UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-1752

United States of America,

Plaintiff-Appellee,

VERSUS

John Homer Stevens, and Roger Dale Brooks,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

(CR-2-90-0055)

(January 15, 1993)

Before GARWOOD, and DeMOSS, Circuit Judges.[*]

PER CURIAM:[**]

I.

In the summer of 1987 Defendant John Homer Stevens, an established amphetamine dealer, recruited O.B. "Buddy" Martin to

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[*]Judge John R. Brown sat for oral argument in this case, but due to subsequent illness he has not been able to participate in the final decision. Accordingly, this decision is rendered by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

distribute amphetamine which he did with the help of Ernest Boles and Craig Pendleton.

In the summer of 1988 Stevens told Martin of a drug lab Stevens operated in Oklahoma. Martin visited it several times and on one occasion brought along Steve Deatherage who indicated a willingness to attempt to manufacture amphetamine. Stevens met with Deatherage on the trip and later supplied him with enough chemicals and glassware to produce approximately 20-25 pounds of amphetamine at the Oklahoma location. Apparently there was an agreement to manufacture up to 100 pounds at the site. Deatherage had not manufactured amphetamine before and was only able to make about 3-5 pounds before the lab was discovered by law enforcement officers and he was arrested on July 19, 1988.

In September Stevens purchased a ten-acre parcel off Pullman Road in Amarillo, Texas, from David Dixon, the brother-in-law of Defendant Roger Dale Brooks. Both Dixon and Brooks lived in separate trailer houses on the property which contained a large horse barn. Stevens made an initial payment of $8,000 in cash. Dixon questioned Brooks about the cash payment. Brooks, who had known Stevens for at least 15 years, told Dixon that Stevens was in the "wholesale drug business."

In early October Dixon prepared to move to New Mexico. Brooks told him that if he wanted to receive the rest of his equity money for the Pullman property he would have to allow Stevens to "make a cook there." Dixon did not oppose the plan, and a week later Brooks and Stevens brought a pickup truck that they began to unload

on the property. It contained glassware for the manufacturing of amphetamine in the barn.

The manufacturing began several days later which Dixon observed on five different occasions; on all but one occasion Brooks was present in the lab. Afterwards, Dixon observed Brooks pouring vinegar on the floor to dissipate the strong odor from the manufacturing.

The lab was then moved a couple of miles down Pullman Road to a five-acre tract in Pullman Acres. Boles and Brooks helped Stevens and Martin set up the lab. Brooks helped to load the equipment from the barn lab into a camper that Martin used to transfer the items to Pullman Acres. This property would be occupied by Martin and his wife, Connie, in November, as they currently resided in Borger, Texas.

The first "cook" from the Pullman Acres lab yielded about 5 pounds of amphetamine. The lab produced more quantities over several months.

Also, in late September or early October, Russell Owens stole some amphetamine from the Martin home in Borger. On October 6, Stevens and Brooks went to his residence located in the Foxfire Apartments in Amarillo, Texas which he occupied with his girlfriend, Pam Spangler. Stevens demanded return of the drugs and pistol-whipped Owens with a 9 mm gun. Brooks hit him a few times, bound him with duct tape, removed Spangler's jewelry, and made a futile search for the drugs. Brooks then produced a syringe and the appellants threatened to give Owens the last injection of his

life. Owens struggled, grabbed the gun, and escaped, screaming for help. Brooks and Stevens left. The Martins met Brooks and Stevens at the horse barn who related the incident to them.

On October 31, 1988, Stevens was arrested during a traffic stop for speeding when the officer detected the odor of amphetamine. Stevens' pickup truck was impounded. It contained a gun rack securing a 12-gauge shotgun and a .22 caliber rifle. A little less than a pound of amphetamine was found in the truck.

In late October or early November, Dixon moved to New Mexico and Stevens moved to the Pullman property which contained the horse barn. Brooks had moved to a nearby location and took messages for Stevens since he had no telephone.

Once when Stevens was out of town, Brooks furnished a quarter pound of amphetamine to Martin. Boles drove Martin to the barn and waited in the car while Martin secured the drugs. Martin returned to the car and told Boles that Brooks said he had half a pound but could only give Martin a quarter of a pound because he had promised to distribute the rest to somebody else.

On December 1, the Pullman Acres lab was raided by police officers and the Martins were arrested. Brooks and Stevens paid some of Connie Martin's bills after she was released on personal recognizance.

When Dixon moved to New Mexico, Stevens approached him about setting up a lab on Dixon's New Mexico property. Dixon agreed and in late November Stevens brought a truck load of glassware to the property. Stevens was unsuccessful in manufacturing the first

batch because he needed a continuous supply of water. He brought co-defendant Randy Adams out to help him and the second batch was successfully manufactured.

In December Adams hired Terry Smithson to help produce the third batch with Stevens supervising. This batch resulted in three jars of amphetamine oil which could be distilled into 6-9 pounds of powder.

In January 1989, Smithson and Adams made two more batches of three jars of amphetamine oil each. These were distilled into powder and sold. Another six jars were produced in February. Some of the oil from the February batch was distilled into powder and some of the oil was buried by Adams at the Dixon property. No more amphetamine was produced due to a dispute over the amount owed to Dixon for the use of his property as a lab.

