IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1990

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WELLINGTON O. ROTHWELL and
ROSSWELL H. WESTMORELAND,

Defendants-Appellants.

AppealS from the United States District Court
for the Northern District of Texas
(CR3-89-328-T)

(January 29, 1993)

Before REAVLEY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

Defendants Wellington Rothwell and Rosswell Westmoreland owned and operated a number of related corporations and partnerships in Dallas that engaged in real estate transactions. Rothwell is a certified public accountant specializing in financial and tax

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* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

planning. Westmoreland is a licensed real estate salesman who has sold both residential and commercial real estate. Around June, 1985, the defendants formed R&W Investments ("R&W"), a partnership owning companies that invest in apartments and other real estate. R&W owned RW Operations ("RW"), the parent corporation of an affiliated group of several other small companies, including Thane Investments ("Thane") and A.H.A.B.

Thane was a real estate company with a broker's license. In July 1985, the defendants opened a checking account for Thane on which they were signatories. A.H.A.B. was a service company that handled the financial and accounting records of the other companies. Al Stephens, a certified public accountant, headed A.H.A.B. and testified that he always consulted Rothwell when he had a question regarding the tax treatment of an item and that Rothwell made the final decision on how to classify assets.

The defendants also formed two other partnerships that figure prominently in this case. In August 1985, defendants formed Kelly Partners ("Kelly"), which was half owned by R&W. Blanco Junction Ltd. was formed in February 1986, and the two individual defendants held a controlling interest.

Westmoreland also worked on commission for Timothy Byrne, a Dallas real estate developer who wanted to sell a condominium project, an office building, and some vacant land known as Kelly Springfield. In late summer 1985, Westmoreland brokered the sale of these properties to Rothwell, who acted on behalf of R&W. Byrne paid Westmoreland a commission for arranging the deal. In August

1985, Rothwell signed the sales documents individually, then applied to Vernon Savings and Loan ("Vernon") for $29 million in financing necessary to complete the deal. On loan applications, Rothwell indicated that R&W was the borrower and would hold title to the property. Vernon approved the loans, and Rothwell purchased the property in his own name, then conveyed them to R&W a few days later. Both defendants personally guaranteed the loans.

Thane received a commission for this transaction. In an August 11, 1985, letter to Thane, Rothwell stated that R&W agreed to pay Thane a $396,000 commission "for service rendered in the sale of . . . the Kelly Springfield Tract." On August 28, 1985, Rothwell and Vernon executed a loan agreement for the purchase that included the $396,000 commission as a budget item. On September 17, 1985, Rothwell sent an affidavit to Vernon in which he requested an advance of $396,000 for "labor, materials and other costs incurred in connection" with the Kelly Springfield development; the attached schedule stated that the $396,000 was for commissions.

The next day, Vernon approved the "draw" for a "Commission Fee Thane Investments." Rothwell then made a check for $396,000 payable to Thane. Acting as an officer of Thane, he endorsed the check "For Deposit Only, Thane Investments." Vernon's records reveal that the money was withdrawn from the appropriate account at Vernon and deposited in Thane's account.

Stephens testified that A.H.A.B. originally recorded the $396,000 deposit on Thane's books as "an equity account")) meaning an infusion of capital by Thane's owners. Stephens explained that at that time, he did not believe the defendants had put that much money into Thane, so he asked Rothwell about the money. Rothwell stated that the money came from a loan from a financial institution. Acting on Rothwell's instructions, Stephens "reclassified" the $396,000 "as an amount due from one related company to another . . . ." Stephens testified he would have classified the money as income if he had known about the commission check.

On June 16, 1987, Thane filed its corporate return for its 1985 tax year. Rothwell signed the return, which stated that Thane had received gross receipts of $35,000 in 1985 and sustained a loss of $153,000. Thane did not report the $396,000 as income but instead reported that it had received a loan of that amount from Kelly. Proper reporting would have reflected taxable income of $242,928, yielding a tax liability of $91,496.

Kelly also filed its partnership "information return" for 1985, which Rothwell signed, listing a $396,000 loan due from Thane as an asset on its amended 1985 and 1986 information returns, both signed by Rothwell. Neither of those returns indicated that Kelly had received any interest payments or repayments of principal from Thane.

We now proceed to describe a second transaction under consideration. In October 1985, Westmoreland learned that Don Mann wanted to sell his interest in Blanco Junction ("Blanco"), a San Antonio Shopping Mall. After studying the property, Westmoreland decided he was interested in purchasing it. He applied to Vernon on February 6, 1986, for a $10,350,000 loan to purchase Blanco, the adjacent land, and a yacht owned by Vernon subject to outstanding obligations. Westmoreland stated that a partnership called Blanco Junction Ltd. would be the borrower and hold title to the property.

