

Ken Lay and Jeff Skilling lost in the game of trust

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IN the end, it came down to trust.

The fates of Ken Lay and Jeff Skilling always hung on the question of whether the two men were to be believed. With the guilty verdicts they rendered Thursday, 12 Houston jurors said, resoundingly that, No, Lay and Skilling could not be believed.

These jurors clearly listened intently to both sides throughout the trial. They heard Judge Sim Lake's final instructions with all their nuances of "intent" and "willful blindness." They weighed and picked apart the evidence and arguments. And yes, thankfully and importantly, the law was once again measured.

But something else fundamentally consequential also went on inside the Enron jury room. In a case without a "smoking gun" - and one that was always a morality play, anyway - it came down to credibility. Who would the jury trust more, the accused or the accusers?

Clearly, they connected with the government's lawyers and their case against Lay and Skilling.

Inside that jury room, the panel was able to reach a decision that said they trusted the version of events set out by federal prosecutors. They were able to do so because the prosecution systematically removed all the risks necessary to trust in its case. By contrast, the risks in relying upon the defendants' version of events remained too high.

Both sides in this case worked hard to claim the mantle of trust as their own. Lay believed his predicament was entirely due to Enron chief financial officer Andrew Fastow's "breached trust." Prosecutors summarized their case on the "choices" and "lies" of the defendants, arguing that the defendants simply could not be trusted. The government side effectively argued that Lay and Skilling were deceiving the jury just as they had deceived Enron's hapless shareholders and employees.

Ultimately, the jury trusted and believed in lead prosecutor John Hueston, even though Hueston was roundly criticized for leaning heavily on former indicted Enron executives who had plea-bargained - what amounted to a "legal bribe" - in exchange for testimony against their former superiors.

The jurors didn't trust Skilling's and Lay's blanket insistence that they never deliberately participated in schemes to manipulate earnings or cover up Enron's losses - otherwise known as the Sgt. Schultz defense ("I see nothing I know nothing.") Instead, the jurors trusted in the 22 witnesses who suggested that Lay and Skilling knew a lot more, or should have known and thus engaged in "willful blindness."

The Enron jury trusted the government case because prosecutors were successful in connecting the dots of fraud. They simply did not trust two defendants who were obviously well prepared for their personal testimony, but when on the witness stand conveniently repeated "I don't know" or "I can't remember" more than 200 times. In the end, the jurors didn't trust Skilling because he frequently bragged about how smart he was, but then couldn't remember how much he personally invested in a girlfriend's Internet photography business, Photofete. He said the investment was \$60,000, but it turned out to be \$180,000.

Perhaps there was some concern that the jury wouldn't trust the government for bringing up such extraneous allegations (162 questions on Photofete). But in the end, they couldn't trust Skilling, who snidely asked what any of this had to do with fraud at Enron. He received his answer soon enough: "When we started this testimony," the prosecutor reminded Skilling, "we agreed that the one thing, the most important thing the jury had to rely upon here, was your word." Skilling could only respond with a sheepish "yes."

When a witness or defendant is caught in even a little lie that may seem irrelevant to the core issues of the case, most courtroom experts agree that there is a big write-down on that individual's trustworthiness. The Photofete incident is not anything much, but the more inconsequential the defense made it sound, the bigger it actually became. Ultimately, the Jury didn't trust Lay, who had told investors he was a buyer of Enron stock when in fact he was a massive seller of Enron stock at the same time. In fact, Lay's purchasing of a trifling number of shares didn't fool the jury at all. They saw through his attempt to deceive with this half-truth.

Jurors did not trust Lay when he blamed his legal problems on the renegade CFO Fastow, either. They saw that Lay had voted not once, but twice, to lift Enron's conflict-of-interest rules to allow Fastow to manage (and handsomely profit from) a series of partnerships that existed solely to conduct transactions with Enron and to hide debt. Lay's credibility tanked when he told jurors that "rules are important, but you should not be a slave to them either."

In this complex case that boiled down to "lies and choices," the jury had to choose which party they trusted most. In hindsight, their rapid verdict is no surprise. After almost four months of testimony, most court-watchers, myself included, had their suspicions. I suspect the jury had theirs, too.

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