From March until August 1989, Stevens continued to supply Boles and Pendleton. Boles estimated he received 5 pounds while Pendleton estimated Boles had received 12 pounds.

Around October 1989, Brooks told Dixon to dispose of the evidence connected with the New Mexico lab on Dixon's property.

On November 1, 1990 search warrants were executed for the homes of Stevens, Brooks, and Dixon. Subsequently Stevens and Brooks were arrested.

An indictment filed on March 1, 1991 in the United States District Court for the Northern District of Texas charged Stevens and Brooks and nine others with violations of federal drug, travel and firearm laws. Stevens was named in twelve counts and Brooks

was named in six counts. The defendants were tried jointly. At the close of the government's case the court granted the prosecutor's motion to dismiss counts 4,7,16,17 and 18.

Stevens was later convicted on 7 counts: conspiracy to manufacture, distribute and possess with intent to distribute amphetamine (count 1); continuing criminal enterprise (count 2); attempted possession of amphetamine with intent to distribute (count 8); use of a firearm in relation to a drug trafficking crime (count 9); possession of amphetamine with intent to distribute (count 10); carrying a firearm in relation to a drug trafficking crime (count 11); and manufacturing of amphetamine (count 12).

Brooks was later convicted on 5 counts: conspiracy to manufacture, distribute and possess with intent to distribute amphetamine (count 1); possession of amphetamine with intent to distribute (count 6); attempted possession of amphetamine with intent to distribute (count 8); use of a firearm in relation to a drug trafficking crime (count 9); and manufacturing of amphetamine (count 12).

Stevens was sentenced to concurrent terms of imprisonment for 30 years on count 2 and 20 years on counts 1, 8, 10 and 12, and consecutive terms of imprisonment for five years on count 9 and 10 years on count 11. Brooks was sentenced to imprisonment for concurrent 188-month terms on count 1,6,8 and 12, and a consecutive 60-month term on count 9. Both defendants also were ordered to serve three-year supervised release periods and to pay the

mandatory $50 per count assessment. On appeal the defendants raised six grounds for relief as follows:

1. Whether the evidence is sufficient to support the convictions.

2. Whether the indictment was lawfully obtained.

3. Whether the defendants were properly tried jointly.

4. Whether the trial events amounted to reversible error for Brooks.

5. Whether Brooks' claim of ineffective assistance of counsel is cognizable on direct appeal.

6. Whether the sentence are lawful.

We DISMISS Ground V without prejudice; and decline to reverse the Trial Court's actions as to all other grounds.

II.

WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTIONS

Defendant Brooks challenges the sufficiency of the evidence supporting each of the counts upon which he was convicted. Stevens questions the sufficiency of the evidence as to count 9 and the two firearm counts.

Neither appellant moved for a judgment of acquittal at any stage during the trial. Therefore, the standard of review is whether the convictions constitute a manifest miscarriage of justice. United States v. Hernandez, 962 F.2d 1152, 1156 (5th Cir. 1992); United States v. Pruneda-Gonzalez, 953 F.2d 190, 193 (5th Cir. 1992), cert. denied, ____ U.S. ____, 112 S. Ct. 2952, 119 L. Ed. 2d 2575 (1992). This Court examines the evidence, together

with all reasonable inferences and credibility choices, in the light most favorable to the government. Glasser v. United States, 315 U.S. 60, 80, 86 L. Ed. 680 (1942); United States v. Juarez-Fierro, 935 F.2d 672, 677 (5th Cir. 1991) cert. denied, ____ U.S. ___, 112 S. Ct. 402, 116 L. Ed. 2d 351 (1991). The verdict must be upheld if the Court concludes that any reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2560 (1979); United States v. Pruneda-Gonzalez, 953 F. 2d at 190; United States v. Anderson, 933 F.2d 1261, 1274 (5th Cir. 1991).

A. STEVENS

1. Stevens disputes the evidence for count 10, possession of amphetamine with intent to distribute, which is based on the amphetamine recovered from his pickup truck during the traffic stop on October 31, 1988. The traffic officer testified that the substance was a white powder while the chemist testified that when he received the substance on November 3, it was partially liquified and the powder was brown in color. Stevens does not object to any gap in the chain of custody but to the lack of evidence regarding the change in color. Stevens argues that no jury could convict him since no one tested the white powdery substance for traces of amphetamine; only the brown powder was tested.

Neither the statute nor the charge to the jury required the prosecution to prove the color of the substance.

This is a credibility question concerning the inconsistent testimony of two witnesses. The jury resolves such inconsistencies. United States v. Miranne, 688 F.2d 980, 989 (5th Cir. 1982), cert. denied, 459 U.S. 1109, 103 S. Ct. 736, 74 L. Ed. 2d 959 (1983). A rational jury could have believed one witness over the other or have concluded that as the substance liquifies it turns a brownish color.

