FSM SUPREME COURT APPELLATE DIVISION

FRANK CHOLYMAY and ROOSEVELT D. KANSOU, Appellants, vs. FEDERATED STATES OF MICRONESIA, Appellee.	)	APPEAL CASE NO. C3-2008

OPINION

Argued: July 10, 2009
Decided: January 18, 2010

BEFORE:

Hon. Martin G. Yinug, Associate Justice, FSM Supreme Court
Hon. Aliksa B. Aliksa, Temporary Justice, FSM Supreme Court*
Hon. Benjamin F. Rodriguez, Temporary Justice, FSM Supreme Court**

*Chief Justice, Kosrae State Court, Lelu, Kosrae
*Chief Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

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HEADNOTES

Appellate Review – Standard of Review – Criminal Cases; Evidence – Witnesses

The trial court is in the best position to judge the demeanor and credibility of the witnesses. Cholymay v. FSM, 17 FSM Intrm. 11, 17 (App. 2010).

Criminal Law and Procedure; Evidence

Although the court must first look to FSM sources of law for purposes of establishing legal requirements in criminal cases, when an FSM court has not previously construed an FSM evidence rule which is identical or similar to a U.S. counterpart, the court may look to U.S. sources on the United States Federal Rules of Evidence for guidance. Cholymay v. FSM, 17 FSM Intrm. 11, 19 (App. 2010).

Appellate Review – Standard of Review – Criminal Cases

For purposes of review, the trial court has substantial discretion in deciding questions concerning the admissibility of evidence. Cholymay v. FSM, 17 FSM Intrm. 11, 19 (App. 2010).

Evidence – Hearsay

Hearsay is inadmissible unless it falls within an exception to the hearsay rule. Cholymay v. FSM, 17 FSM Intrm. 11, 20 (App. 2010).

Evidence – Hearsay

FSM Evidence Rule 803(6) authorizes the admission, over a hearsay objection, of a record made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Cholymay v. FSM, 17 FSM Intrm. 11, 20 (App. 2010).

Evidence – Authentication; Evidence – Hearsay

Business records are normally authenticated by a custodian of records. The custodian or other qualified witness who must authenticate business records need not be the person who prepared or maintained the records, or even an employee of the record-keeping entity, as long as the witness understands the system used to prepare the records. Objections concerning the identity or competency of preparer of a record might go to the evidentiary weight or credibility of a record but not to the record's admissibility. Cholymay v. FSM, 17 FSM Intrm. 11, 20 (App. 2010).

Evidence – Hearsay

Because of the general trustworthiness of regularly kept records and the need for such evidence in many cases, the business records exception has been construed generously in favor of admissibility. Cholymay v. FSM, 17 FSM Intrm. 11, 20 (App. 2010).

Evidence – Hearsay

No evidence rule requires that the custodian have personal knowledge of the business record. The custodian is merely a person with knowledge of what the proponent claims the record to be. Rule 803 also does not require that the custodian be the author of the record or even an employee of the business from which the record originated. The witness need only be a qualified witness to satisfy the requirements of Rule 803(6). Whether the witness was qualified to satisfy those requirements is a decision within the trial court's discretion. Cholymay v. FSM, 17 FSM Intrm. 11, 21 (App. 2010).

Evidence – Hearsay

When an extensive evidentiary foundation had been laid before the business records exhibits

were admitted over the defendants' hearsay objections, the trial court, having heard adequate foundational testimony, did not abuse its discretion by admitting the exhibits. Cholymay v. FSM, 17 FSM Intrm. 11, 21 (App. 2010).

Evidence – Hearsay

When compiling of debts owed to businesses was a regular transaction of any company regardless of whether or not it had been prepared at or near the time of pending litigation and when the accountant/bookkeeper was specifically hired to address accounts receivables information for the businesses, her compilation of debts owed by an authority was in the regular course of her duties and a typical business practice, and therefore the trial court did not abuse its discretion by admitting the debt compilation. Cholymay v. FSM, 17 FSM Intrm. 11, 21 (App. 2010).

Appellate Review – Standard of Review – Criminal Cases; Evidence – Authentication

Authentication is satisfied by evidence sufficient to support a finding that the matter in question is what it its proponent claims. The appellate court's review is limited to determining whether the trial court abused its discretion in deciding that the government made a prima facie showing as to the documents' authenticity. Cholymay v. FSM, 17 FSM Intrm. 11, 21 (App. 2010).

