not accurate in every situation. A review of the case law reveals how the courts have struggled with the meaning of "willfulness" as a mens rea requirement for substantive criminal offenses. See Bryan v. United States, 524. U.S. 184, 189-92, 114 S. Ct. 1939, 1944-45 (1998)("The word 'willfully' is sometimes said to be 'a word of many meanings' whose construction is often dependent on the context in which it appears." (citing Spies v. United States, 317 U.S. 492, 497, 63 S. Ct. 364, 367 (1943))); see also Ratzlaf v. United States, 510 U.S. 135, 140-41, 114 S. Ct. 655, 659 (1994); United States v. Phillips, 19 F.3d 1565, 1576 - 84 (11th Cir. 1994) (noting the difficulty in defining "willfully" and discussing the term in various contexts), amended to correct clerical errors, 59 F.3d 1095 (11th Cir. 1995); United States v. Granda, 565 F.2d922, 924 (5th Cir. 1978) (noting, inter alia, that "willfully" has defied any consistent interpretation by the courts"); see generally United States v. Bailey, 444 U.S. 394, 403, 100 S. Ct. 624, 631 (1980) ("Few areas of criminal law pose more difficulty that the proper definition of the mens rea requirement for any particular crime.").

Based on the case law, the Committee has concluded that the criminal offenses that expressly include "willfulness" as an essential element can be divided into two broad categories. For the first category (Instruction 9.1A, which encompasses most offenses) "willfully" is defined to require that the offense be committed voluntarily and purposely with the intent to do something unlawful. However, the person need not be aware of the specific law or rule that his or her conduct may be violating. This definition is narrower than the traditional definition that has been used in our pattern charges in the past, but the Committee believes that this narrower definition is required under the law. See, e.g. Bryan v. United States, 524 U.S. 184, 118 S. Ct. 1939 (1998) (holding that the term "willfully" in 18 U.S.C. §§ 922(a)(1)(A) and 924(a)(1)(D) requires proof that the defendant knew that his conduct was generally unlawful, but does not require that the defendant knew of the specific licensing requirement that he was violating).

The second category of criminal offenses that have "willfulness" as an essential element have a heightened mens rea requirement. For this limited class of offenses, the Government must prove more than the defendant knew that his conduct was done with a bad purpose to disobey the law in general. The Government must prove that the defendant had an intent to violate a known legal duty, that is with the specific intent to do something the law forbids. For these offenses, the Committee recommends that the definition of "willfully" in Instruction 9.1B be given to the jury. These offenses include currency structuring statutes and certain tax laws, which tend to involve "highly technical statues that present[] the danger of ensnaring individuals engaged in apparently innocent conduct." Bryan, 118 S. Ct. at 1946 - 47. For example, see Ratzlaf v. United States, 114 S. Ct. 655 (1994) (holding that with respect to 31 U.S.C. § 5322(a) and the monetary transaction provisions that it controls, the Government must prove that the defendant acted willfully, i.e., with specific knowledge that the structing of currency transactions in which he was engaged was unlawful); see also Cheek v. United States, 111 S. Ct. 604, 609-10 (1991) (explaining that due to the complexity of tax laws, there is an exception to the general rule that "ignorance of the law or a mistake of law is no defense to criminal prosecution," and "[t]he term 'willfully' [as used in certain federal criminal tax offenses] connot[es] a 'voluntary, intentional violation of a known legal duty'" (citing United States v. Pomponio, 429 U.S. 10, 12, 97 S. Ct. 22, 23 (1976) and United States v. Bishop, 412, U.S. 346, 360-61, 93 S. Ct. 2008, 2017 (1973))). In Cheek, the Supreme Court found error in the trial court's instruction to the jury that in order for the defendant's belief that he was not violating the law to be a defense, his good-faith belief must have been objectively reasonable. The Court further explained, however, that "a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper." Cheek, 498 U.S. at 206, 111S. Ct. at 613.