2. Stevens disputes count 11, carrying a firearm in relation to a drug trafficking offense in violation of 18 U.S.C. 924 (c), on the sole basis that if the underlying charge, Count 10, is defective then count 11 is as well. Stevens argument fails. The government proved that at the time the trooper discovered the amphetamine hidden in the tool box on Stevens truck, he also found a rifle and a shotgun from the truck. The record reflects that there is sufficient evidence to convict Stevens on the possession charge, therefore this charge is valid as well. See United States v. Coburn, 876 F.2d 372 (5th Cir. 1989); United States v. Beverly, 921 F.2d 559, 562-563 (5th Cir. 1991), cert. denied, sub nom. Brown v. United States ____ U. S. ____, 111 S. Ct. 2869, 115 L. Ed. 2d 1035 (1991).

3. Stevens also contends there is insufficient evidence to support forfeiture of the Pullman property which contained the barn. The Government has filed a quitclaim deed and has abandoned all interest in the property. No dispute exists on this issue.

B. STEVENS AND BROOKS

Count 9 charged both defendants with the use and carriage of a firearm in relation to a drug trafficking offense. The firearm alleged in the indictment was a 9 mm. semi-automatic handgun. The drug trafficking offense was the endeavor to retrieve the amphetamine that Owens had stolen from Martin.

1. Stevens claims that the conviction on count 9 is tainted because the only rational conclusion for a trier of fact was that Stevens did whatever he did unarmed, and that the 9 mm. gun introduced in evidence belonged to Owens. This contention is based upon the facts that Owens told police that Stevens had used a .45 caliber gun; that Owens knew the difference between a .45 caliber gun and a 9 mm. gun; that Owens used a 9 mm. gun against Stevens; and that although Owens claimed to have been pistol whipped and there was blood on his floor, no blood was found on the 9 mm. gun introduced in evidence.

Stevens has no case.

Owens testified that he did think the gun was a .45 caliber at first but later that same night when he saw the police photographing the weapon, realized he was mistaken.

A misdescription of the gun used by Stevens creates at most a variance between the proof and the indictment. Variances cause reversible error only if they result in prejudice to substantial rights. United States v. Guerra-Marez, 928 F.2d 665, 671 (5th Cir. 1991), cert. denied, ___ U.S. ____, 112 S. Ct. 322, 116 L. Ed. 2213 (199?); United States v. Richerson, 833 F.2d 1147, 1152 (5th Cir. 1987). There was no variance alleged here and none was established

The absence of blood on the 9 mm. gun when it was found by the police does not negate guilt. No one testified that the gun used to harm Owens became bloodied. The gun was handled by Owens after Stevens put it down. Moreover, the record reflects that it was raining heavily the night of the attack. A rational jury could find that the rain washed away any blood that might have been on the gun.

2. Brooks also questions the sufficiency of the evidence on count 9. He couples his attack with a claim that the evidence was insufficient to convict him of count 8, the offense underlying count 9.

Brooks complains that the assault victims gave a description of the second assailant that did not fit him in several ways, including the color of his hair. Brooks' contentions have no merit. The record reflects that both Spangler and Owens identified Brooks under oath at trial, and that Spangler identified Brooks' photograph out of a group of six shown to her by police.

The question whether Brooks was the second assailant was factual. The jury was entitled to weigh the credibility of the witnesses and to determine how much weight to give to the testimony of the two victims who positively identified Brooks and to the testimony of a neighbor who was unable to identify Brooks. See United States v. Lawrence, 699 F.2d 697, 703 (5th Cir. 1983), cert. denied 461 U. S. 935, 103 S. Ct. 2103, 77 L. Ed. 2d 309 (1983).

3. Brooks also raises two other points: that the evidence indicated that since the assailants were more interested in

administering a beating than retrieving their drugs, there was insufficient proof that they used a firearm in relation to the drug trafficking offense of possession of amphetamine with intent to distribute. He also repeats Stevens' claim of inadequate proof that Stevens used a 9 mm. gun.

We have rejected the latter argument above. Further, our review of the evidence reveals that the defendant's primary purpose for going to Owens' apartment that night was to recover the amphetamine.

4. Brooks objects to the credibility of Owens and Spangler because they are co-conspirators and can't be trusted because they made deals with the government. This contention was specifically refuted by United States v. Osum, 943 F.2d 1394 (5th Cir. 1991), which held that "a conviction may be based even on uncorroborated testimony of an accomplice or of someone making a plea bargain with the government, provided that the testimony is not incredible or otherwise insubstantial on its face." Id. at 1405. The jury is the ultimate arbiter of the credibility of a witness. Id.

5. Brooks also complains about testimony offered against him by the co-conspirators because it was hearsay. He did not object, except once concerning testimony unrelated to the incident involving the attempted recovery of the stolen drugs. His failure to object is fatal because "it is settled law in our circuit that '[w]here there is no objection to hearsay the jury may consider it for whatever value it may have.'" United States v. Hamilton, 694 F.2d 398, 401 (5th Cir. 1982), citing, United States v. Pearson,

508 F.2d 595, 596 (5th Cir. 1975), cert. denied 423 U.S. 845, 96 S. Ct. 82, 46 L. Ed. 66 (1975).

6. Brooks further claims that the aborted search for the drugs in Owens' apartment was not a substantial step in committing the offense of attempted possession. This court has held that "[a] substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent." United States v. Mandujano, 499 F.2d 370, 376 (5th Cir. 1974), cert. denied, 419 U.S. 1114, 95 S. Ct. 792, 42 L. Ed. 2d 812 (1975). This conduct must rise above the level of "mere preparation." Id., at 377. Here, the defendants beat Owens and threatened his life in attempt to recover the amphetamine and also conducted a partial search of the house. There is ample evidence that a sufficient step was taken. See also, United States v. Rovetuso, 768 F.2d 809, 821 (7th Cir. 1985), cert. denied, 474 U.S. 1076, 106 S. Ct. 838, 88 L. Ed. 2d 809 (1986).