Evidence – Authentication

When the defendants did not claim that the exhibits were something other than what the government claimed them to be, but instead stated that the exhibits were illegible, incomplete, or had notes written on them raising substantial doubts as to their authenticity, that is a question of what weight or credibility the exhibits should be given, not whether they should be admitted. Cholymay v. FSM, 17 FSM Intrm. 11, 22 (App. 2010).

Evidence – Authentication; Evidence – Hearsay

When the government's witnesses testified as to what the exhibits were and, if a witness did not know what an exhibit was, it was not admitted, the weight or credibility that an exhibit was given was for the trial court to decide. When the trial court took into account the defendants' stated concerns regarding the documents but there was no requirement that the exhibits be excluded after the witnesses had testified that they were what the government claimed them to be, the trial court, having heard adequate testimony, did not abuse its discretion by admitting the exhibits. Cholymay v. FSM, 17 FSM Intrm. 11, 22 (App. 2010).

Evidence

To prove the content of a writing the original is required, but a duplicate of an original writing is admissible when the original cannot be found and if there is no genuine issue as to the original's authenticity. Cholymay v. FSM, 17 FSM Intrm. 11, 22-23 (App. 2010).

Evidence – Authentication

Arguments concerning the accuracy of the record go to their weight and not their admissibility. The question then is whether the photocopy was a duplicate of what the government claimed it to be. Cholymay v. FSM, 17 FSM Intrm. 11, 23 (App. 2010).

Evidence – Authentication

When the defendants' argument is not a true objection to the records' admissibility but is instead a question concerning the weight or credibility that the exhibits should be given because the defendants dispute the exhibits' accuracy; when the government stated that the originals were unobtainable due to judicial process because the documents were collected by the court in the related criminal matters and were not available for the trial of this case; and when FSM Evidence Rule 1004 does not require originals when they cannot be obtained, the trial court did not err or abuse its discretion in admitting

the government's exhibits over the defendants' best evidence objections. Cholymay v. FSM, 17 FSM Intrm. 11, 23 (App. 2010).

Appellate Review – Standard of Review – Criminal Cases

The standard of review applied to sufficiency of the evidence challenges in a criminal case is whether, in reviewing the evidence in the light most favorable to the trial court's determinations of fact, there is sufficient evidence to convince a reasonable trier of fact, relying on evidence which it had the right to believe and accept as true, that the defendant is guilty beyond a reasonable doubt. This standard of review extends to inferences drawn from the evidence as well. Cholymay v. FSM, 17 FSM Intrm. 11, 23 (App. 2010).

Appellate Review – Standard of Review – Criminal Cases

Appellate review of the sufficiency of the evidence is very limited – only findings that are clearly erroneous can be set aside. Cholymay v. FSM, 17 FSM Intrm. 11, 23 (App. 2010).

Appellate Review – Standard of Review – Criminal Cases

An appellate court will not set aside a factual finding where there is credible evidence in the record to support that finding, in part because the trial court had the opportunity to view the witnesses and the manner of their testimony. The trial court's findings will be upheld so long as they rationally reflect evidence which is reasonable and combines with other evidence to present a coherent, believable, overall picture. Cholymay v. FSM, 17 FSM Intrm. 11, 23 (App. 2010).

Criminal Law and Procedure – Conspiracy

A person commits the offense of conspiracy, if, with intent to promote or facilitate the commission of a national offense, he agrees with one or more persons that they, or one or more of them, will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and he or another person with whom he conspired commits an overt act in pursuance of the conspiracy. Cholymay v. FSM, 17 FSM Intrm. 11, 23 (App. 2010).

Criminal Law and Procedure – Conspiracy

The agreement in a conspiracy does not have to be explicit. A mere tacit understanding will suffice, and there need not be any written statement or even a speaking of words which expressly communicates the agreement. It is not necessary to prove the specific terms or the specific scope of the conspiratorial agreement or to prove that the conspiracy's substantive object was accomplished. The existence of, and participation in, a criminal conspiracy may be proved by circumstantial as well as by direct evidence, if it affords a reasonable inference as to the ultimate facts sought to be proved. Cholymay v. FSM, 17 FSM Intrm. 11, 23 (App. 2010).

