

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
V.	:	NO. 3:99CR235(EBB)
	:	
	:	
MONA KIM	:	

RULING ON DEFENDANT’S MOTION FOR JUDGMENT OF ACQUITTAL

Pursuant to FED. R. CRIM. P. 29(a), Defendant Kim (“Kim”) orally moved for judgment of acquittal on all seven counts of the Superseding Indictment (“Indictment”) at the close of the Government’s case-in-chief at trial. See Tr. Vol. 8 at 161-62. The Court reserved decision on Kim’s motion. Kim renewed her motion for judgment of acquittal after the close of all the evidence on January 28, 2003. See Tr. Vol. 11 at 170. The Court again reserved decision. On January 30, 2003, following the jury’s verdict of guilty on all seven counts of the Indictment, the Court scheduled briefing on the matter. See Tr. Vol. 13 at 32-33. The Court has since entertained pleadings from both sides and heard oral argument on the motion. For the reasons stated below, Kim’s motion for acquittal [Doc. No. 275] is DENIED.

BACKGROUND

The Court sets forth only those facts deemed necessary to an understanding of the issues raised in, and decision

rendered on, Kim's motion.

A. The Indictment

The Indictment charged Kim with participating in Martin Frankel's scheme to defraud various investors, financial institutions, insurance companies, and the shareholders and policy holders of those insurance companies. The Indictment principally alleged that Frankel and other persons arranged, beginning in 1991, for Frankel to purchase life insurance companies in various states and to do so without disclosing to regulators or the public that Frankel would own the companies and manage their financial assets. The Indictment charged that Kim participated in Frankel's scheme by assisting in the conversion, theft and embezzlement of insurance company assets, by using an alias of "Monica Kim" to assist Frankel in falsely representing that the assets were on account with Liberty National Securities ("LNS"), and by establishing, maintaining and employing bank accounts under Frankel's control.

Count 15 of the Indictment charged Kim with participation in the scheme that included an interstate wire transaction on April 6, 1999, involving the transfer to Frankel's control of \$5,280,000 from one of the acquired insurance companies, Old

Southwest Life Insurance Company of Arkansas.

Count 16 of the Indictment charged Kim with participation in the scheme that included an interstate wire transaction on April 9, 1999, involving the transfer to Frankel's control of \$44,795,000, which money was obtained through a reinsurance agreement with the Settler's Life Insurance Company in Virginia.

Count 32 of the Indictment charged Kim with money laundering, alleging that Kim, along with Frankel, transferred via wire funds in the amount of \$16,000,000 for the purchase of Vienna Philharmonic Gold coins from Banque SCS Alliance in Switzerland to Farmers and Merchants Bank in California, for the account of Monex, a commodities broker.

Count 42 charged Kim with money laundering, alleging that she transferred via wire funds in the amount of \$20,000 from Banque SCS Alliance in Switzerland to an account in her name at Key Bank in Mount Kisco, New York.

Count 43 charged Kim with money laundering, alleging that she transferred via wire funds in the amount of \$3,985 from Banque SCS Alliance in Switzerland to an account in her name at Fleet Bank in Greenwich, Connecticut.

Count 46 of the Indictment charged Kim with violating the

Racketeer Influenced and Corrupt Organizations Act, also known as "RICO," pursuant to 18 U.S.C. § 1962(c). Specifically, Count 46 charged that Frankel, Kim and others, along with the Thunor Trust, the Saint Francis of Assisi Foundation ("SFAF"), LNS and other entities, were members of an enterprise, led by Frankel, engaged in and affecting interstate and foreign commerce.

Count 46 alleged that the enterprise operated for the purpose of engaging in acts involving wire fraud and money laundering, acts which constituted a pattern of racketeering activity. The alleged purpose of the enterprise was to secure economic benefits for its members by obtaining, via wire fraud, the cash reserves of insurance companies and the laundering of these fraud proceeds. These fraud proceeds were also to be used to fund the operations of the enterprise and to further its illegal goals and objectives.

Kim, along with Frankel and other members, allegedly conducted and participated, directly and indirectly, in the affairs of the enterprise through a pattern of racketeering activity that involved the commission of racketeering acts, including those acts charged in Counts 15 and 16 (wire fraud), and 32, 42 and 43 (money laundering) against Kim.

Count 47 charged Kim with conspiracy to violate the RICO

statute.

