

**FILED**  
United States Court of Appeals  
Tenth Circuit

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JAN 28 1988

ROBERT L. HOECKER  
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT JOCHIM,

Defendant-Appellant.

No. 87-1505  
(D.C. CR No. 87-CR-36)  
(D. Colo.)

ORDER AND JUDGMENT

Before LOGAN, TACHA, McWILLIAMS, Circuit Judges.

In the first count of a two-count indictment Robert Jochim was charged with taking \$25,000 in currency belonging to the Central Bank of Broomfield, located in Broomfield, Colorado, and insured by the Federal Deposit Insurance Corporation, from the person and presence of one James Musser, and that in thus taking the money Jochim assaulted James Musser and put his life in jeopardy by the use of a dangerous weapon, i.e., a firearm, all in violation of 18 U.S.C. §§ 2113(a) and (d). In a second count Jochim was charged with using and carrying a firearm in committing the robbery charged in count one, in violation of 18 U.S.C. § 924(c)). A jury convicted Jochim on both counts and he now appeals those convictions and the sentences imposed thereon. We affirm.

At trial Jochim elected not to testify. However, his defense was that it was not he, but someone else, who committed the robbery. His counsel called several alibi witnesses whose testimony, if believed by the jury, would place Jochim in Fairchild's Poker Club, located in Westminster, Colorado, at or about the time of the robbery.

On appeal, Jochim urges two grounds for reversal: (1) The evidence is legally insufficient to establish that it was he (Jochim) who committed the robbery, and (2) the admission, over objection, of a plastic replica of an automatic pistol and statements made by defendant concerning it was erroneous and prejudicial under the circumstances. Our study of the trial transcript leads us to conclude that the evidence is sufficient to support the jury's determination that it was Jochim, not someone else, who committed the robbery, and that the admission into evidence of the plastic replica of an automatic pistol and defendant's statement was not erroneous, though it was quite possibly prejudicial. All evidence which tends to show guilt is, in one sense, "prejudicial."

At about 2:00 a.m. on Sunday, February 1, 1987, the automatic teller machine (ATM) owned and operated by the Central Bank of Broomfield "jammed" and became inoperative. It is undisputed that the defendant, Jochim, was present at that particular ATM at or about that time, since his picture was taken by a surveillance camera. Jochim was shown the photo by the investigating officers, and he said "that's me, all right," and he freely admitted that he had tried to obtain some money from the machine, but found the

machine "jammed." The machine was serviced and placed back in operation around 8:00 a.m. on February 1, 1987.

At about 11:00 p.m. that evening, this same ATM machine at the Central Bank in Broomfield again became inoperative, and James Musser, a serviceman, immediately went to the scene to correct the problem. At this time the surveillance camera malfunctioned, for some unexplained reason. Musser testified that he arrived at the scene about 11:30 p.m. and proceeded to remedy the situation. However, as Musser was about to step outside the machine, he was confronted by a male who shouted "hold it, don't shut the door." Musser looked the man in the face, and testified that he immediately noted a rather striking resemblance between the robber and a friend of Musser's whom he had known when he lived in Iowa. The robber, according to Musser, wore a ski mask which went "around" the face, more than it covered the face proper, to the end that Musser could see his assailant's visage, i.e., eyebrows, cheeks, nose, mouth, and the like. At trial, Musser testified that he "believed" that the defendant, Jochim, was the man who accosted him, and he related why he had this belief.

Musser further testified that the person who accosted him had a gun in his hand, that he (Musser) could not tell what kind of gun it was, but that "[i]t looked like it was in a bag, a clear bag of some type, a baggie or . . . ."

Following the orders of his assailant, Musser turned around and knelt on the floor. The robber then removed Musser's loaded and operational 357 caliber revolver and held both weapons on Musser, who was ordered to put currency into what looked like a



Safeway shopping bag. This Musser did. The robber then fled the scene, and Musser called the police.

The Broomfield Police responded immediately and one officer, while searching the area, found a toy replica of an automatic pistol in a plastic bag in the street near the ATM.

A witness who lived in a townhouse across the street from the bank testified that he had observed a light-colored, early 1970s Chrysler-product car pull out of the townhouse parking lot without its headlights on at approximately 11:40 p.m., February 1, 1987. He identified defendant's car, a 1977 Plymouth, as looking very similar to the car he saw that night.

