UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-3054

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

OBIADIAH STEPHENSON
and TONY JOHNSON,

Defendants-Appellants.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CR M 91 113 L)

(March 5, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendants, Tony Johnson and Obadiah Stephenson, were convicted for conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1988). Johnson appeals his conviction on several grounds. Stephenson appeals his sentence and the district court's denial of his motion for new trial. We affirm in part, and vacate and remand in part.

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

The arrests and convictions of Johnson and Stephenson arose from a DEA investigation of co-defendant, George Foster, Jr. In March 1991, DEA agent Willis purchased cocaine from Foster. During negotiations with Foster, agent Willis learned that Foster was planning to take a trip to Texas to purchase more cocaine. Shortly thereafter, Foster and his son drove away in Foster's Chevrolet, followed by Obadiah Stephenson and co-defendant Tina Owney in Stephenson's taxi cab. Both cars arrived at the Days Inn Motel in Houston, Texas later that evening, and the four co-defendants checked into two rooms for one night.

When the four co-defendants ate breakfast together the next morning, Stephenson was seen leaving and entering the restaurant carrying a brown paper bag. That same morning, Johnson arrived at the motel in a Jeep Lariat, and entered Stephenson's room with a visible bulge under his shirt. He left carrying a brown paper bag. When he was arrested a short time later, the police found nearly 200 grams of cocaine and over $15,000 in a brown paper bag in the car.

After Johnson left, Foster walked over empty-handed to Stephenson's room. He reappeared five minutes later with a brown paper bag, which he placed in the trunk of his Chevrolet. Foster and Stephenson then left the motel in separate cars. Along Interstate 10 to New Orleans, the Louisiana State Police stopped their cars for traffic violations. A search of Foster's Chevrolet revealed a package containing 780.5 grams of cocaine. The cocaine

found in the Jeep with Johnson, and the cocaine found with Foster, both tested at 88% purity. When Stephenson was arrested, six of the one-hundred dollar bills recovered from him matched the photocopies of the money used by one of the undercover agents to purchase crack cocaine from Foster.

Johnson and Stephenson were subsequently convicted by a jury for conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1988). The district court denied Stephenson's motion for new trial, including his oral motion to have certain affidavits admitted into the record. Johnson was sentenced to a 70-month term of imprisonment, followed by four years of supervised release and a $50 special assessment. After the district court granted the government's motion to depart upward, Stephenson was sentenced to a 144-month term of imprisonment, followed by four years of supervised release and a $50 special assessment.

Johnson appeals his conviction, contending that: (1) insufficient evidence supported the jury's verdict; (2) the district court committed reversible error in allowing the government to introduce into evidence a co-defendant's guilty plea to the same conspiracy charge; and (3) the government failed to disclose exculpatory information.

Stephenson appeals his sentence and the court's denial of his motion for new trial, contending that the district court abused its discretion by: (1) departing upward from the sentencing guidelines; and (2) denying his motion for new trial, by refusing

to accept into evidence affidavits presented by Stephenson.[1]

II

A

Johnson first argues that insufficient evidence supported his conviction for conspiring to distribute cocaine. Brief for Johnson at 13-20. In assessing a challenge to the sufficiency of the evidence, we must consider the evidence in the light most favorable to the verdict and must afford the government the benefit of all reasonable inferences and credibility choices. *United States v. Ayala,* 887 F.2d 62, 67 (5th Cir. 1989). The evidence is sufficient if a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt based upon the evidence presented at trial. *Id.*

To support a conviction for conspiracy under 21 U.S.C. § 846, the government had to prove that there was an agreement between two or more persons to possess the cocaine with the intent to distribute it, that Johnson knew of the agreement, and that Johnson participated in the conspiracy voluntarily. *United States v. Pierre,* 958 F.2d 1304, 1311 (5th Cir.) (en banc), *cert. denied,* ___ U.S. ___, 113 S. Ct. 280, ___ L. Ed. 2d ___ (1992). "The existence of a conspiracy need not be proved by direct evidence, but may be inferred from circumstantial evidence indicating a `concert of action' between the alleged conspirators." *Id.* (quoting *United States v. Espinoza-Seanez,* 862 F.2d 526, 536 (5th Cir. 1988)).