B. The Government's Case-in-Chief

The Government presented the live testimony of twenty-one witnesses, with one of those witnesses, FBI Special Agent Erin McNamara, testifying on two separate occasions. The Government's case-in-chief also consisted of voluminous documentary evidence, as well as reading into evidence the stipulated offense conduct of Gary Atnip, an indicted co-conspirator.

A sizeable portion of the Government's evidence focused on establishing the existence of Frankel's fraud, dating back to the early 1990s, prior to Kim's participation. Because Kim makes no argument to contest the existence of Frankel's fraud,¹ and because the Court finds overwhelming evidence in support thereof, the Court's review of the evidence presented at trial focuses primarily on evidence concerning events

¹ Indeed, Kim agrees with the Government's contention that Frankel and other "principal co-conspirators," including Sonia Howe, John Hackney, Gary Atnip and John Jordan, were involved in a scheme to defraud. See, e.g., Tr. Vol. 12 at 71 (Defense Attorney Kelly in closing argument: "The scheme essentially was that Frankel, as we know, would buy insurance companies through his -- his agents, primarily Hackney and people who worked for him. He would then say siphon off those assets and put them in his piggybank which was the Swiss bank, SCS."); Motion at 2-3 ("At the outset, it should be acknowledged that Martin Frankel was the creator and driving force behind the fraud. Frankel controlled his principal co-conspirators, Howe, Hackney, Atnip, and Jordan.").

taking place following Kim's arrival at the Frankel compound in Greenwich, Connecticut. Viewing the evidence in the light most favorable to the Government, and resolving all credibility issues and drawing all reasonable inferences in the Government's favor, the evidence at trial established, inter alia, the following:

Kim first became acquainted with Frankel in 1996, although she did not begin living at the Frankel compound in Greenwich, Connecticut until some time in 1997. Starting in 1998, Kim's level of responsibility around 889 Lake Avenue, the home out of which Frankel directed his operations, began to increase. Karen Timmins ("Timmins") testified that Kim became office manager of 889 Lake Avenue by the end of 1998 or beginning of 1999, and that Kim became signatory for two bank accounts used to pay salaries, bills and other expenses related to Frankel's enterprise. According to Timmins, Kim's increased responsibilities came about at her own request.

As her responsibilities increased, so, too, did Kim's direct and personal involvement in Frankel's scheme. Kim opened two bank accounts, one in Greenwich, Connecticut, the other in Mt. Kisco, New York, through which she made various withdrawals and deposits, principally from Frankel's Swiss Banque SCS Alliance account. Frankel's Swiss account was

comprised of stolen insurance company funds.

As part of her increased responsibilities, Kim also became very involved with document production for the SFAF, the fraudulent foundation created by Frankel. Work involving the SFAF was operated out of the office manager's office of 889 Lake Avenue, where, according to Timmins, Kim and Jackie Ju most frequently worked during the early part of 1999. According to Timmins, Kim "became very involved with the Saint Francis of Assisi Foundation and document production." Tr. Vol. 6 at 69.

Alicia Walters Pepe ("Walters"), whose work for Frankel overlapped with Kim's, also testified about Kim's work involving the SFAF documents. According to Walters, Kim instructed her and others on what to do with regard to the SFAF document production, and Kim was among the select women with whom Frankel met in his office to discuss the SFAF packages as they were being assembled. In one instance, while assembling SFAF materials, Kim cut out a signature, pasted it to an affidavit, photocopied the affidavit, and then included the copied affidavit with a set of documents that was being sent out to insurance regulators. As Walters testified, Kim was "assembling packages; overseeing the girls; telling them what to do. . . . Answering the telephone lines. She started

taking the expense reports. She started working closer with Marty [Frankel] on a daily basis." Tr. Vol. 2 at 195.

According to Timmins, Kim knew during this period that Frankel was not trading securities. Furthermore, Kim was aware that the accounts pertaining to assets generated by insurance company purchases were being falsified. Timmins testified that Kim did not evidence surprise when, in the spring of 1999, Timmins discussed with her a "huge hole" in the LNS account pertaining to assets generated by an insurance company purchased by Frankel. The "hole" resulted from the assets of the insurance company being held in Frankel's personal account in Switzerland rather than in the LNS account. Timmins testified that she discussed this matter with Kim, whose reaction "wasn't a surprised thing." Timmins continued: "I mean, it was if [sic] everybody knew it." Tr. Vol. 6 at 28.