On February 6, 1986, Westmoreland completed the purchase. Thane received a commission on this deal as well. Ray Jeter from Vernon testified that this commission was part of the transaction. Mann wrote a February 5, 1986, letter to Westmoreland indicating that he would pay Thane a $419,040 commission for services rendered in connection with the assignment of the real estate contract for Blanco. Westmoreland signed this letter as a general partner of Blanco Junction Ltd.

On February 6, 1986, Mann drew a $419,040 check payable to Thane on which he noted "commissions on sale." Westmoreland endorsed the check on behalf of Thane to Blanco Junction Ltd.; the check later was deposited into Blanco Junction Ltd.'s bank account. Because the check was not deposited into Thane's bank account, the commission never appeared in Thane's bank records or on its books.

Westmoreland, like Rothwell in the Kelly Springfield deal, submitted an affidavit to Vernon requesting a draw of $2,542,708.83 for "labor, materials and other costs incurred in connection" with the Blanco development. As one of the costs, Westmoreland listed the $419,040 commission. In March and April 1987, both defendants testified, in a Federal Savings and Loan Insurance Corporation ("FSLIC") investigation of Vernon, that Thane had received a commission in the Blanco transaction and that they were the ultimate recipients of the money.

Rothwell signed Thane's 1986 corporate tax return, which omitted the $419,000 commission from the Blanco deal and reported a net loss of $16,000 for the 1986 taxable year. This return also reflected an improper net operating loss carry-forward from the previous year that resulted from omitting the other commission. Had the return reflected the proper numbers, Thane would have had to pay $164,806 for this tax year. The return continued to reflect the $396,000 as a loan. RW replaced Thane as the parent of defendants' group of affiliated corporations and continued to reflect the same tax treatment of the above amounts.

The $419,040 was treated as a deposit to a bank account and an increase in the partners' equity account. On June 30, 1986, these entries were reclassified to reflect a $419,040 reduction of the partners' equity and a $419,040 increase in Blanco Junction Ltd.'s liability to Vernon. The ledger reveals that after the initial classification as partners' equity, Blanco Junction Ltd. distributed $200,000 each to Rothwell and Westmoreland and $19,000 to Mann.

On November 30, 1986, Blanco Junction Ltd. made accounting entries reducing its basis in the land by $41,904 and reducing its basis in the buildings by $377,136. On the same day, it reduced its Vernon note payable account by the total of the asset reductions, $419,040.

Blanco Junction Ltd. filed its 1986 information return on March 10, 1988, reflecting the reduced basis in land and assets shown on the general ledger after the November 30, 1986, changes. Westmoreland signed that return.

In mid-1986, Vernon came under new management and began trying to collect its debts from major borrowers in anticipation of failure. Lisa Burandt, the asset manager in charge of defendants' portfolio, held meetings with Westmoreland to discuss defendants' failure to make interest or principal payments. Westmoreland stated he had an agreement with prior management that Vernon would not hold defendants personally liable on any of their loans.

In August 1986, Westmoreland delivered a letter to Burandt's secretary, stating that R&W was brought in as a "white knight" to turn classified loans into non-classified loans. In return, Vernon supposedly promised to supply capital until the properties involved could be either completed or renovated. Westmoreland then suggested that Vernon relieve R&W and its partners of personal liability on the loans. Westmoreland later represented to Burandt, in discussions, that he had written the letter. Vernon subsequently obtained a judgment against defendants for $4 million.

II.

A grand jury indicted Rothwell and Westmoreland on November 16, 1989, on nine counts charging conspiracy to defraud the United States (18 U.S.C. § 371), attempting to evade a corporation's tax (26 U.S.C. § 7201), and making and subscribing to false tax returns (26 U.S.C. § 7206(1)). In June 1990, a jury found defendants guilty as charged. The district court granted the defendants' motion for a new trial on the ground that the jury may have been improperly influenced by publicity surrounding the indictment of Donald Dixon, the owner of Vernon. Following a second trial in May 1991, a jury again found defendants guilty on all counts.

III.

Defendants first allege that the district court erred in failing to hold an evidentiary hearing on their double jeopardy defense. During the first trial, the government indicted Dixon; the indictment received extensive press coverage. Prior to the first trial, the defendant raised with the court the possibility of an indictment. The prosecutor said he would inquire about the possibility of having the indictment sealed.