Criminal Law and Procedure – Conspiracy

The trial court is allowed great discretion in the reception of circumstantial evidence, for a conspiracy must be proved by a number of indefinite acts, conditions, and circumstances varying with the purpose to be accomplished. Cholymay v. FSM, 17 FSM Intrm. 11, 24 (App. 2010).

Criminal Law and Procedure – Conspiracy

When it is shown that the defendants by their acts pursued the same object, one performing one part and the other performing another part so as to complete it or with a view to its attainment, the trier of fact will be justified in concluding that they were engaged in a conspiracy to effect that object. Most conspiracy convictions are based on circumstantial evidence. Cholymay v. FSM, 17 FSM Intrm. 11, 24 (App. 2010).

Appellate Review – Standard of Review – Criminal Cases; Criminal Law and Procedure – Conspiracy

While appellate panels must always show deference to the inferences and conclusions drawn by a trial judge from evidence, this deference seems even greater in the context of a conspiracy trial, in which the trial judge is likely looking for the proverbial "wink and nod" that often ties a conspiracy together. It is with such considerable deference that an appellate court reviews the evidence explicitly relied upon by the trial court in finding the defendants guilty. Cholymay v. FSM, 17 FSM Intrm. 11, 24 (App. 2010).

Criminal Law and Procedure – Conspiracy

When the circumstantial evidence establishes that the defendants by their acts pursued the same object, one performing one part and the other performing another part so as to complete the making of obligations in advance of availability of funds, obligating funds for other than their lawful purpose, and submitting fraudulent documents, the trier of fact was justified in concluding that the defendants were engaged in a conspiracy to achieve those objectives. Cholymay v. FSM, 17 FSM Intrm. 11, 24 (App. 2010).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Associate Justice:

Frank Cholymay and Roosevelt Kansou ("Defendants") appeal their convictions of conspiracy by the FSM Trial Division in Chuuk. They contend that: (1) the trial court erred in admitting evidence over their objections of hearsay, lack of authentication, and the use of duplicates instead of originals; and (2) there was insufficient evidence to support their convictions.

We conclude that the trial court did not err in admitting the Government's exhibits over the Defendants' objections and there was sufficient evidence to sustain the convictions.

I. Issues on Appeal

1. Whether the trial court erred in admitting evidence over the objection of defense counsel on the grounds that the evidence was inadmissible hearsay under Rule 802 of the FSM Rules of Evidence?

2. Whether the trial court erred in admitting evidence over the objection of defense counsel on the grounds that the evidence was not properly authenticated under Rule 901 of the FSM Rules of Evidence?

3. Whether the trial court erred in admitting evidence over the objection of defense counsel on the grounds that the evidence was not the best evidence under Rule 1003 of the FSM Rules of Evidence?

4. Whether the guilty verdict on the charge of conspiracy was in error, when there was insufficient evidence to support a guilty verdict beyond a reasonable doubt?

II. Factual Background

In November 2003, fourteen defendants were charged with violations of FSM criminal law.

Roosevelt Kansou was charged with Conspiracy, 11 F.S.M.C. 203 and Bribery, 11 F.S.M.C. 531(1).[1] Frank Cholymay was also charged with Conspiracy, 11 F.S.M.C. 203. Trials for the fourteen defendants were severed and the Defendants Kansou and Cholymay were tried together.

The trial was held in this criminal matter starting on January 10, 2009 and concluding on January 19, 2009. The Government called fourteen witnesses and admitted well over six hundred exhibits into evidence. Kansou called three defense witnesses and admitted two exhibits into evidence. Cholymay called one defense witness and admitted twenty exhibits into evidence.

On March 10, 2009, the trial court rendered a decision, concluding that the Defendants were both guilty of conspiracy.[2] On May 2, 2008, the trial court issued a Judgment of Conviction and Sentencing Order. This was the final severed matter to be heard.

The conspiracy was alleged to have worked in the following manner. Island Imports and Merry Sand Mining,[3] provided goods, materials and services, and sometimes cash on credit to the Northern Namoneas Development Authority ("NNDA"), among others. These credit purchases would be authorized by Congressman Kansou,[4] and would be subsequently paid for from the future Congressional allotments of national government funds.

Frank Darra, the former FSM Department of Finance and Administration representative in Chuuk and co-conspirator, would process the payments for the credit purchases even though he knew the payments were being made in violation of the Financial Management Act because the goods, materials, and services had previously been released. Additionally, he would shift funds from other allotments to cover the credit purchases to avoid having to report over-obligated allotments as required by law.