While at 889 Lake Avenue, Kim also falsely confirmed hundreds of millions of dollars in account balances and transactions in investment accounts. James Leuty ("Leuty") and Stuart Heath ("Heath"), both certified public accountants from Tennessee, testified about conversations they had in 1999 with "Monica Kim." According to both men, upon calling the phone number for LNS in order to confirm hundreds of millions

of dollars in account balances and transactions in investment accounts for certain insurance and holding companies, "Monica Kim," after stating that she represented LNS, confirmed the amounts in question.

Timmins corroborated Leuty and Heath's testimony, describing how the auditors called 889 Lake Avenue on telephone lines devoted to LNS, wanting to confirm assets of 300 million dollars. According to Timmins, Frankel was "very panicked" about the phone call, although he soon became "very excited and happy" because "Mona did a brilliant job" in handling the call. Timmins testified that Frankel said that Kim "convinced [the auditors] because she pretended she was looking up information on the computer when, in fact, there was no information to look up." Tr. Vol. 6 at 83-84. Kim pretended to look up information by "just typing on the keyboard making the clicking sounds." Id. at 84.

After falsely confirming the assets in question, Kim expressed concern to Timmins about having identified herself to the auditors as "Monica," since, according to Timmins, "it wouldn't be very difficult for anyone to figure out that Mona was, in fact, Monica." Id.

As the mood at 889 Lake Avenue became more tense during the spring of 1999, with everyone "waiting for the axe to

fall," Kim became involved in discussions with Frankel about helping him buy gold and about leaving the country. Id. at 86-88. Kim made contact with a commodities dealer, Martin Moon, who worked in California. Testimony and documentary evidence, including memoranda sent from Kim to Frankel, established that Kim was personally involved in inquiring about and assisting in the purchase of commodities for Frankel. Evidence concerning Kim's discussions with Moon, and the memoranda from Kim to Frankel about those discussions, revealed that Kim assisted Frankel in misrepresenting his true identity to the commodities broker by using aliases "David Rosse" and "Steve Rothschild," while also misrepresenting herself as an affiliate/employee of Devonshire Technologies.

It was during this time--spring of 1999--when Frankel told Timmins and Kim "that everything was all over and that probably regulators or police were going to be coming up to . . . arrest people." Tr. Vol. 6 at 96. Walters testified that, following a meeting in Mississippi with state insurance regulators, Frankel and others (although not Kim) returned from the trip in a heightened state of panic. Walters was told to shred everything, and was told by Kim that the computers were all going to be "torn down." In so directing Walters, Kim also told her that "the shit's going to hit the

fan. . . . Everything's falling apart now." Tr. Vol. 3 at 29.

Kim ultimately fled with Frankel, as well as Jackie Ju, on a chartered plane which flew from Westchester County Airport to Rome on May 4, 1999. While in Italy, Kim opened a nominee bank account, into which approximately \$455,000 was wired by a diamond dealer from whom Frankel purchased diamonds shortly before his flight.

C. The Jury's Verdict

On January 30, 2003, the jury unanimously found Kim guilty on all seven counts. In sum, the jury unanimously found Kim guilty on Counts 15 and 16, charging interstate wire fraud transactions in violation of 18 U.S.C. § 1343; Counts 32, 42 and 43, charging Kim with international money laundering transactions involving the unlawful transfer of funds into the United States in violation of 18 U.S.C. § 1956(a)(2); Count 46, charging Kim with violating the RICO statute, pursuant to 18 U.S.C. § 1962(c); and Count 47, charging Kim with conspiracy to violate the RICO statute, pursuant to 18 U.S.C. § 1962(d). As to Count 46, the substantive RICO violation, the jury unanimously found that Kim committed all five alleged racketeering acts.

STANDARD

Rule 29(a) of the Federal Rules of Criminal Procedure

provides, in pertinent part, that the Court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Id. Under this rule, the Court must determine whether a reasonable mind might fairly conclude, based on the evidence presented at trial, that the defendant was guilty beyond a reasonable doubt. See United States v. Mariani, 725 F.2d 862, 865 (2d. Cir. 1984). Since the Court reserved decision on Kim's initial Rule 29 motion at the close of the Government's case-in-chief, the Court must decide the motion on the basis of the evidence at the time the ruling was reserved. See FED. R. CRIM. P. 29(b).

