IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-7044

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM C. BRAGG,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(CR 2 91 11 (01))

(November 30, 1992)

Before POLITZ, Chief Judge, JOHNSON, and JOLLY, Circuit Judges.

E. GRADY JOLLY:[*]

In this appeal, William Bragg contests his conviction for conspiracy to defraud several insurance companies. He contends that the indictment charging him with conspiracy was flawed because it did not contain the elements of the underlying offense that was the object of the conspiracy. He also argues that the evidence was insufficient to convict him of conspiracy. Finally, he argues that the district court improperly sentenced him under

---

[*]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 Pursuant to that Rule, the court has determined that this opinion should not be published.

the guideline for attempted murder. Finding that the indictment satisfied the requirements of the law and that the evidence was sufficient, we affirm Bragg's conviction. Because the district court did not find that it would convict Bragg of conspiring to possess a bomb if it were sitting as the trier of fact, we reverse Bragg's sentence and remand for re-sentencing.

I

In June of 1982, Scotty Joe McAninch moved to Amarillo, Texas. A high school dropout, McAninch was only seventeen and poorly educated. In 1983, McAninch married Debbie, a local girl, and they had a child. The child died in February of 1984 because of a drug the hospital administered to the child. McAninch and his wife sued the drug company, and in July of 1985 they received $675,000 in partial settlement of their suit. The McAninches went on a spending spree and in six months they had spent all of the money. During the spending spree, McAninch met Terry Monzingo, a salesman at a dealership where McAninch purchased several vehicles. Monzingo's superior was J. W. Bragg, sales manager and father of the defendant and appellant, William Bragg.

At that time, Bragg, our defendant-appellant, was attempting to purchase a hazardous waste disposal well in Oklahoma. Bragg was looking for other investors to help him buy the well. Hoping to convince McAninch to invest in the well, Bragg asked Monzingo to introduce him to McAninch. Although McAninch had pretty much run out of money when he met Bragg, he expected to receive several

million dollars in final settlement of the suit. In September of 1986, McAninch agreed to invest in the well. To ensure that he would receive the proceeds of any settlement between McAninch and the drug company, Bragg had McAninch assign his future settlement funds to Bragg. In October, McAninch learned that he would only receive $243,000 in final settlement of his suit. It is unclear whether McAninch told Bragg that he would not receive anything beyond the $243,000. In any event, Bragg went with McAninch to collect the settlement funds and McAninch immediately signed the check over to Bragg to invest in the well. Instead of investing the money, Bragg gave McAninch some of the money and spent the rest.

About this time, Bragg told McAninch that they needed to obtain two million dollars of "key man" life insurance. Bragg told McAninch that the insurance on McAninch's life would enable them to obtain a loan that they could use to purchase the hazardous waste disposal well. In March of 1987, McAninch, at Bragg's direction, applied for a one million dollar insurance policy, but the insurance company rejected the application. In May, Bragg had McAninch apply for eight different $250,000 life insurance policies from eight different companies. McAninch listed Bragg or his company, Amarillo Bragg, as the beneficiary on all of the policies. Bragg, either personally or through his company, paid the premiums on all of the policies. In the end, four of the insurance companies approved and issued policies. Of course, in order to

obtain the insurance policies, Bragg had to misrepresent McAninch's role in his company. By the time the insurance companies issued the policies, Bragg knew that McAninch would not receive anymore money from the settlement of the lawsuit.

After obtaining the policies on McAninch's life, Bragg and his co-conspirators attempted, it would seem, to permanently eliminate McAninch so they could collect on the insurance policies.[1] Accordingly, Bragg gave McAninch a job running errands. Bragg and his co-conspirators sent McAninch to pick up packages at odd locations, preparing for the day when one of the packages would contain a bomb that would bring McAninch's life to a sudden end. In the spring of 1988, Bragg sent McAninch to pick up a package at an unusual location. McAninch could not find the package, but several days later some children found a bomb there. On October 12, one of Bragg's co-conspirators called McAninch and directed him to pick up another package at an odd location. When McAninch picked up the package it exploded. The bomb seriously injured McAninch and he spent about a week in intensive care. Several of the life insurance policies were still in affect when the bomb when off. At trial, an expert testified that the same individual made both bombs. Neither of the bombs were registered.

[1]Around this time, McAninch received two threatening notes. One day he also found a dangerous pesticide that emitted toxic fumes in his car. It is not clear whether these events are related to the conspiracy to defraud the insurance companies.