Executive Director Cholymay of NNDA and Kansou were in agreement with co-conspirators to make obligations in advance of availability of funds. Once funding became available and allotments made, fraudulent purchase requisitions, allegedly with inaccurate dates and fictitious purchases, would be created and processed through FSM Department of Finance and Administration for payment.

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[1]The charge of Bribery is not at issue on appeal in this matter.

[2]11 F.S.M.C. 203. Conspiracy (1982) –

> (1) A person commits the offense of conspiracy if, with intent to promote or facilitate the commission of a National offense:
>
> > (a) he agrees with one or more persons that they, or one or more of them, will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and
> >
> > (b) he or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

[3]Island Imports and Merry Sand Mining were owned by John Engichy. He was a co-conspirator and one of the fourteen originally charged defendants. FSM Supreme Court Trial Division, Chuuk – Criminal Case No. 2003-1508.

[4]Former FSM Congressman representing the Chuuk election district served by Northern Namoneas Development Authority.

III. Discussion

The trial court – being in the best position to judge the demeanor and credibility of the witnesses – held after careful review of the record, including review of all exhibits and testimony of the witnesses that the Government met its burden, proving beyond a reasonable doubt that the Defendants committed the offense of conspiracy. The trial court admitted Darra's affidavit, the Government's exhibits P6-3-3 through P6-3-5 which implicated the Defendants in the course of conduct with Darra. The trial court found that the Government's exhibits P1-5 and P1-6 demonstrated that NNDA owed thousands of dollars to Island Imports and Merry Sand Mining, businesses owned by John Engichy, and reflected a pattern in which NNDA had numerous charged sales.

The trial court held that the Government's exhibits P2-1 through P2-28 were checks issued by Island Imports and Merry Sand Mining which were authorized by Kansou and were charged to NNDA. The issuance of these checks was an improper practice because even if the funds were ultimately used for legitimate purposes the funds should not have been issued by Island Imports and Merry Sand Mining to certain individuals. Specifically, the Government's exhibits P2-2 and P2-38 were checks issued to Cholymay, the Government's exhibit P2-38 was a check issued to Cholymay's co-worker, Etop Sos, and the Government's exhibit P2-39 was a check issued to Kansou.

The trial court concluded from the Government's exhibits P3-18, 22, 32, 55, 106, 113 and 157 that there were charges for more than the authorization allowed. The trial court held that there were authorization letters with attached checks charged to NNDA, as demonstrated by the Government's exhibits P3-29, 37, 50-51, 70, 116, 135, 155, 176 and 187. There were supporting documents, including invoices attached to authorization letters that pre-dated the letters themselves, confirmed by the Government's exhibits P3-9, 47, 52, 100, 121 and 135. There were also instances in which supporting documents were submitted separately to split the overall amount due so that Darra could issue checks without additional authorization from the national office which was verified by the Government's exhibits P4-1-13 and P4-3-11.

The trial court established that NNDA entered into contracts with Island Imports and Merry Sand Mining for the procurement of materials and supplies in such amount that requests or orders should have gone to open bidding as demonstrated by the Government's exhibits P4-4-3, P4-4-6, P4-6-2 and P4-6-3. The trial court concluded that the Government's exhibit P5-6-1 confirmed that a Nissan Frontier pick up truck was purchased by FSM check number 163565. However, the Government's exhibit P2-39 verified that Island Imports issued a check for cash given to Kansou in exchange for FSM check number 163565. The trial court found that the Defendants had held a meeting or meetings with a constituent or constituents regarding requests for vehicles to be purchased by NNDA through Island Imports and Merry Sand Mining.

The court concluded that the Defendants course of conduct, the business practices of Engichy, and interaction with Darra, head of FSM Department of Finance and Administration in Chuuk, indicated an agreement between these conspirators to obligate funds in advance of availability,[5] to obligate funds

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[5]55 F.S.M.C. 221. Overobligation of Funds Prohibited –

> Unless otherwise specifically authorized by law, no officer or employee of the Federated States of Micronesia, or allottee of funds shall make or authorize an expenditure from, or create or authorize an obligation pursuant to any appropriation, apportionment, reapportionment, or allotment of funds of the United States Government or the Federated States of Micronesia Government:

for other than their lawful purpose,[6] and to submit fraudulent documents.[7] Throughout the trial, the Defendants raised similar and continuous objections to the Government's exhibits. The Defendants' objections are summarized as follows:

Exhibit P1-5 is a twenty-two page document including a summary of transactions or accounts receivables between NNDA and Island Imports and Merry Sand Mining drafted by witness Virginia Galang, an accountant/bookkeeper for Island Imports and Merry Sand Mining. The Defendants asserted that this exhibit was inadmissible hearsay and was prepared in preparation for litigation. The Government argued that it was admissible pursuant to the business record exception. The court ruled that the summary was prepared by Virginia Galang, the Island Imports and Merry Sand Mining's accountant/bookkeeper by a pattern of business practice.

Exhibits P1-A-2 through P1-A-28 and P1-B-2 through P1-B-28 are invoices reviewed by Virginia Galang in the drafting of NNDA's transaction summary (exhibit P1-5). The Defendants claimed that the invoices could not be properly authenticated and were not the best evidence (originals). The Government argued that the invoices were trustworthy business records and the originals, which were used in the co-conspirators' prior cases, could not be located. The invoices were admitted as business records over the Defendants' objections. The court held that even if the invoices which the Defendants claimed were untrustworthy had been excluded, NNDA's total debt owed to Island Imports and Merry Sand Mining was still substantial and all charges, even if they were for legitimate purposes, were still improper pursuant to FSM Finance and Administration legal requirements.

Exhibits P2-1 through P2-40 are checks issued by Island Imports and Merry Sand Mining reviewed by Virginia Galang in the drafting of NNDA's transaction summary (exhibit P1-5). The Defendants claimed that the checks could not be properly authenticated and were not the best evidence (originals). The Government maintained that the checks were trustworthy business records and the

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(1) in excess of the sum made available by law; or

(2) in advance of the availability of funds; or

(3) for purposes other than those for which an allotment has been made.

[6] *Id.*

[7] 11 F.S.M.C. 529. Tampering with public records or information –

(1) A person commits a crime if he or she:

(a) knowingly makes a false entry in, or false alteration of, any record, document, or thing received or kept by a public servant, or belonging to the Government of the Federated States of Micronesia for information or record, or required by statute or regulation of the Federated States of Micronesia to be kept by anyone for information of the Government;

(b) makes, presents, or uses any record, document, or thing knowing it to be false, and with the purpose that it be taken as a genuine part of information or records referred to in paragraph (a) of this subsection; or

(c) purposely and unlawfully destroys, conceals, removes, or otherwise impairs the verity or availability of any such record, document, or thing.

originals which were used in the co-conspirators' cases could not be retrieved. The checks were then admitted as business records.

Exhibits P3-7 through P3-262 are NNDA Authorization Forms given to Chuuk citizens with approved projects seeking assistance to obtain necessary materials from local vendors. The Authorization Forms were admitted through foundational testimony offered by Etop Sos, former Project Coordinator of NNDA. Again, Defendants claimed that the Authorization Forms could not be properly authenticated and were not the best evidence (originals). The Government again claimed that the Authorization Forms were trustworthy business records and the originals which were used in the co-conspirators' cases could not be located. The forms were admitted over Defendants' objections.

Exhibits P4-1-1 through P4-9-15 are FSM National Government Project Control Documents. Project Control Documents are a variety of documents used by FSM Department of Finance and Administration to track and manage the allocation of national funds for an approved project. Again, the Defendants claimed that the Project Control Documents could not be properly authenticated and were not the best evidence (originals). The Government further maintained that the Project Control Documents were trustworthy business records and the originals which were used in the co-conspirators' cases could not be located. The exhibits were admitted over the objections of the Defendants.

Exhibits P5-1-1 through P5-7-1 are FSM National Advice of Allotment forms. The Defendants claimed that these forms could not be properly authenticated and were not the best evidence (originals). The Government again asserted that the forms were trustworthy business records and the originals which were used in the co-conspirators' cases could not be located.

Exhibit P6-3-3 through P6-3-5 is witness Darra's affidavit dated November 3, 2003. Darra's affidavit was admitted through his own testimony over the objection of Kansou, who asserted that the affidavit was inadmissible pursuant to a previous court order. The court ruled that the previous court order was issued when Darra and Kansou were to be tried together as co-conspirators. The order was to protect Kansou's constitutional right to confront the witness. However, the court found that the order lost its purpose when Kansou was severed from Darra and admitted the affidavit. Kansou was afforded an opportunity to confront the witness and thus there was no constitutional violation.