7. Finally, Brooks alleges that the "hearsay testimony by Boles and Connie should not have been allowed since this was not a conspiracy and it was error to sustain the Government's objection to Brooks' question when he asked a police officer how the 9 mm could be found on top of its holster if it was supposedly tossed away. No objection was interposed at the time the testimony was given. Consequently, the evidence was admissible to prove the described events. United States v. Goff, 847 F.2d 149, 177 (5th Cir. 1988), cert. denied, 488 U.S. 932, 109 S. Ct. 324, 102 L. Ed. 2d 341 (1988); United States v. Hamilton, 694 F.2d at 398.

C. BROOKS

1. Brooks contends that his conviction on the conspiracy count is defective because the government proved multiple conspiracies and because government witnesses who implicated Brooks, such as Connie Martin, Dixon, Boles, Owens and Spangler cannot be believed and their testimony was not corroborated.

Brooks contends that the events surrounding the traffic stop of Stevens, the attack on Owens, the alleged sale of 1/4 pound of amphetamine by Brooks to Martin and Boles, and the individual "cooks" on the Dixon property were each a separate conspiracy. Brooks admits that no defendant "specifically requested a multiple conspiracy instruction and none was given." Brooks alleges that because of the existence of multiple conspiracies the indictment is at variance with the Government's proof at trial and that this variance prejudiced Brooks substantial rights by transferring other defendants' guilt over to him.

The failure to request a multiple conspiracy instruction is fatal to Brooks' challenge. The lack of preservation of the issue elevates the standard of review to plain error. Fed. R. Crim. P. 52(b). This Court has held that the failure to instruct on multiple conspiracies does not constitute plain error. United States v. Devine, 934 F.2d 1325, 1341-1342 (5th Cir. 1991). cert. denied, sub nom. Baker v. United States, ____ U.S. _____, 112 S. Ct. 349, 116 L. Ed. 2d 288 (1991); United States v. Richerson, 833 F.2d 1147, 1155-1156 (5th Cir. 1987); United States v. Vicars, 467

F.2d 452, 454 (5th Cir. 1972), cert. denied, 410 U. S. 967, 93 S. Ct. 145, 35 L. Ed. 2d 702 (1973).

The facts proved at trial amply implicated Brooks as a knowing, participating member of the conspiracy charged in the indictment. Moreover, the facts established a single conspiracy. United States v. Pruneda-Gonzalez, 953 F.2d at 190.

Brooks' credibility attack has no merit. The jury was entitled to believe the testimony of co-participants in the criminal ventures and a lack of corroboration did not taint the verdict. The co-participants' testimony was not incredible nor unsubstantial on its face. United States v. Hernandez 962 F.2d at 1152.

2. Brooks also complains about the jury verdict of guilty on Counts 1, 6 and 12.

Brooks claims there is insufficient evidence to convict him of count 1, conspiracy, because all the other separate conspiracies are legally flawed except for the separate conspiracies of "cooks" on Dixon's place. Brooks alleges that he had no knowledge of these "cooks" so he could not be part of these conspiracies and since no other conspiracies are valid there is insufficient evidence to convict him on a general count of conspiracy. Brooks admits that "[s]ince the defendant did not make a motion for judgment of acquittal at any time, the issue of sufficiency of the evidence is reviewable only to determine whether affirmance of the conviction would result in 'manifest miscarriage of justice.'" United States v. Meneses-Davila, 580 F.2d 888, 896 (5th Cir. 1978). The record

reflects that Brooks was a knowing, participating member of the conspiracy. He assisted in setting up labs, selling amphetamine and attempting to retrieve stolen amphetamine. There was no manifest miscarriage of justice here.

Brooks contends there is insufficient evidence to convict him on count 6 for the distribution of amphetamine when he gave a quarter pound to Martin as Boles waited in the car for Martin. Brooks premises his contention on the fact that the evidence used to convict him was the hearsay testimony of Boles who related what Martin said Brooks had told him. This hearsay was not objected to and was therefore waived.

Brooks also claims there is insufficient evidence to convict him of count 12, manufacturing of amphetamine, which relates to the lab at the Pullman Acres location. He believes this is also a separate conspiracy which requires a showing of knowledge and he had no knowledge of any manufacturing at the Pullman Acres site. A conspirator can be held liable for the substantive acts of a co-conspirator as long as the acts were reasonably foreseeable and done in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180, 1184-85, 90 L. Ed. 1489 (1946). Although the Government might not have proven manufacturing against Brooks personally, there are substantial facts to prove manufacturing by Stevens, a co-conspirator. These acts were done in furtherance of the conspiracy to manufacture and distribute amphetamine and it is foreseeable that amphetamine will be manufactured in a conspiracy which has as its goal the manufacture

and distribution of amphetamine. Therefore, it is proper to find Brooks liable under a theory of vicarious liability. See, United States v. Maceo, 947 F.2d 1191, 1199 (5th Cir. 1991), cert. denied, sub nom. Bauman v. United States, ____ U.S. ____, 112 S. Ct. 1510, 117 L. Ed. 2d 647 (1992).