As noted by the Second Circuit, "a defendant who challenges the sufficiency of the evidence to support his conviction after a jury verdict bears a heavy burden." United States v. Maher, 108 F.3d 1513, 1530 (2d Cir. 1997). Indeed, the Court must "view the evidence, whether direct or circumstantial, in the light most favorable to the government, crediting every inference that could have been drawn in its favor." Id. (internal quotation marks and citation omitted). Moreover, the Court must assess the evidence in its totality, and must reject the defendant's challenge "if 'any rational trier of fact could have found the essential elements of the crime.'" United States v. Tubol, 191 F.3d 88, 97 (1999)

(quoting Mahe, 108 F.3d at 1530).

In addition, a jury is entitled to reach its verdict based "entirely on circumstantial evidence." United States v. Martinez, 54 F.3d 1040, 1042-43 (2d Cir. 1995). "When making a case based on circumstantial evidence, the government need not 'exclude every reasonable hypothesis other than that of guilt.'" United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999) (quoting Holland v. United States, 348 U.S. 121, 139 (1954)). A judgment of acquittal is appropriate "only if the evidence that the defendant committed the crime alleged is 'nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.'" Guadagna, 183 F.3d at 130 (quoting United States v. White, 673 F.2d 299, 301 (10th Cir. 1982)). Finally, all issues of credibility must be resolved in favor of the jury's verdict. See United States v. Chang An-Lo, 851 F.2d 547, 554 (2d Cir. 1988).

DISCUSSION

Kim raises a host of arguments in support of her motion. First, Kim argues that the Government's proof failed to establish that she knowingly and willfully participated in the "scheme and artifice to defraud" alleged in the Indictment. See Motion at 5-12. On this point, Kim argues that the Government's proof failed to establish the requisite specific

intent to commit acts constituting the essential elements of Frankel's scheme. See Reply at 2-10. Second, Kim argues that the Government's proof failed to establish the existence of an enterprise separate and distinct from the pattern of racketeering activity. See id. at 12-14. Third, Kim argues that the Government's proof failed to show that she was involved in the "operation or management" of the enterprise. See id. at 14-15. Fourth, Kim argues that statements of co-conspirators allegedly made during the course and in furtherance of the charged conspiracy should be deemed inadmissible because the evidence failed to establish a conspiracy. See id. at 15.

The Court first addresses Kim's argument that the evidence failed to show that she knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud, or that she knowingly and intentionally aided and abetted others in the scheme. Specifically, Kim asserts that the Government's aiding and abetting theory cannot be sustained by the evidence because of the lack of proof concerning Kim's "specific intent to further Frankel's scheme to fraudulently obtain insurance company assets and then convert them to his own use, thus defrauding investors,

financial institutions and the insurance companies." Reply at 5.

To convict a defendant on a theory of aiding and abetting, "the government must prove that the underlying crime was committed by a person other than the defendant and that the defendant acted . . . with the specific purpose of bringing about the underlying crime." United States v. Best, 219 F.3d 192, 199 (2d Cir. 2000). While evidence of "mere association with conspirators and suspicious circumstances" is insufficient, see Salameh, 152 F.3d at 151, the Government may, for example, offer proof of a defendant's knowledge or intent through circumstantial evidence which includes "some indicia of the specific elements of the underlying crime." See United States v. Samaria, 239 F.2d 228, 235 (2d Cir. 2001). As the Court discusses below, the Government presented sufficient proof containing evidence of Kim's knowledge and specific intent to sustain the jury's conclusions.

For example, the Government's evidence established that Kim knew that Frankel's "business" involved insurance companies and that he kept his personal funds abroad. Kim also assisted in the creation of false documents concerning the SFAF. Moreover, Kim falsely confirmed assets for auditors Leuty and Heath, going so far as to call herself

"Monica" Kim and confirming--falsely--that she was an employee of LNS. Kim also exhibited awareness of the "huge hole" in the balance of insurance company accounts, and she involved herself in Frankel's pursuit of commodities, showing her facility in juggling (and managing) Frankel's use of false names. Furthermore, as these events were unfolding, the evidence establishes that Kim was aware that Frankel's scheme was falling apart. As a result, Kim assisted in attempting to dismantle the enterprise through shredding (and directing others in so doing), and then accompanied Frankel when he fled.