Issue (1) *Whether the trial court erred in admitting evidence over the objection of defense counsel on the grounds that the evidence was inadmissible hearsay under Rule 802 of the FSM Rules of Evidence?*

On appeal, the Defendants argue that approximately 180 of the Government's exhibits were wrongfully admitted over their hearsay objections. The Defendants also claim that the admitted exhibits were not originals and were prepared by someone other than the witness who testified regarding the exhibits.

Although the court must first look to FSM sources of law for purposes of establishing legal requirements in criminal cases, when an FSM court has not previously construed an FSM rule or issue on appeal which is identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance. FSM v. Wainit, 14 FSM Intrm. 164, 168 n.1 (Chk. 2006). It is noted that FSM Rules of Evidence are based on the United States Federal Rules of Evidence. For purposes of review, the trial court has substantial discretion in deciding questions concerning the admissibility of evidence. United States v. Zepeda-Lopez, 478 F.3d 1213, 1219 (10th Cir. 2007).

Hearsay[8] is inadmissible unless it falls within an exception to the hearsay rule. Rosokow v. Bob, 11 FSM Intrm. 210, 215 (Chk. S. Ct. App. 2002). Records which are kept in the normal course of business can be admitted in evidence. In re Lot No. 014-A-21, 11 FSM Intrm. 582, 592 (Chk. S. Ct. Tr. 2003). Rule 803(6) of the FSM Rules of Evidence authorizes the admission, over a hearsay objection, of a record made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record, all as shown by the testimony of the "custodian or other qualified witness," unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Business records are normally authenticated by a custodian of records. Richmond Wholesale Meat Co. v. Kolonia Consumer Coop. Ass'n (III), 7 FSM Intrm. 453, 455 (Pon. 1996). "The 'custodian or other qualified witness' who must authenticate business records need not be the person who prepared or maintained the records, or even an employee of the record-keeping entity, as long as the witness understands the system used to prepare the records." Conoco, Inc. v. Department of Energy, 99 F.3d 387, 391-92 (Fed. Cir. 1996). Objections concerning the identity or competency of preparer of a record might go to the evidentiary weight or credibility of a record but not to the record's admissibility. United States v. Smith, 609 F.2d 1294, 1301-02 (9th Cir. 1979). "Because of the general trustworthiness of regularly kept records and the need for such evidence in many cases, the business records exception has been construed generously in favor of admissibility." Conoco, 99 F.3d at 391-92.

Here the sponsoring witness, Virginia Galang testified in some detail regarding the record-keeping processes of Island Imports and Merry Sand Mining. The Defendants assert that Galang as a custodian of records did not have personal knowledge regarding the records, the records were not authored by her, and were not contemporaneous recordings. However, she did testify regarding the storage of the records, the purpose of the records and customary authors. Galang, of course, was available for voir dire and cross-examination regarding her familiarity with the records and the degree of reliance placed upon such records by the company.

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[8]Rule 802. Hearsay rule – "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Chief Justice pursuant to Article XI of the Constitution, or by statute enacted by the Congress of the Federated States of Micronesia."

Rule 803. Hearsay exceptions –

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . .
>
> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time of, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trust-worthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

No evidence rule requires that the custodian have personal knowledge of the business record. The custodian is merely a person with knowledge of what the proponent claims the record to be. Rule 803 also does not require that the custodian be the author of the record or even an employee of the business from which the record originated. The witness need only be a qualified witness to satisfy the requirements of Rule 803(6). Whether the witness was qualified to satisfy the requirements was a decision within the discretion of the trial court. Here, it was only after extensive evidentiary foundation had been laid that the exhibits were admitted over the Defendants' hearsay objections. Therefore, we find that the trial court having heard adequate foundational testimony did not abuse its discretion by admitting the exhibits.

The Defendants also argue that the Government's exhibit P1-5 was drafted in preparation for litigation and therefore was inadmissible. The parties argued extensively regarding the admission of the Government's exhibit P1-5. The Government asserted that compiling NNDA's debts owed to Island Imports and Merry Sand Mining was a regular transaction of any company regardless of whether or not it had been prepared at or near the time of pending litigation. Additionally, Galang testified that as an accountant/bookkeeper she was specifically hired to address accounts receivables information for Island Imports and Merry Sand Mining. Her compilation of debts owed by NNDA was in the regular course of her duties and a typical business practice. We conclude that the trial court did not abuse its discretion by admitting the Government's Exhibit P1-5.