III.

WHETHER THE INDICTMENT WAS LAWFULLY OBTAINED.

Brooks contends that the indictment was defective because Connie Martin's grand jury testimony was false and inconsistent as compared to her later trial testimony.

No assertion of this claim was made in district court. By failing to raise this claim before the district court, Brooks waived the claim. Fed. R. Crim. P. 12(b)(1); United States v. Helms, 897 F.2d 1293, 1299 n. 7 (5th Cir. 1990), cert. denied ___ U.S. ____, 111 S. Ct. 257, 112 L. Ed. 2d 215 (1990).

IV.

WHETHER THE DEFENDANTS WERE PROPERLY TRIED JOINTLY

A. BROOKS

Brooks contends that all the hearsay evidence and the spill over effect of evidence about people, dates, physical evidence, and "cooks" that relates to Stevens requires a severance.

Brooks failed to timely object to the testimony that he claims as the basis for compelling prejudice. Moreover all of the evidence is admissible against him because it was proven he was a member of a single conspiracy. Also, the court gave an instruction

that the jury should consider the case against each defendant separately.

The denial of a severance motion will be reversed only for abuse of discretion, upon a showing of specific and compelling prejudice." United States v. Erwin, 793 F.2d 656, 665 (5th Cir. 1986), cert. denied 499 U. S. 991, 107 S. Ct. 589, 93 L. Ed. 2d 590 (1986). United States v. Bryan, 896 F.2d 68, 75 (5th Cir. 1990), cert. denied sub nom. Malcamoon v. United States, ____ U.S. ____, 118 S. Ct. 133, 112 L. Ed. 2d 101 (1990). Compelling prejudice might occur if the jury could not sort out the evidence reasonably and view each defendant the evidence relating to that defendant separately. United States v. Rocha, 916 F.2d 219, 228 (5th Cir. 1990), cert. denied ____ U.S. ____, 111 S. Ct. 2057, 114 L. Ed. 2d 462 (1991). However, "[t]his Court has repeatedly stated that an appropriate limiting instruction is sufficient to prevent the threat of prejudice of evidence which is incriminating against one co-defendant but not another." Id. at 228-29. Such a limiting instruction was given by the court and Brooks in no way challenges its appropriateness. Moreover the hearsay evidence was not objected to except in one instance and that concerned the testimony of Connie Martin relaying what Buddy Martin told her concerning Stevens. The objection was overruled because the evidence in question was a statement of a co-conspirator. See, Rocha, 916 F.2d at 239-40.

B. STEVENS

Stevens contends he could not receive a fair trial because evidence was admitted against Brooks concerning a drug transaction and the cover-up of the evidence on the Dixon property and Stevens was not a party to either of these transactions. This argument is irrelevant because both defendants are properly convicted of a conspiracy encompassing all the transactions. The potential spill over effect of this evidence is not prejudicial because as Rocha points out, "since each defendant here was convicted of essentially one complex conspiracy, severance is not required merely because the Government introduced evidence admissible only against individual co-defendants." Id. at 228.

V.

WHETHER THE TRIAL EVENTS CITED BY BROOKS AMOUNTED TO REVERSIBLE ERROR

Brooks cites four instances occurring during the trial that he regards as reversible error.

A. Hearsay

Brooks contends that the hearsay of the conspirators is unreliable and violates his Sixth Amendment right of confrontation. This argument has been answered above. Absent an objection, hearsay evidence is admissible to prove the truth of the matter stated therein. United States v. Hamilton, supra; United States v. Gresham, 585 F.2d 103, 106 (5th Cir. 1978). The unobjected to hearsay is waived on appeal. Absent plain error, review is precluded. Fed. R. Evid. 103. The only objected to statement,

that a conspiratorial connection had not been established against Buddy Martin and thus anything he said was hearsay, was admissible because the evidence at issue could be introduced subject to the government establishing a connection. The connection was made by the end of the trial. See United States v. Rocha, 916 F.2d at 219.

B. Violation of the "knock and answer" statute.

Brooks argues that 18 U.S.C. § 3109 was violated because officers executing the search warrant did not announce they were police officers and did not knock before entering as required by the statute. Brooks did not raise this issue at trial. A defendant has the burden of establishing a prima facie case when asserting a section 3109 claim. United States v. Mueller, 902 F.2d 336 (5th Cir. 1990). Defendant must put into evidence at least some testimony that establishes the factual basis for a claim that section 3109 has been violated." Id. at 344. No evidence exists in the record, therefore Brooks has failed to meet his burden of proof and his point of error is overruled.

C. Brady Claims

Brooks contends that the prosecution suppressed evidence favorable to Brooks in violation of the Fourteenth Amendment Due Process Clause. Specifically, the prosecution allegedly suppressed the psychiatric exam report for Connie Martin, the April 17, 1989, presentencing report of Connie Martin, and any immunity agreements with Dixon.