FBI agents, accompanied by a Broomfield policeman, interviewed Jochim on February 15 and 18, 1987, who was by that time a prime suspect. Jochim was not arrested until February 20, 1987. We do not propose to set forth in detail those conversations between the FBI agents and Jochim. It is sufficient to state that Jochim denied any involvement in the robbery and stated that at the time of the robbery he was playing poker at Fairchild's Poker Club. We would also note that one agent told Jochim that a "toy gun laying [sic] in the street outside the ATM machine that had been used during the robbery" had been found and sent to a laboratory in Washington, D.C. for fingerprint processing, and that "if his [Jochim's] fingerprints were on that toy gun he was in a lot of trouble." Jochim's response was that he had forgotten to tell the agents in their prior conversations that when he was at this particular ATM in the early morning hours on February 1, 1987, he had seen a toy gun lying in a trash can and had picked it

up and looked at it before throwing it back into the trash can, and that "if his fingerprints were on the toy gun that would be the reason." (Parenthetically, no prints were found on the toy gun!)

In examining the record, this Court is bound to view the evidence presented in the trial court in the light most favorable to the government to ascertain if there is sufficient substantial evidence, direct and circumstantial, together with reasonable inferences, from which a jury might find a defendant guilty beyond a reasonable doubt. *United States v. Twilligear*, 460 F.2d 79 (10th Cir. 1972). This Court has found evidence sufficient to support a conviction even though statements of witnesses as to the identity of the robber differed between the initial trial and the retrial. *United States v. Gipson*, 693 F.2d 109 (10th Cir. 1982), cert. denied, 459 U.S. 1216 (1983). We have also upheld conviction based on in-court identification by one witness although other witnesses were equivocal in their identification. *United States v. Ingram*, 600 F.2d 260 (10th Cir. 1979).

Circumstantial evidence is entitled to the same weight as that given to direct evidence in determining the issue of factual sufficiency to support a verdict beyond a reasonable doubt. *United States v. Smith*, 788 F.2d 663 (10th Cir. 1986). This case presents both direct evidence in the form of the victim's testimony at trial and circumstantial evidence in various forms. Together, they present sufficient evidence to support the jury's finding that Jochim, and not someone else, committed this robbery. In addition to the foregoing, the government showed that Jochim

was in financial straits prior to the robbery, but shortly after the robbery bought expensive camera equipment and made a down-payment on a house. Also, the defendant made certain admissions in his several conversations with the investigating agents. For example, he told them on one occasion that "hypothetically if I did the incident, would you let me go home to talk to my mom and dad?" Also, an investigating officer testified that Jochim said if he could get a personal recognizance bond, he could help them "find a gun." (The gun taken from the ATM repairman was never recovered.) It is true that defense counsel in cross-examination challenged, and quite ably, the accuracy of the testimony of certain government witnesses, such as Musser's initial belief as to the height and weight of his assailant, but such did not torpedo the government's case. It only posed credibility issues for the jury. The evidence tying Jochim into this robbery is legally sufficient.

As indicated, the district court admitted into evidence, over objection, the plastic replica of an automatic pistol found at the scene shortly after the robbery, as well as defendant's statements about it. We find no error in this ruling.

Fed. R. Evid. 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 403 provides for exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. The Advisory Committee on Proposed Rules noted



that unfair prejudice within this context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Fed. Crim. Code and Rules, at 221 (West 1987). The balancing of probative value against prejudicial effect is a matter which is within the discretion of the trial court, where admission of evidence is generally favored over exclusion. *United States v. Guerrero*, 667 F.2d 862, 867 (10th Cir. 1981), cert. denied, 456 U.S. 964 (1982).

Defense counsel argues that the plastic gun was not the gun actually used in the robbery. That is perhaps one version. But the government's version is that the discarded plastic gun was the weapon used by the robber, who then took, and used, the victim's own revolver. It is true that Musser could not identify the plastic toy gun as the weapon held by his assailant and had told police the weapon was a silver-type metal revolver rather than a black automatic; however, he testified that he only got a glance at the weapon. He also testified, and he was unequivocal on this point, that the weapon used was enclosed in a clear plastic bag or "baggie." A toy gun was found in a plastic bag at the scene shortly after the robbery; this corroborates the theory that the toy gun was used in the robbery.

The government quite understandably emphasizes Jochim's admission that he had handled the toy gun the day of the robbery and his explanation as to why his fingerprints might be on the toy gun. This statement is clearly relevant because it places in defendant's hand a toy gun which was found at the scene shortly after the robbery, enclosed in a plastic bag in the same manner

that the gun used in the robbery was enclosed in a plastic bag. Although perhaps prejudicial to a finding of defendant's innocence, the statements are not prejudicial in the context of Fed. R. Evid. 403.

Judgment affirmed.

Entered for the Court

Robert H. McWilliams,  
Circuit Judge