The court indicated it likely would give a cautionary only instruction if Dixon were indicted. Dixon was indicted two weeks prior to the verdict, and the court proceeded to question jurors individually about the effect on the verdict. At least one juror thought the press coverage may have had an effect on the jury, so the district court granted a new trial.

Prior to the second trial, both defendants claimed the second trial was barred by double jeopardy, as the prosecution had intended to provoke the defense into moving for a mistrial. Defendants requested an evidentiary hearing to determine whether the government timed Dixon's indictment in order to prejudice this case. The court denied defendants' request for an evidentiary hearing.

Where governmental conduct "is intended to `goad' the defendant into moving for a mistrial," a defendant may raise the double jeopardy bar even after aborting the first trial by his own motion. Oregon v. Kennedy, 456 U.S. 667, 676 (1982). Other circuits have split on the issue of whether the district court should hold an evidentiary hearing.[1] At least one of our prior cases suggests the district court should make findings of fact on the prosecutor's intent. United States v. Barcelona, 814 F.2d 165, 167 (5th Cir.), cert. denied, 483 U.S. 1022 (1987). In this case, we need not decide this broader issue and conclude only that a district court need not hold an evidentiary hearing where defendant's claim fails as a matter of law.

In general, a defendant who moves for a mistrial may be retried without offending the double jeopardy clause. The Kennedy exception to that rule seeks to prevent the government both from depriving the defendant of his right to complete the trial before the first jury and from trying to start over when a trial is going badly. United States v. Singleterry, 683 F.2d 122, 124 (5th Cir. 1982). "Only where the governmental conduct in question is intended to `goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after

[1] Compare United States v. Wentz, 800 F.2d 1325, 1328 (4th Cir. 1986) (district court should normally hold evidentiary hearing) with United States v. White, 914 F.2d 747, 752-53 n.1 (6th Cir. 1990) (no need to hold hearing where district court is satisfied defense has raised no genuine issue as to whether the prosecution intended to force defendant into moving for a mistrial).

having succeeded in aborting the first on his own motion." Kennedy, 456 U.S. at 676 (emphasis added).

Here, the defendants did not abort the first trial or even attempt to do so by moving for a mistrial; they moved instead to set aside the results of the first trial and subsequently received a new one. A defendant who does not move for a mistrial may not invoke the Kennedy exception,[2] which the Supreme Court intended to be a narrow one. See United States v. Singleterry, 683 F.2d 122, 124 (5th Cir. 1982).

The case before us does not implicate the concerns underlying the exception. Where the defendant does not move for a mistrial, he is not denied the protections of the double jeopardy clause, as the first trier of fact does determine the defendant's guilt. Id. As we interpret Kennedy, the Court sought to prevent prosecutors from subverting the protections of double jeopardy, not to use the double jeopardy clause as a prophylactic device to prevent all forms of prosecutorial misconduct.

This, of course, does not leave the defendant without a remedy. Instead, he must make a strategic choice: He may either seek a mistrial or wait to see whether the jury acquits him. A defendant who obtains a mistrial and successfully proves that the prosecutor intended to provoke his motion for mistrial may invoke the Kennedy exception. If he fails to make the required showing,

[2] We also observe that the usual Kennedy-type case involves prosecutorial conduct inside the courtroom. It would seem to be a rare case indeed where the prosecutor took actions outside the courtroom with the intent to provoke a mistrial as required by Kennedy.

he obtains a new trial.

On the other hand, a defendant who does not move for a mistrial goes free if the first jury acquits him. If the first jury convicts him, but he later proves harmful prosecutorial misconduct, he may obtain a new trial as a remedy.

In other words, assuming prosecutorial misconduct occurred, the defendant either gets the opportunity to bar retrial under Kennedy, if he can make the proper showing, or receives the opportunity to be tried by two juries. If he does not make the proper showing or the first jury convicts him, he obtains a new trial, undoubtedly an adequate remedy.

IV.

We next consider whether the district court properly admitted the "white-knight" letter into evidence. At trial, the government introduced a letter, allegedly written by Westmoreland, that the parties label the "white knight" letter. The letter makes reference to R&W's performing favors for Vernon and informs Vernon's new management that the old management had promised not to hold Rothwell or Westmoreland personally liable for any of the loans. Supposedly, R&W did Vernon a favor by taking problem properties off Vernon's hands. Westmoreland alleges the government did not lay a proper foundation for admissibility.