II

On April 3, 1991, the government indicted Bragg in a ten-count indictment. The indictment charged him with one count of conspiracy, eight counts of mail fraud, and one count of possession of an unregistered firearm. The trial began on June 10 and the jury returned its verdict on June 20. The jury found Bragg guilty of conspiracy and four of the mail fraud counts, but it acquitted him of the other mail fraud counts and the count for possession of an unregistered firearm.

Because of the dates of the respective offenses, the conspiracy count fell under the sentencing guidelines, but the mail fraud counts did not. On the conspiracy count, the district court used the guideline for conspiracy to murder and sentenced Bragg to sixty months in prison, and ordered Bragg to pay a $1,000 fine and $15,529.40 in restitution. The court sentenced Bragg to five years on each mail fraud count. The court suspended the mail fraud sentences and placed Bragg on probation for five years. Bragg filed a timely notice of appeal and this appeal followed.

III

A

Bragg contends that count one of the indictment is defective. Count one charges the defendant with conspiring to "defraud various insurance companies in violation of Section 1341 of Title 18, United States Code, and to possess an unregistered destructive device, that is a bomb, in violation of Sections 5861(d) and 5871

of Title 26, United States Code." Bragg argues that the indictment is insufficient to charge him with conspiracy to commit mail fraud because it does not contain all of the elements of mail fraud. According to Bragg, at a minimum, the indictment must allege that he used or intended to use the mail.

Whether an indictment sufficiently alleges the elements of an offense is a question of law that we review de novo. United States v. Chaney, 964 F.2d 437, 446 (5th Cir. 1992); United States v. Shelton, 937 F.2d 140, 142 (5th Cir. 1991). An indictment must contain a "plain, concise and definite written statement of the essential facts constituting the offense charged" to satisfy Rule 7(c) of the Federal Rules of Criminal Procedure. We have held that an indictment is sufficient if it "contains the elements of the offense charged, fairly informs the defendant what charges he must be prepared to meet, and enables the accused to plead acquittal or conviction in bar of future prosecutions." Shelton, 937 F.2d at 142, quoting United States v. Gordon, 780 F.2d 1165, 1169 (5th Cir. 1986). Because Bragg challenges the indictment for the first time on appeal, we review the indictment with "maximum liberality" and will find it sufficient "unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant was convicted." Chaney, 964 F.2d at 447, citing Shelton, 937 F.2d at 143.

The essence of Bragg's argument is that an indictment for conspiracy to commit mail fraud must allege the elements of the

underlying offense of mail fraud. That is not the law. The Supreme Court rejected the same argument that Bragg advances in 1927 when it held that:

> [i]t is well settled that in an indictment for conspiring to commit an offense - in which the conspiracy is the gist of the crime - it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy . . . . or to state such object with the detail which would be required in an indictment for the substantive offense.

Wong Tai v. United States, 273 U.S. 77, 81 (1927). See also Williamson v. United States, 207 U.S. 425, 447 (1908). Relying on Wong Tai and Williamson, we have consistently held that a conspiracy charge does not have to "spell out the elements of the substantive offense the accused conspired to commit." United States v. Graves, 669 F.2d 964, 968 (5th Cir. 1982). Thus, we measure the sufficiency of the indictment with regard to the elements of a conspiracy to violate federal law rather than with regard to the elements of mail fraud.

The essential elements of conspiracy are that (1) two or more persons made an agreement, (2) to commit a crime against the United States, and (3) one of the conspirators knowingly committed at least one overt act in furtherance of the conspiracy. United States v. Contreras, 950 F.2d 232, 238 (5th Cir. 1991). The indictment contains all three elements of conspiracy and that is all the law requires. Furthermore, the indictment specifically refers to the mail fraud statute, which clarifies any latent

ambiguity. United States v. Boyd, 885 F.2d 246, 249 (5th Cir. 1989). We, therefore, find that the indictment easily passes our review.

B

Bragg also argues that the evidence the government adduced at trial was insufficient to convict him of conspiracy. We must sustain the verdict if a rational jury could have believed the government proved its case beyond a reasonable doubt. We review the evidence in the light most favorable to the government and accept as established all reasonable inferences that tend to support the verdict. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Duncan, 919 F.2d 981, 990 (5th Cir. 1990).

Bragg maintains that the evidence the government adduced at trial does not support any possible construction of the jury verdict. He analyzes the evidence under the two federal statutes the government alleged he conspired to violate. Beginning with the bomb charge, Bragg contends that the jury did not believe he conspired to possess an unregistered firearm. He notes that the jury found him innocent of the substantive offense of possession of an unregistered firearm. He also argues that a question the jury asked the judge, and the jury's notes in the margin of the verdict, indicate that the jury did not believe he had anything to do with an unregistered bomb. With regard to the mail fraud counts, he argues that there is no evidence that another specified person was involved.