These so-called Brady claims come from the Supreme Court language that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U. S. 83, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963).

The Government responds by stating that the lawyer's motion for a psychiatric exam was part of the public record. United States v. Jones, 712 F.2d 115, 122 (5th Cir. 1983). That may be but Brooks is arguing the psychiatric exam report itself was suppressed. Assuming the evidence was suppressed and favorable to the defendant, however, the defendant must still prove that "the suppressed evidence was material to the defense." Derden v. McNeel, 938 F.2d 605, 617 (5th Cir. 1991). The test for materiality is whether there is a "reasonable probability that, had the evidence been disclosed to the defense the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985). Even without Connie Martin's testimony, there is ample testimony from other co-conspirators that was used to convict Brooks so that the result of the proceeding would not be different had the report been made available.

The other document alleged to have been suppressed, a "Petition on Probation and Supervised Release," filed by a probation officer, could not have been suppressed because it did

not exist at the time of trial. The petition is dated July 25, 1991 and the filing date is August 1, 1991. Trial ended April 17, 1991.

The petition refers to a presentence report dated April 17, 1989. Until December 1, 1991 Fed. R. Crim P. 32(c)(3)(E) prohibited the government from keeping a copy of a presentence report in its file after sentence had been imposed.

Brooks also contends that an immunity agreement between Dixon and the Government was suppressed. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). The Government responds that it made no immunity agreement with Dixon and cites to the record to show at the time of Dixon's testimony Dixon stated that no immunity agreement existed. Brooks does not cite to the record and merely speculates that an immunity agreement exists somewhere. Brooks further claims that a piece of plywood was removed from the Pullman barn to test for traces of chemicals remaining from the "cook." Brooks does not cite any evidence beyond merely alleging that such a report exists. The point of error is overruled.

In any event, the items referred to by Brooks are collateral in nature, and it can fairly be said that the verdict would not have been affected if Brooks' counsel could have used them to cross-examine the witnesses in question.

D. Denial of Brooks' right to testify on his own behalf

Brooks argues that the conviction must be reversed because his constitutional rights were violated due to the fact that he was not

allowed to testify on his own behalf. He repeatedly asked his attorney if he could testify and his attorney indicated he could. However, after Brooks again asked to testify after the last witness had finished, Brooks was told it was too late. Nothing in the record supports Brooks' contention. This court has held that if the trial judge tells the defendant of his unfettered right to testify then "[t]hat defense counsel may have erred in restraining [defendant's] testimony might implicate [defendant's] right to effective assistance of counsel, but it does not implicate his right to testify." Hollenbeck v. Estelle, 672 F.2d 451, 453 (5th Cir. 1982), cert. denied 459 U.S. 1019, 103 S. Ct. 383, 74 L. Ed. 2d 514 (1982). Brooks was advised by the trial judge of his absolute right to testify, therefore no constitutional infraction exists.

VI.

WHETHER BROOKS' CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS COGNIZABLE ON DIRECT APPEAL.

Brooks claims that his trial counsel was ineffective for a number of reasons.

The trial judge did not conduct an evidentiary hearing and did not make a ruling. The law of this Court is to not review a claim of ineffective assistance of counsel if the issue has not been presented to the trial court. United States v. Armendariz-Mata, 949 F.2d 151, 156 (5th Cir. 1991), cert. denied _____ U.S. _____, 112 S. Ct. 2288, 119 L. Ed. 2d 212 (1992). The claim of ineffective assistance of counsel is dismissed without prejudice to Brooks' right to raise the issue in a proper proceeding below.

VII.

WHETHER THE SENTENCES ARE LAWFUL

Both Stevens and Brooks attack their sentences.

A. Steven's Drug Computations

The presentence report (PSR) set the offense level for Stevens at 40, in criminal history category IV. The offense level was arrived at by starting with a base offense level of 36 and adding four levels for Stevens' role in the offense as an organizer or leader. The probation officer determined that the base offense level of 36 was appropriate because the total amount of drugs in which Stevens was involved was at least 50 kilograms. U.S.S.G. § 2D1.1.

Stevens disputes the drug weights for his sentence. Stevens alleges that his sentence was improper because the base offense level of 36 was based in part on the finding from the testimony of a co-conspirator that 100 pounds of amphetamine were intended, but not actually produced, at the Oklahoma laboratory. He contends that the calculation of the amount of amphetamine he was responsible for in Oklahoma and New Mexico is inaccurate and that moreover, he should not be responsible for the entire amount since he did not personally manufacture all of the drugs. Stevens also contends that he could not reasonably have foreseen that all the amphetamine at the Oklahoma and New Mexico labs would be produced or contemplated. Furthermore, there were not enough chemicals to produce the amount intended. Stevens also disputes the calculation for the drugs manufactured on the Dixon property.

Stevens filed an objection concerning the computation in the PSR and the court made a specific finding that the PSR's calculations were accurate.