Lisa Burandt, a member of Vernon's new management, testified at the first trial that Westmoreland delivered the letter to her personally; at the second trial, she testified that the letter was delivered to her secretary. The letter was dated August 28, 1986, and was addressed to Vernon from R&W. Westmoreland did not sign the letter. The trial court admitted the letter, then changed its mind and withdrew it from evidence, and later changed its mind again and allowed it into evidence.

Defendants claim the government did not lay a sufficient foundation to authenticate the letter. We disagree. Westmoreland's attorney testified that he drafted the letter for Westmoreland. Moreover, Burandt testified that Westmoreland made reference to the letter in telephone conversations. Westmoreland's claim that he did not write the letter might affect the weight the jury should attach to the letter but not its admissibility. A proponent may authenticate a document merely by proving a rational basis for the claim that the document is what he asserts it to be. United States v. Long, 857 F.2d 436, 442 (8th Cir. 1988). The foundation offered here more than met that standard.

Rothwell argues that he had nothing to do with writing the letter and it should not have been admitted against him. Rothwell and Westmoreland were partners, however, and the letter was written on behalf of the partnership. The contents of the letter speak to partnership transactions in which Rothwell participated.

We think the district court did not abuse its discretion in admitting the letter against Rothwell. Moreover, the government introduced the evidence to rebut the testimony of Ray Jeter, who claimed that Vernon's loans were legal and proper. The letter tends to rebut that claim, making it admissible for impeachment purposes.

V.

Next, the defendants contend that the district court erred in admitting prior deposition testimony into evidence. The FSLIC took these depositions as part of its investigation of Vernon. Neither defendant was present during the other's deposition. Defendants object that admission of this testimony violates their right to confrontation and that the evidence constitutes hearsay.

We first address the hearsay issue. Apparently, the court admitted the testimony under Fed. R. Evid. 801(d)(2)(A), which provides that testimony is not hearsay if it is the "party's own statement in either an individual or a representative capacity." Under this rule, the evidence would not be hearsay as to the defendants. In other words, each defendant's deposition testimony was properly admissible against him but not against the other defendant, at least under this rule.

Neither defendant requested the court to instruct the jury that the deposition testimony was admissible only against the defendant who made the statements. As a result, our review is only for plain error.

The government now contends that the evidence was admissible against each respective co-defendant under rule 801(d)(2)(D), which provides that testimony is not hearsay if it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." The defendants argue that we should not consider this ground of admissibility because the government did not present this theory below. See United States v. Anderson, 618 F.2d 487, 491 (8th Cir. 1991). Defendants misinterpret Anderson.

In Anderson, the district court failed to admit evidence on one theory offered at trial. On appeal, the proponent of that evidence offered a second theory of admissibility. As the court properly noted, however, any error was waived, as the proponent did not make an offer of proof on this ground at trial. In the context of excluded evidence, this holding makes sense: The trial court must have the opportunity to consider all relevant theories of admissibility for excluded evidence. Otherwise, parties could save up evidentiary theories and attempt to reverse otherwise proper verdicts.

Here, on the other hand, the trial court admitted the evidence, rather than excluding it. We see no reason why the proponent of evidence may not offer new theories of admissibility on appeal where the district court admitted the evidence. Our concern in this situation is to determine whether the district court erred in admitting the evidence, not whether its reasoning was correct. If the district court admits evidence under an erroneous theory, that error is per se harmless if the evidence was properly admissible under a different theory. We decide that parties may present new theories of admissibility on appeal where the trial court admitted, rather than excluded, the evidence. Given that conclusion, we now address the government's theory of why each defendant's deposition testimony was admissible against the other.

We recently held that partners are agents of each other for purposes of rule 801(d)(2)(D). United States v. Saks, 964 F.2d 1514, 1524 (5th Cir. 1992). There, we admitted deposition testimony of one partner against the other in the context of a criminal prosecution against both partners for conspiracy. Here, as there, the testimony concerned matters within the scope of the partnership and therefore within the scope of the agency relationship.

Westmoreland argues that because Rothwell was a potential criminal defendant at the time of the deposition, he was not representing Westmoreland's interests and therefore was testifying outside of the agency relationship. We find this contention to be without merit. Because the testimony concerned a partnership matter, it comes within the scope of the agency relationship. See id.