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[1] Stephenson has also filed a pro se brief on appeal, but after reviewing it, we find no grounds for reversal.

The evidence presented at trial established that while Foster and Stephenson were at the Days Inn Motel, Johnson approached the room where Stephenson was staying and appeared to be hiding something under his shirt, *see* Supplemental Record on Appeal, vol. 3, at 17, 45; that Johnson emerged from Stephenson's room fifteen minutes later carrying a brown paper bag, *see id.,* vol. 2, at 69; that Johnson then returned to his Jeep and drove away, *see id.;* that when Johnson was arrested in the Jeep moments later, a brown paper bag was found inside of a white plastic behind the back seat of the Jeep, *see id.* at 134; and that the bag contained 195.6 grams of cocaine and $15,120 in cash, *see id.,* vol. 2, at 135, 138, vol. 3, at 36-37. The evidence also established that after Johnson left, Foster walked empty-handed to Stephenson's room, *see id.,* vol. 3, at 48-49, that five minutes later, Foster carried a brown paper bag which he placed in his Chevrolet, *see id.,* vol. 2, at 70-71; that a search of his car revealed a brown paper bag containing a zip-lock bag filled with 780.5 grams of cocaine, *see id.,* vol. 2, at 34-35, vol. 3, at 37, 167; and that the cocaine found in the Jeep with Johnson and the cocaine found with Foster were packaged in identical zip-lock bags, and tested at 88% purity. *See id.,* vol. 3, at 36-38. Thus, from the evidence presented by the government, the jury could reasonably have inferred that Johnson was a participant in the conspiracy to distribute cocaine. Accordingly, sufficient evidence supported Johnson's conviction.

B

Johnson also argues that the district court committed

reversible error when it allowed the prosecution to introduce into evidence Foster's guilty plea to the same conspiracy charge. *See* Brief for Johnson at 20-23. Johnson contends that this evidence unduly prejudiced his defense because "the jury may [have] regard[ed] [Johnson's] guilt as settled and the trial . . . a mere formality." *Id.* (citing As Johnson has not made a timely and specific objection, we must review for plain error the court's decision to admit such evidence. *See United States v. Leach,* 918 F.2d 464, 467 (5th Cir. 1990) (reviewing admission of co-conspirators' guilty pleas and convictions for plain error where defendant failed to raise timely objection), *cert. denied,* ___ U.S. ___, 111 S. Ct. 2802, 115 L. Ed. 2d 976 (1991).[2] "[P]lain error is an error `so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and would result in a miscarriage of justice.'" *United States v. Fortenberry,* 914 F.2d 671, 673 (5th Cir. 1990) (quoting *United States v. Graves,* 669 F.2d 964, 971 (5th Cir. 1982)), *cert. denied,* ___ U.S. ___, 111 S. Ct. 1333, 113 L. Ed. 2d 265 (1991).

In determining whether the district court plainly erred in

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[2] Johnson objected to the introduction of Foster's guilty plea on the ground that it was elicited by an improper leading question, and not because such evidence may unduly prejudice his defense. *See* Supplemental Record on Appeal, vol. 2, at 8. Because "[a] loosely formulated and imprecise objection will not preserve error," *United States v. Jiminez Lopez,* 873 F.2d 769, 773 (5th Cir. 1989), we conclude that Johnson has not preserved this error on appeal. *See United States v. Martinez,* 962 F.2d 1161, 1166 (5th Cir. 1992) (holding that imprecise objection will not preserve error on appeal). Therefore, since Johnson made no specific prejudice objection to Foster's guilty plea, we review its admission for plain error only. *Martinez,* 962 F.2d at 1166 n.10; *see* Fed. R. Evid. 103(d) ("Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.").

admitting Foster's guilty plea, we consider the following factors: (1) the absence or presence of a limiting instruction; (2) a proper evidentiary purpose for the introduction of the guilty plea; (3) whether the plea was emphasized or introduced as substantive evidence of Johnson's guilt; and (4) whether the introduction of the plea was invited by the defense. *Leach,* 918 F.2d at 467. Because the record indicates that the district court gave a limiting instruction, *see* Record on Appeal, vol. 6, at 64-65; that the government had a proper purpose for introducing Foster's guilty plea;[3] and that the government did not emphasize the guilty plea as substantive evidence of Johnson's guilt,[4] we conclude that the district court did not plainly err in admitting into evidence Foster's guilty plea.[5]