The district court's finding about the quantity of drugs implicated in the criminal offenses is a factual finding, reviewable under the standard of clear error. United States v. Giraldo-Lira, 919 F.2d 19, 21 (5th Cir. 1990); United States v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989). A clearly erroneous finding is one that is not plausible in the light of the record viewed in its entirety. United States v. Sanders, 942 F.2d 894, 897 (5th Cir. 1991). Findings contained in a presentence report may be relied upon by the sentencing court as long as the information has some minimum indicia of reliability. The burden is upon the defendant to show that the information that the court credited was materially untrue. United States v. Vela, 927 F.2d 197, 201 (5th Cir. 1991), cert. denied _____ U.S. _____, 112 S. Ct. 214, 116 L. Ed. 2d 172 (1991).

The court had the authority to reject Stevens' own calculations and to credit the probation officer. Stevens did not introduce any evidence to rebut the probation officer. The court's acceptance of the findings of the probation officer is clearly warranted. United States v. Thomas, 932 F.2d 1085, 1091 n.4 (5th Cir. 1991), cert. denied _____ U.S. _____, 112 S. Ct. 887, 116 L. Ed. 2d 791 (1992).

Moreover no statute or rule requires corroboration. The fact that the amount charged against Stevens was reached by including

quantities that the conspirators intended to manufacture but did not because of the disruption of their efforts by law enforcement officers did not entitle him to be responsible for sentencing purposes only for the amount actually manufactured. The sentencing guidelines hold a participant in an incomplete conspiracy liable as if the object of the conspiracy had been completed. United States v. Woolford, 896 F.2d 99 (5th Cir. 1990); U.S.S.G. § 2D1.4. The amount may include drugs that Stevens personally did not manufacture, since production of amphetamine by co-conspirators were reasonably foreseeable by Stevens, the mastermind of the enterprise. United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991), cert. denied _____ U.S. _____, 112 S. Ct. 1677, 118 L. Ed. 2d 394 (1992); United States v. Vela, 927 F.2d at 197; U.S.S.G. § 1B1.3(a)(1).

Part of Stevens complaint is that there was no expert testimony concerning the conversion of oil to powder.

Stevens' argument fails. The full weight of the oil can be considered. United States v. Mueller, 902 F.2d at 345.

Stevens also points to contradictory testimony. Stevens objected to this part of the PSR and the trial judge made a specific finding. The evidence is not so unreliable as to make the court's finding clearly erroneous.

B. Stevens' Weapon Offenses

Stevens also disputes the ten year sentence imposed under 18 U.S.C. § 924(c)(1) for a "second" or "subsequent" gun conviction. This conviction relates to the traffic stop arrest where guns were

seized from the gun rack of Stevens pickup truck and the Foxfire Apartment incident involving the 9 mm. handgun. Stevens claims that the statute is ambiguous and based on the concept of lenity only a subsequent conviction requires the enhanced ten year sentence.

This court has held the two gun convictions merely need to arise from separate incidents and that a "second or subsequent (gun) conviction" under 18 U.S.C. § 924(c) "can result from the same indictment as the first conviction under § 924(c)." United States v. Deal, 954 F.2d 262, 263 (5th Cir. 1992), cert. granted, ___ U.S. _____ 113 S. Ct. 53, 121 L. Ed. 2d 22 (1992).

C. Stevens' Other Complaints

Stevens also contends the judgment on count 12 is fatally defective because it says Stevens was convicted for possession and for aiding and abetting when the indictment and jury charge said count 12 concerned manufacturing amphetamine. He alleges that this variance violates Fed. R. Crim. P. 32(b)(1) which requires "[a] judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence."

This variance is a mere technicality because the verdict and sentence is based on the indictment. Fed. R. Crim. P. 36 states that "[c]lerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such

notice, if any, as the court orders." This error appears to be a clerical mistake. Id.[1]

Finally, Stevens contends he was tried under the wrong sentencing guidelines because the court's judgment states the conspiracy ended on "11/87." This is another technical error since the indictment states that the conspiracy began on November, 1987 and concluded in October, 1989. Mistakenly listing the wrong date certainly appears to be a clerical mistake and this contention is overruled.

D. Brooks' Drug Trafficking Sentence

1. Brooks objects to the determination of the drugs' weight because some of the amphetamine was in oil and not powder form, and the weights were based on uncorroborated testimony of unreliable witnesses. The weights are supported by the record and no rule requires the testimony to be corroborated.

The clearly erroneous standard applies to the calculation of drug weights. United States v. Woolford, 896 F.2d 99, 104 n.7 (5th Cir. 1990), citing United States v. Thomas, 870 F.2d 174, 176 (5th Cir. 1989). This Court can only reverse the sentences if it is "left with the 'definite and firm conviction that a mistake has been committed.'" United States v. Shaw, 894 F.2d 689, 691 (5th Cir. 1990), cert. denied ____U.S.____, 111 S.Ct. 85, 112 L.Ed. 2d

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[1] *"In a criminal case if a clerical error is first noticed while a case is on appeal the appellate court may treat the matter as if it were corrected..." 3* CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 611 (1982) (footnotes omitted).

57 (1990), citing Anderson v. Bessemer City, 47 U.S. 564, 105 S. Ct. 1504, 1511 84 L. Ed. 518 (1985).

Brooks' charge about the weight of the oil is erroneous. This Court has held that "the total weight of a liquid containing any detectable amount of methamphetamine would be used" in determining the offense level under the drug quantity table. United States v. Mueller, 902 F.2d at 345.