Next, the defendants argue that admitting this evidence violated their right to confrontation. The Supreme Court has held, however, that admission of evidence under a "firmly rooted hearsay exception" does not violate confrontation rights. Bourjaily v. United States, 483 U.S. 171 (1987) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). In Saks, we determined that admission of deposition testimony of one partner against the other did not violate the confrontation rights of the second partner. 964 F.2d at 1525. We follow Saks and hold that admission of the deposition testimony did not violate defendants' confrontation rights.

VI.

Finally, both defendants challenge the sufficiency of the evidence. The first count charged both defendants with conspiracy to defraud the United States by concealing the taxable income Thane received as commissions from both transactions. To obtain a conviction under this statute, the government must prove (1) that the defendant knowingly joined a group of two or more persons working toward illegal purposes and (2) that at least one member of the group committed an overt act in furtherance of the conspiracy. United States v. Wheeler, 802 F.2d 778, 782 (5th Cir. 1986), cert. denied, 480 U.S. 908 (1987). The prosecution must prove knowledge of, and intent to join, the conspiracy beyond a reasonable doubt. Id. Knowledge and intent can be shown by circumstances. Id. Similarly, the existence of a conspiracy may be proved by circumstantial evidence and may be inferred from concert of action. Id.

Rothwell argues that the government offered no evidence that the two defendants conspired. First, he argues that Stephens and five or six other people worked on Thane's books. Second, Stephens testified that Rothwell did not make any entries on the books and did not do any of the tax returns. Third, Rothwell argues, as to the Blanco transaction, that the money came out of the loan proceeds for Blanco and that both defendants still owed for that amount on that loan. Fourth, Rothwell argues that Westmoreland had no education in taxes and had nothing to do with tax return preparation. Fifth, Rothwell notes that the lone employee of Thane testified he never did anything on the Blanco project. Sixth, Rothwell argues he had no reason to falsify his tax returns because he had net operating losses in the years in question.

Westmoreland argues that the evidence does not show he had any connection to the Kelly Springfield transaction. He notes that Rothwell made the final decision of how to classify the assets. With regard to the Blanco transaction, Westmoreland argues he had no idea about the tax treatment of the commission. Stephens testified that Rothwell made the decision as to how to treat the commission on the books. Westmoreland's testimony before the FSLIC reveals that he endorsed the check as he did at Rothwell's direction, and he testified he did not know why Rothwell told him to do so.

We observe that while many of defendants' arguments may have been relevant at trial, they simply have no significance here. We will affirm the jury verdict if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. United States v. Chaney, 964 F.2d 437, 448 (5th Cir. 1992). The record presents ample evidence to sustain the verdict based upon the two analogous transactions. Both transactions were similar in that both labeled a payment a "commission," and both defendants obtained loans from Vernon to pay "commissions" to Thane. Both defendants handled the checks so as to make sure Thane's books did not reflect payment of a commission to Thane.

Both defendants received $200,000 payments from Blanco on the second commission.

The defendants spoke to one another almost daily. Given Westmoreland's experience in real estate transactions, the jury legitimately may have rejected his pleas of ignorance as to why Rothwell had him endorse the Blanco commission check in the manner he did. The jury reasonably could have concluded he knew the endorsement would affect tax liability. Given Rothwell's tax experience and Stephen's testimony about how Rothwell decided how to classify income, the jury reasonably could conclude that Rothwell's actions were willful.

We also think the jury reasonably could conclude that Rothwell had learned from his mistake in the first transaction and better structured the second one. The first transaction showed up on Thane's books, and Rothwell had to tell Stephens to reclassify the asset. The second transaction avoided any problem with the asset showing up on Thane's books.

A reasonable jury also could conclude that Westmoreland acted the way he did because Rothwell explained the tax advantages of his actions. The jury could believe that Westmoreland would not blindly structure the loan, and sign the check, the way he did unless he understood why he was doing so. Westmoreland also failed to file personal tax returns for several years, from which the jury could conclude that Westmoreland was willing to violate the tax laws.

None of the interest or principal was ever repaid on the loan to Thane from the Kelly Springfield transaction. Neither defendant offers any reason for a loan other than avoiding tax liability. The jury reasonably could have concluded that Rothwell suggested that the loan be reclassified for that purpose. Overall, the record presents sufficient evidence from which a reasonable jury could infer a conspiracy.

Next, the second and third counts charged tax evasion and aiding and abetting tax evasion. To succeed on these claims, the government must prove the existence of a tax deficiency, willfulness, and the commission of an affirmative act constituting an evasion or attempted evasion. United States v. Masat, 896 F.2d 88, 97 (5th Cir. 1990).

