United States v. Bray

1998

RYAN, Circuit Judge.

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The defendant, James A. Bray, appeals from the judgment entered following a jury trial in which he was convicted of embezzling some $20,000 during the course of his employment with the United States Postal Service. He argues that the district court abused its discretion in admitting exhibits that summarized voluminous underlying documents without admitting the underlying documentation and without giving a limiting instruction. We conclude that the district court did not abuse its discretion and, thus, affirm the defendant's convictions.

[The defendant, a postal employee, was convicted of being a part of a scheme to steal cash given by customers. Money collected each day at a post office is reported on a 1412 Form and the government in this case elected to admit as evidence a summary of all the 1412 forms rather than the voluminous forms themselves.]

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Bray now argues that the district court committed reversible error by admitting the government's summary exhibits without admitting the underlying documents and without giving a limiting instruction. "The admission of summary charts is a matter within the discretion of the district court, whose decisions in such matters will be upheld absent an abuse of discretion." *United States v. Williams*, 952 F.2d 1504, 1519 (6th Cir.1991) (citation omitted).

Rule 1006 of the Federal Rules of Evidence provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

Fed.R.Evid. 1006.

The text of the Rule and the cases construing it make clear that there are several preconditions to admitting a 1006 summary chart. First, the documents (or recordings or photographs) must be so "voluminous" that they "cannot conveniently be examined in court" by the trier of fact. That is, the documents must be sufficiently numerous as to make comprehension "difficult and ... inconvenient." *United States v. Seelig*, 622 F.2d 207, 214 (6th Cir.1980); *see Martin v. Funtime, Inc.*, 963 F.2d 110, 115 (6th Cir.1992). On the other hand, it is not necessary that the documents be so voluminous as to be "literally impossible to examine." *United States v. Scales*, 594 F.2d 558, 562 (6th Cir.1979).

Second, the proponent of the summary must also have made the documents "available for examination or copying, or both, by other parties at [a] reasonable time and place." Fed.R.Evid. 1006; *see Scales*, 594 F.2d at 562.

> The purpose of this requirement is to provide the opposing party who desires to attack the authenticity or accuracy of a chart, summary, or calculation, with an opportunity to prepare for cross-examination, or to offer exhibits of its own as rebuttal evidence, which would serve to counteract the impression made on the jury by the proponent's witness.

6 WEINSTEIN'S FEDERAL EVIDENCE § 1006.06[1], p. 1006-14 (Joseph M. McLaughlin ed., 2d ed.1997).

Third, and relatedly, "`[c]ommentators and other courts have agreed that Rule 1006 requires that the proponent of the summary establish that the underlying documents are admissible in evidence.'" *Martin*, 963 F.2d at 116 (emphasis omitted) (quoting *United States v. Johnson*, 594 F.2d 1253, 1256 (9th Cir.1979)). Thus, if the underlying documents are hearsay and not admissible under any exception, a chart or other summary based on those documents is likewise inadmissible. *See generally* Fed.R.Evid. 801-805. The same principle would render inadmissible a summary based on documents that are inadmissible for any other reason, such as irrelevancy, unfair prejudice, or lack of authenticity. *See generally* Fed.R.Evid. 401-403, 901(a). But given Rule 1006's provision that the underlying documents need not themselves be in evidence, however, it is plain that a summary admitted under Rule 1006 is itself the evidence that the trier of fact should consider. *See* 2 McCORMICK ON EVIDENCE § 233, p. 68 (John W. Strong ed., 4th ed.1992); 6 WEINSTEIN'S FEDERAL EVIDENCE § 1006.04[2], p. 1006-7 (Joseph M. McLaughlin ed., 2d ed.1997).

Fourth, reasonably enough, a summary document "must be accurate and non-prejudicial." *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir.1986). This means first that the information on the document summarizes the information contained in the underlying documents accurately, correctly, and in a non-misleading manner. Nothing should be lost in the translation. It also means, with respect to summaries admitted in lieu of the underlying documents, that the information on the summary is not embellished by or annotated with the conclusions of or inferences drawn by the proponent, whether in the form of labels, captions, highlighting techniques, or otherwise. Once a Rule 1006 summary is admitted, it may go to the jury room, like any other exhibit. Thus, a summary containing elements of argumentation could very well be the functional equivalent of a mini-summation by the chart's proponent every time the jurors look at it during their deliberations, particularly when the jurors cannot also review the underlying documents.

Fifth and finally, a summary document must be "`properly introduced before it may be admitted into evidence.'" *Martin*, 963 F.2d at 115-16 (quoting *Scales*, 594 F.2d at 563). In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation. *See Scales*, 594 F.2d at 562-63.

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Since Rule 1006 authorizes the admission in evidence of the summary itself, it is generally inappropriate to give a *limiting* instruction for a Rule 1006 summary. This is a point, however, on which in the past this court has been less than clear. In *United States v. DeBoer*, 966 F.2d 1066 (6th Cir. 1992), for example, the court observed in *dicta* that "the district court properly instructed the jury that the [Rule 1006] summaries ... were not evidence or proof of facts." *Id.* at 1069. Other opinions likewise suggest a pervasive misunderstanding. *Cf. Seelig*, 622 F.2d at 214; *Scales*, 594 F.2d at 563-64.