As to the uncorroborated testimony, "[t]he district court may consider a wide variety of evidence, not limited to amounts seized or specified in the indictment, in making its findings." United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). A review of the record shows that Brooks did not object to this issue in the presentencing report (PSR) therefore his claim is denied because, "[t]he sentencing court may base its sentence upon undisputed factual findings in the defendant's PSR." United States v. Ponce, 917 F.2d 846 (5th Cir. 1990), cert. denied _____ U.S. _____, 111 S. Ct. 1398, 113 l. Ed. 2d 453 (1991). See United States v. Thomas, 870 F.2d 174 (5th Cir. 1989).

2. Brooks contends he deserves a lack of accountability for the manufacturing activity at the Martin and Dixon properties and he disputes the quantity of drugs attributed to those establishments. Brooks did file objections to the PSR because he claimed entitlement to a reduction for acceptance of responsibility. No adjustments were recommended for factors such as acceptance of responsibility or minor role in the offense.

The findings are subject to a clearly erroneous standard of review; Brooks bore the burden of showing clear error; and he did not meet that burden. The testimony adduced at trial clearly connected Brooks to both properties. The amounts are supported by the record. The court did not err in rejecting Brooks' calculus.

3. Brooks maintains that he was entitled under U.S.S.G. § 3B1.2 to either a two-level or a four-level reduction in his guidelines range for being a minimal or minor participant. The finding of whether a defendant is a minimal or minor participant enjoys the protection of the clearly erroneous standard. Ibid.; United States v. Lokey, 945 F.2d 825, 840 (5th Cir. 1991).

Brooks has not demonstrated clear error. Among his acts of misconduct, Brooks assisted in loading chemicals and glassware into vehicles, distributed amphetamine on behalf of Stevens while Stevens was unavailable, paved the way for the establishment of the laboratory in New Mexico, and warned Dixon to dispose of any evidence of the laboratory after two truly minor players in the scheme had been arrested on an unrelated matter. Brooks himself states that he knew Stevens for 15 years. As stated in United States v. Mitchell, 964 F.2d 454, 460 (5th Cir. 1992), citing United States v. Devine, 934 F.2d 1325 (5th Cir. 1991), cert. denied, ____ U.S. ____, 112 S. Ct. 954, 117 L. Ed. 2d 121 (1992), "a longtime relationship with suppliers indicates knowledge of the scope of a drug distribution operation."

4. Brooks also contends that the sentencing was in error because he did not enter into any agreement to be part of the

"cooks" at the Dixon property or the property on Pullman Acres run by Martin. Brooks misstates the law and believes one only includes the amount of drugs that were produced pursuant to a conspirator's agreement. The sentencing guidelines state this is only the case "where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake." U.S.S.G. § 1B1.3, Application Note 1 (italics added).

5. Brooks also claims error in not receiving a downward departure from the guidelines range under U.S.S.G. § 5K2.0. His sole basis is the proposition enunciated by the Ninth Circuit in United States v. Valdez-Gonzalez, 957 F.2d 643, 649 (9th Cir. 1992), that nothing in the guidelines prevents a court from making a downward adjustment for "marginal culpability."

This Court does not review a district court's refusal to depart from the sentencing guidelines unless the refusal was in violation of the law. United States v. McKnight, 953 F.2d 898, 906 (5th Cir. 1992), cert. denied ____ U.S. ____, 112 S. Ct. 2975, 119 L. Ed. 2d 594 (1992); United States v. Guajardo, 950 F.2d 203, 207-208 (5th Cir. 1990), cert. denied _____ U.S. _____, 112 S. Ct. 1773, 118 L. Ed. 2d 432 (1992). Nothing urged by Brooks at the sentencing hearing justified a downward departure. The evidence reflects that Brooks was not merely marginally culpable.

6. Brooks finally claims that the existence of inaccuracies in his PSR had violated his due process rights.

Due process requires that the defendant be given a reasonable time to examine the PSR. United States v. Victoria, 877 F.2d 338, 340 (5th Cir. 1989). After that, defendant must be given an opportunity to object to the PSR. If defendant disputes the facts within the PSR, the trial judge must resolve the specifically disputed fact issues, or else the case must be remanded for reconsideration by the trial judge. United States v. Rivera, 898 F.2d 442, 445-46 (5th Cir. 1990). Brooks was given a reasonable opportunity to review the PSR, an opportunity to contest the PSR, and did not dispute the PSR. His due process rights have not been violated merely because he now alleges that the PSR contains factual errors.[2]

VI.

CONCLUSION

We dismiss defendant Brooks' ineffective assistance of counsel claims without prejudice to Brooks' right to raise the issue in a proper proceeding below. Our review of the record on all other grounds reveals that the evidence adduced by the government was sufficient to support the defendants conviction and that the allegations of trial error are without merit.

AFFIRMED.

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[2] It is also too late to change the PSR. This Court has held that: "complaints regarding the contents of a presentence investigation report must be raised prior to imposition of sentence. The district court correctly determined that it lacked jurisdiction under Fed. R. Crim. P. 32 to reach the substantive issues of [defendant's] motion." United States v. Engs, 884 F.2d 894, 897 (5th Cir. 1989).