Bragg's arguments are without merit. We review the evidence on each count of the indictment independently and, thus, the fact that the jury acquitted him of possession of an unregistered bomb does not indicate that he did not conspire to possess an unregistered bomb. United States v. Powell, 469 U.S. 57 (1984). As for the question the jury asked the judge and the jury's notes, we cannot take these two incidents in isolation from the rest of the very strong case that supports the verdict and conclude that the two incidents express the jury's rationale regarding the conspiracy count. With regard to Bragg's complaint that no other conspirators are named, the government correctly points out that it is not obligated to name the co-conspirators. United States v. Moree, 897 F.2d 1329, 1332 (5th Cir. 1990).

Bragg's arguments simply miss the mark. The only question is whether the government adduced sufficient evidence to lead a reasonable jury to believe he conspired to violate federal law. As we note above, the essential elements of conspiracy are that (1) two or more persons made an agreement, (2) to commit a crime against the United States, and (3) one of the conspirators knowingly committed at least one overt act in furtherance of the conspiracy. The government does not have to prove any of the elements of conspiracy with direct evidence; instead, the government can establish all of the elements of conspiracy with circumstantial evidence. United States v. Shively, 927 F.2d 804, 809 (5th Cir. 1991); United States v. Schmick, 904 F.2d 936, 941

(5th Cir. 1990). Bragg's conspiracy conviction is based on the following facts. Bragg arranged for McAninch to apply for several insurance policies and paid the premiums on the policies once the insurance companies issued them, all of which involved various mailings. Bragg and an unidentified woman sent McAninch on several errands and on one of those errands Bragg's mistress accompanied McAninch. While the life insurance policies were in place, Bragg and the unidentified woman sent McAninch to retrieve a package and when McAninch picked up the package it exploded severely injuring him. A reasonable jury could conclude from these facts that Bragg conspired with his mistress, and--if she was not the same person--the unidentified woman, to defraud the insurance companies by using the mail and by possessing and using explosive devises. Thus, the conspiracy was a crime against the United States because--at a minimum--the defendant conspired to violate, and indeed violated, the federal mail fraud statute.

We, therefore, find that substantial evidence supports Bragg's conspiracy conviction.

C

We now turn to Bragg's argument that the district court, when it sentenced him for conspiracy, erroneously used the guideline for attempted murder. While we review application of the guidelines to facts for clear error, questions concerning the interpretation of the guidelines are questions of law subject to de novo review.

United States v. Shano, 955 F.2d 291 (5th Cir. 1992); See also 18 U.S.C. § 3742(e).

The government agrees that the district court used the wrong reasoning in determining which guideline to apply, but argues that the court actually used the correct guideline. The government's argument hinges on the defendant's conviction for conspiracy to possess an unregistered bomb. The government contends that the conspiracy guideline refers to the bomb possession statute, which provides that if the defendant used the bomb in committing or attempting to commit another offense, he should be sentenced under the guidelines for the other offense. See U.S.S.G. §§ 1B1.2(d), 2K2.1(c). The government then concludes that because Bragg attempted to murder McAninch during the conspiracy, he should be sentenced under the guideline for attempted murder.

The government's argument is based on a faulty premise: that the jury found Bragg guilty of conspiring to possess an unregistered bomb. It is not clear from the verdict whether the jury believed the defendant conspired to violate the mail fraud statute, the bomb statute or both. The guidelines provide that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count for each offense that the defendant conspired to commit." United States Sentencing Commission, Guideline Manual, § 1B1.2(d). The comments to this guideline explain, however, that when the jury's verdict does not establish

which offense was the object of the conspiracy, an object offense may not dictate a sentence unless the court determines that, if it were sitting as trier of fact, it would convict the defendant of conspiring to commit that offense. U.S.S.G. § 1B1.2 comment 5.

The district court, however, did not find that it would convict Bragg of conspiring to possess a bomb if it were sitting as the trier of fact. Instead, the district court only adopted the findings of the pre-sentence report that both parties agree was erroneous. Without such a finding, the sentence the district court imposed cannot stand. We, therefore, VACATE Bragg's sentence on the conspiracy count and REMAND for re-sentencing on that count in a manner not inconsistent with this opinion.

IV

To sum up, we AFFIRM Bragg's conviction, but we VACATE his sentence on the conspiracy count and REMAND for re-sentencing on that count.

AFFIRMED in part, VACATED in part, and REMANDED.