The problem hinges on the distinction between Rule 1006 summaries and summaries used as "pedagogical devices," which are more properly considered under Rule 611(a). The distinction was clearly explained in *Gomez*:

> Contents of charts or summaries admitted as evidence under Rule 1006 must fairly represent and be taken from underlying documentary proof which is too voluminous for convenient in-court examination, and they must be accurate and nonprejudicial. Such summaries or charts admitted as *evidence* under Rule 1006 are to be distinguished from summaries or charts used as pedagogical devices which organize or aid the jury's examination of testimony or documents which are themselves admitted into evidence. Such pedagogical devices "are more akin to argument than evidence ... Quite often they are used on summation." Generally, such a summary is, and should be, accompanied by a limiting instruction which informs the jury of the summary's purpose and that it does not itself constitute evidence.

Gomez, 803 F.2d at 257-58 (citations omitted). In other words, summary exhibits that are used as pedagogical devices do not, "strictly speaking, ... fall within the purview of Rule 1006." *United States v. Paulino*, 935 F.2d 739, 753 (6th Cir.1991).

We understand the term "pedagogical device" to mean an illustrative aid such as information presented on a chalkboard, flip chart, or drawing, and the like, that (1) is used to summarize or illustrate evidence, such as documents, recordings, or trial testimony, that has been admitted in evidence; (2) is itself not admitted into evidence; and (3) may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent. This type of exhibit is "`more akin to argument than evidence' since [it] organize[s] the jury's examination of testimony and documents already admitted in evidence." *Id.*; *see also United States v. Wood*, 943 F.2d 1048, 1053-54 (9th Cir.1991); *cf. United States v. Sawyer*, 85 F.3d 713, 740 (1st Cir.1996). Trial courts have discretionary authority to permit counsel to employ such pedagogical-device "summaries" to clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury. This court has held that Fed.R.Evid. 611(a) provides an additional basis for the use of such illustrative aids, as an aspect of the court's authority concerning the "mode ... of interrogating witnesses and presenting evidence." *Paulino*, 935 F.2d at 753 n. 7. The rule states:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Fed.R.Evid. 611(a).

We note in passing that in appropriate circumstances not only may such pedagogical-device summaries be used as illustrative aids in the presentation of the evidence, but they may also be admitted into evidence even though not within the specific scope of Rule 1006. Such circumstances might be instances in which such pedagogical device is so accurate and reliable a summary illustration or extrapolation of testimonial or other evidence in the case as to reliably assist the factfinder in understanding the evidence, although not within the specific requirements of Rule 1006.

To recapitulate, there are three kinds of summaries:

> (1) Primary-evidence summaries, such as those at issue here, which summarize "voluminous writings, recordings, or photographs" that, because they are so voluminous, "cannot conveniently be examined in court." Fed.R.Evid. 1006. In this instance, the summary, and not the underlying documents, is the evidence to be considered by the factfinder. *See* 1 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14.02 (4th ed.1992); 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS (Criminal) ¶ 5.05, p. 5-34 (1997).
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> (2) Pedagogical-device summaries or illustrations, such as chalkboard drawings, graphs, calculations, or listings of data taken from the testimony of witnesses or documents in evidence, which are intended to summarize, clarify, or simplify testimonial or other evidence that has been admitted in the case, but which are not themselves admitted, instead being used only as an aid to the presentation and understanding of the evidence. For these the jury should be instructed that the summaries are not evidence and were used only as an illustrative aid. *See* 1 DEVITT, *supra*, § 14.02; 1 SAND, *supra*, ¶ 5.05, p. 5-35.
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> (3) Secondary-evidence summaries that are a combination of (1) and (2), in that they are not prepared entirely in compliance with Rule 1006 and yet are more than mere pedagogical devices designed to simplify and clarify other evidence in the case. These secondary-evidence summaries are admitted in evidence not in lieu of the evidence they summarize but *in addition thereto*, because in the judgment of the trial court such summaries so accurately and reliably summarize complex or difficult evidence that is received in the case as to materially assist the jurors in better understanding the evidence. In the *unusual* instance in which this third form of secondary evidence summary is admitted, the jury should be instructed that the summary is not independent evidence of its subject matter, and is only as valid and reliable as the underlying evidence it summarizes. *See United States v. Citron*, 783 F.2d 307, 317 n. 10 (2d Cir.1986).

Since, in this case, it is clear that the summaries at issue are within the first of the three categories we have described, and were admitted under Rule 1006, the district court's refusal to give a limiting instruction in its final instructions to the jury was proper. There was no error, let alone reversible error. To be sure, the district court mistakenly gave a limiting instruction *sua sponte* when it admitted the government's summaries, but this error was one that favored Bray. Obviously, it provides no basis for overturning his convictions.