Issue (2) *Whether the trial court erred in admitting evidence over the objection of defense counsel on the grounds that the evidence was not properly authenticated under Rule 901 of the FSM Rules of Evidence?*

On appeal, the Defendants argue that the Government's exhibits were inadmissible for lack of authentication. The Defendants claim the Government's witnesses only testified as to the office use of the exhibits and where they were kept in the office but did not testify as to actual knowledge of the content of the exhibits. The Defendants state that the content of some of the exhibits was in question and, without proper authentication, should not have been admitted.

Rule 901(a)[9] of the FSM Rules of Evidence provides that authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what it its proponent claims." Joker v. FSM, 2 FSM Intrm. 38, 46 (App. 1985). The appellate "court's review is limited to determining whether the trial court abused its discretion in deciding that the government made a prima facie showing as to the authenticity of the documents." Smith, 609 F.2d at 1301-02.

The Defendants did not claim that the exhibits were something other than what the Government

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[9]Rule 901. Requirement of Authentication or Identification –

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

claimed them to be; for example, the Defendants did not assert that the exhibits were not receipts, checks, Authorization Forms, Allotment Forms, or Project Control Documents. Instead, the Defendants state that the exhibits were illegible, incomplete, or had notes written on them raising substantial doubts as to their authenticity. However, that is a question of what weight or credibility the exhibits should be given, not whether they should be admitted.

The Government's witnesses testified as to what the exhibits were. If a witness did not know what an exhibit was, it was not admitted. The weight or credibility that an exhibit was given was for the trial court to decide. The trial court took into account the Defendants' stated concerns regarding the documents but there was no requirement that the exhibits be excluded after the witnesses had testified that they were what the Government claimed them to be. We find that the trial court having heard adequate testimony did not abuse its discretion by admitting the exhibits.

Issue (3) *Whether the trial court erred in admitting evidence over the objection of defense counsel on the grounds that the evidence was not the best evidence under Rule 1003 of the FSM Rules of Evidence?*

The Defendants assert on appeal that the exhibits offered by the Government were not the originals and were therefore not the best evidence. The Defendants state that there were exhibits that were not legible, were incomplete or their validity was in question. The Defendants argue that the Government failed to state why the originals were not available.

To prove the content of a writing the original is required, pursuant to the best evidence rule.[10] However, a duplicate of an original writing is admissible if the original cannot be found, FSM Evid. R.

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[10]Rule 1002. Requirement of original – "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress."

Rule 1003. Admissibility of duplicates – "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

Rule 1004. Admissibility of other evidence of contents –

> The original is not required, and other evidence of the contents of a writing, recording, or photographs is admissible if–
>
> (1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> (2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
>
> (3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or
>
> (4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

1004(1), and if there is no genuine issue as to the authenticity of the original, Richmond, 7 FSM Intrm. at 455. Arguments concerning the accuracy of the record go to their weight and not their admissibility. Federal Deposit Ins. Corp. v. Staudinger, 797 F.2d 908, 909 (10th Cir. 1986).

The question then is whether the photocopy was a duplicate of what the Government claimed it to be. The Defendants' argument is that some of the records were unreliable and/or fraudulent but their claim is not that the duplicate records were something other than the Government claimed them to be. Not a true objection was made to the admissibility of the records but instead a question was raised concerning the weight or credibility that the exhibits should be given because the Defendants dispute the exhibits' accuracy.

Despite the Defendants' assertion that the Government failed to offer explanation concerning its inability to produce originals, the Government stated that the originals were unobtainable due to judicial process. The Government reported that the documents were collected by the court in the related criminal matters and were not available for the trial of this case. FSM Rule of Evidence 1004 does not require originals when they cannot be obtained.

We conclude that the trial court did not err in admitting the Government's exhibits over the Defendants' best evidence objections. Nor did the trial court abuse its discretion.