With respect to Rothwell, we find his claim that the evidence was insufficient to be completely without merit. Rothwell told Stephens to reclassify the first commission as a loan from Kelly. He told Westmoreland to sign the check on behalf of Thane and then endorse the check to Blanco Junction Ltd. Rothwell is an expert in the area of taxation. He frequently decided how to classify assets for tax purposes. He directed the false accounting of Thane's and Blanco Junction Ltd.'s books in both transactions. From all this evidence, the jury reasonably could have concluded that Rothwell's actions were willful.[3]

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[3] As above, Rothwell argues he had no motive to falsify the returns, as he had personal net operating losses for those years. We find this argument completely disingenuous. At a minimum, properly reflecting the higher income would reduce Rothwell's net operating loss. Because those losses can be carried over to other years, a smaller net operating loss could well reduce future tax payments. If that were not motive enough, properly filed returns

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One who aids and abets the commission of an offense is guilty of it. United States v. Thorn, 917 F.2d 170, 175 (5th Cir. 1990). To prove aiding and abetting, the government must show that a defendant (1) associated with a criminal venture, (2) participated in the venture, and (3) sought by his action to make it succeed. The government must show a defendant "willfully participated in the criminal venture by engaging in some affirmative conduct designed to aid the scheme." Id.

Applying these principles to Westmoreland, we conclude that the record adequately supports his conviction as well. Westmoreland's actions in taking out the loan on the Blanco property in a specific manner, endorsing the check in a specific manner, and receiving the benefit of the Blanco transaction demonstrate that he participated in the criminal venture and sought to make it succeed. Again, given Westmoreland's overall sophistication, the jury reasonably could conclude that he knew what he was doing.

Counts four through nine charge the defendants with willfully subscribing to a false return in violation of section 7206(1). To obtain a conviction under this statute, the government must prove that the defendants willfully made and subscribed to the returns, that the returns contained a written declaration that they were made under penalties of perjury, and that the defendants did not

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would have meant increased taxes for Thane, thereby reducing the value of Rothwell's investment in Thane. Rothwell apparently wanted to avoid the `double tax' that occurs when a corporation receives income and distributes it to shareholders.

believe the returns to be true as to every material matter. United States v. Wilson, 887 F.2d 69, 72 (5th Cir. 1989). The written declaration element is undisputed.

Rothwell challenges only the willfulness element. He claims there is no evidence he knew the entries were false and that he had no motive to make false entries. Once again, we find Rothwell's claim completely without merit. With respect to motive, we addressed this argument above. As to willfulness, the jury reasonably could infer that a man with Rothwell's tax experience knew what he was doing, especially given that his accountant asked him about the income item and he instructed the accountant how to enter the transaction on the books so as to hide the income.

Westmoreland likewise challenges the evidence of willfulness. Again, the jury could infer that Westmoreland knew what he was doing. United States v. Osgood, 794 F.2d 1087, 1094 (5th Cir.), cert. denied, 479 U.S. 994 (1986). Rothwell told him how to handle the check, and the jury could infer that he handled the check in that way for a reason. He had received a letter from Don Mann saying that this commission would be paid to Thane as a commission. The jury could infer that a broker with Westmoreland's experience would know a commission is income. Westmoreland then accepted $200,000 of this money from the partnership. A signature on the return is prima facie evidence that Westmoreland knew the contents of the return he signed. United States v. Mohney, 949 F.2d 1397, 1407 (6th Cir. 1991), cert. denied, 112 S. Ct. 1940 (1992). Given all of this evidence, a jury reasonably could find Westmoreland acted willfully.

Westmoreland also argues the item was not material. He claims the information was not essential to the verification and monitoring of Blanco Junction Ltd.'s income. Westmoreland failed to object to the jury instruction indicating that the item was material. Hence, we review under a plain error standard. United States v. Birdsell, 775 F.2d 645, 655 (5th Cir. 1985), cert. denied, 476 U.S. 1119 (1986).

We think this item was undoubtedly material. Materiality is a question of law; we must determine whether the information is essential to the verification and monitoring of the reporting of income. United States v. Taylor, 574 F.2d 232, 235 (5th Cir.), cert. denied, 439 U.S. 893 (1978). The question is not whether there was an actual effect on tax liability but whether there was a potential effect. United States v. Greenberg, 735 F.2d 29, 31 (2d Cir. 1984). The distorted basis for the Blanco property had the potential to affect (1) the amount of gain reported when that asset was sold, (2) the amount of depreciation available, (3) casualty loss, and (4) other allowances. These potential effects render the information material.

The judgments of conviction are AFFIRMED.