Drawing reasonable inferences from such evidence, the Court finds that the Government's proof establishes that Kim knowingly and willfully, and with the requisite specific intent, committed the charged acts. Although the evidence did not necessarily prove that Kim was completely aware of the various contours of Frankel's scheme, the Government nevertheless established what was required of it.

Looking specifically at Kim's membership in the conspiracy, the evidence clearly shows that Kim "'knowingly' engaged in the conspiracy with the 'specific intent to commit the offenses that were the objects of the conspiracy.'" United States v. Monaco, 194 F.3d 381, 386 (2d Cir. 1999) (quoting

United States v. Salameh, 152 F.3d 88, 145 (2d Cir. 1998)). "Purposeful behavior" is required to establish membership in a conspiracy. See Chang An-Lo, 851 F.2d 547, 554 (2d Cir. 1988). As a result, a "mere association with conspirators is . . . insufficient." Id. However, once the conspiracy has been shown to exist--as was conceded here--evidence sufficient to link another defendant to it need not be overwhelming, and may be proved entirely by circumstantial evidence. See United States v. Abelis, 146 F.3d 73, 80 (2d Cir. 1998) (noting that "only slight evidence is required to link another defendant with a conspiracy once the conspiracy has been shown to exist"); United States v. Desimone, 119 F.3d 217, 223 (2d Cir. 1997).

The evidence presented by the Government at trial clearly supports the essential element of specific intent required for a conspiracy conviction. See, e.g., United States v. Gordon, 987 F.2d 902, 907 (2d Cir. 1993) (holding that knowing and willing participation may be inferred from defendant's lack of surprise when discussing conspiracy with others); see also Samaria, 239 F.2d at 235-36 (listing examples of circumstantial evidence of knowledge and specific intent sufficient to sustain a conspiracy conviction).

Additional support for the jury's finding is found in

Kim's fleeing to Italy with Frankel. The jury could reasonably have inferred that Kim's traveling to Italy with Frankel evidenced consciousness of guilt. As charged by the Court, such evidence could provide an inference of consciousness of guilt, although the jury could not use this evidence as a substitute for proof of guilt. See Tr. Vol. 12 at 182-84 (instructing on consciousness of guilt from flight).

If the jury credited all of the testimony against Kim and drew all inferences from the testimony and the other evidence in favor of the Government, it properly could have found that Kim knowingly and willfully, with the specific intent required, committed the charged acts. In light of the heavy burden Kim faces on a motion for judgment of acquittal, her sufficiency challenge fails.

As to Kim's argument that, pursuant to the RICO charge, the Government's proof fails to make a legitimate distinction between the "enterprise" and the "pattern of racketeering activity," Kim's argument once again fails. The evidence presented at trial established multiple reasons, beyond merely the commission of the charged racketeering acts themselves, for Frankel's association with his co-conspirators. The co-conspirators and Frankel engaged in various activities--running insurance

companies, gathering data concerning financial markets, conducting "special projects" activities"--which provide ample links between the members of the enterprise which extend beyond the commission of the charged racketeering activities.

The Court also rejects Kim's argument that the Government's evidence failed to show that Kim played a part in the "operation and management" of the enterprise. The evidence established, inter alia, that Kim was the president of two companies (Good Luck Corporation and Lucky Star Corporation) used to pay employees at 889 Lake Avenue, as well as to pay other expenses. Kim herself opened a bank account to handle such expenses, as well as opening the Italian account in her name for Frankel. The evidence also showed Kim exercising at least some degree of discretion in her negotiations for the purchase of commodities. Kim also directed others in the putting together of SFAF documents. Such evidence is sufficient to meet the "operation and management" test articulated in Reves v. Ernst & Young, 507 U.S. 170 (1993), which noted that "an enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper

management." Id. at 184.

Finally, because the Court upholds the jury's conspiracy finding, Kim's final argument concerning co-conspirator statements is without merit.

CONCLUSION

Having reviewed the trial transcript and the evidence presented, the Court finds that there was sufficient evidence at trial to support a verdict of guilty on all seven counts of the indictment. Thus, Kim's motion for acquittal [Doc. No. 275] is DENIED.

SO ORDERED.

ELLEN BREE BURNS
SENIOR DISTRICT JUDGE

Dated at New Haven, Connecticut, this ___ day of June, 2003.