Issue (4) *Whether the guilty verdict on the charge of conspiracy was in error, when there was insufficient evidence to support a guilty verdict beyond a reasonable doubt?*

The standard of review applied to sufficiency of the evidence challenges in a criminal case is whether, in reviewing the evidence in the light most favorable to the trial court's determinations of fact, there is sufficient evidence to convince a reasonable trier of fact, relying on evidence which it had the right to believe and accept as true, that the defendant is guilty beyond a reasonable doubt. Tulensru v. Kosrae, 15 FSM Intrm. 122, 125 (App. 2007). This standard of review extends to inferences drawn from the evidence as well. Moses v. FSM, 14 FSM Intrm. 341, 344 (App. 2006).

Appellate review of the sufficiency of the evidence is very limited – only findings that are clearly erroneous can be set aside. Moses, 14 FSM Intrm. at 344. An appellate court will not set aside a factual finding where there is credible evidence in the record to support that finding, in part because the trial court had the opportunity to view the witnesses and the manner of their testimony. Palik v. Kosrae, 8 FSM Intrm. 509, 516 (App. 1998). The trial court's findings will be upheld so long as they rationally reflect evidence which is reasonable and combines with other evidence to present a coherent, believable, overall picture. Moses, 14 FSM Intrm. at 344.

A person commits the offense of conspiracy, if, with intent to promote or facilitate the commission of a national offense, he agrees with one or more persons that they, or one or more of them, will engage in or solicit the conduct or will cause or solicit the result specified by the definition of the offense; and he or another person with whom he conspired commits an overt act in pursuance of the conspiracy. The agreement in a conspiracy does not have to be explicit. A mere tacit understanding will suffice, and there need not be any written statement or even a speaking of words which expressly communicates the agreement. It is not necessary to prove the specific terms or the specific scope of the conspiratorial agreement or to prove that the conspiracy's substantive object was accomplished. The existence of, and participation in, a criminal conspiracy may be proved by circumstantial as well as by direct evidence, if it affords a reasonable inference as to the ultimate facts sought to be proved. FSM v. Este, 12 FSM Intrm. 476, 483 (Chk. 2004)

The trial court is allowed great discretion in the reception of circumstantial evidence, for a

conspiracy must be proved by a number of indefinite acts, conditions, and circumstances varying with the purpose to be accomplished. When it is shown that the defendants by their acts pursued the same object, one performing one part and the other performing another part so as to complete it or with a view to its attainment, the trier of fact will be justified in concluding that they were engaged in a conspiracy to effect that object. Most conspiracy convictions are based on circumstantial evidence. FSM v. Este, 12 FSM Intrm. at 483.

The Este case highlights the great discretion afforded to the trial court in receiving and evaluating circumstantial evidence with regard to an alleged conspiracy. While appellate panels must always show deference to the inferences and conclusions drawn by a trial judge from evidence, this deference seems even greater in the context of a conspiracy trial, in which the trial judge is likely looking for the proverbial "wink and nod" that often ties a conspiracy together. It is with such considerable deference that we review the evidence explicitly relied upon by the trial court in finding the defendants guilty.

When viewed according to the foregoing standards, the evidence in this case establishes the following facts. Executive Director Cholymay of NNDA and Congressman Kansou were in agreement with co-conspirators to make obligations in advance of availability of funds. The total debts owed by NNDA to Island Imports and Merry Sand Mining were substantial and all charges even if they were for legitimate purposes were still improper pursuant to FSM Department of Finance and Administration requirements by law. Charges were made in excess of the authorization amount. Checks were issued for improper expenditures. The invoices attached to the authorization forms pre-dated the authorization letters themselves.

The Project Control Documents demonstrated that allotment amounts were split so that checks could be issued without the approval of FSM Department of Finance and Administration in Palikir. The evidence also confirmed that procurement requirements had not been followed. Darra's affidavit implicated the Defendants and demonstrated that there was an agreement to send all purchase orders to Darra to be paid regardless of the availability of funds, that Darra paid purchase orders even though he knew that an advice of allotment had not been issued by the FSM Department of Finance and Administration in Palikir, and that he split invoices so he could issue checks without the involvement of FSM Department of Finance and Administration in Palikir.

We conclude that the circumstantial evidence establishes that the Defendants by their acts pursued the same object, one performing one part and the other performing another part so as to complete the making of obligations in advance of availability of funds, obligating funds for other than their lawful purpose, and submitting fraudulent documents. The trier of fact was justified in concluding that the Defendants were engaged in a conspiracy to achieve those objectives.

IV. Conclusion

Based on the forgoing we affirm the convictions below.

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