C

Johnson's final argument is that the government violated the

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[3] The government contends that its purpose in eliciting testimony from Foster concerning his guilty plea was to defuse anticipated attacks on Foster's credibility. *See* Brief for United States at 21-23. We have previously held that this reason meets the proper purpose requirement. *See United States v. Borchardt,* 698 F.2d 697, 701 (5th Cir. 1983) ("Counsel presenting witnesses of blemished reputation routinely bring out `such adverse facts as they know will be developed on cross-examination' in order to avoid even the appearance of an `intent to conceal.'" (quoting *United States v. Aronson,* 319 F.2d 48, 51 (2d Cir.), *cert. denied,* 375 U.S. 920, 84 S. Ct. 264, 11 L. Ed. 2d 164 (1963))).

[4] The record reveals that Foster's guilty plea was not stressed by the government as substantive evidence of Johnson's guilt. *See* Supplemental Record on Appeal, vol. 2, at 7-10. The government did not mention that Foster had been a co-defendant of Johnson's; it merely elicited Foster's admission that he had been indicted for cocaine trafficking and was testifying as the result of a plea bargain with the government. *Id.*

[5] Although the record reveals that defense counsel did not invite the introduction of Foster's guilty plea, we conclude, in light of the other relevant factors already discussed, that no plain error occurred. *See United States v. Gerald,* 624 F.2d 1291, 1299 (5th Cir. 1980), *cert. denied,* 450 U.S. 920, 101 S. Ct. 1369, 67 L. Ed. 2d 348 (1981) (holding that plain error is "both obvious and substantial").

dictates of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), when it failed to disclose its knowledge of a police report concerning the Jeep being driven by Johnson when he was arrested.[6] Brief for Johnson at 25-28. In *Brady,* the Supreme Court held that the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment. *Id.* at 87, 83 S. Ct. at 1196-97. Johnson contends that the police report))indicating that the Jeep may have been stolen))constituted favorable and material evidence to his defense. We disagree. We are at a loss as to how an allegation that Hicks had stolen the Jeep before turning it over to Johnson could favorably impact Johnson's defense. None of the government's evidence against Johnson was related to ownership of the Jeep. Therefore, the government did not suppress *Brady* information.[7]

D

Stephenson first argues that the district court abused its discretion in departing upward from the sentencing guidelines.[8] We review the district court's decision to depart from the guidelines for abuse of discretion. *See United States v. Roberson,* 872 F.2d

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[6] Johnson claims that he borrowed the Jeep from Rita Hicks, and that he was not aware that the Jeep contained cocaine while he was in possession of it. *See* Brief for Johnson at 23-24.

[7] Johnson also contends that the government violated Fed. R. Crim. P. 16(a)(1)(C), which provides for the disclosure of documents within the control of the government that are material to the preparation of the defense. Because Johnson fails to show how the police report was material to his defense, this argument is without merit.

[8] *See* United States Sentencing Commission, *Guidelines Manual,* (Nov. 1991).

597, 601 (5th Cir.) ("The court's discretion to depart from the Guidelines is broad."), *cert. denied,* 493 U.S. 861, 110 S. Ct. 175, 107 L. Ed. 2d 131 (1989). A departure from the guidelines will be upheld if: (1) the district court provided acceptable reasons for the departure; and (2) the departure was reasonable. *United States v. Fields,* 923 F.2d 358, 361 (5th Cir.), *cert. denied,* ___ U.S. ___, 111 S. Ct. 2066, 114 L. Ed. 2d 470 (1991).

Stephenson argues that the district court did not provide an acceptable reason for the upward departure.[9] *See* Brief for Stephenson at 13-18. The district court stated that it was departing upward because the criminal history category of II did not adequately reflect Stephenson's past criminal conduct, which included three previous felony drug convictions and two felony convictions for possessing a firearm. *See* Record on Appeal, vol. 8, at 9-11; Presentence Report ("PSR") at 7-10. Although Stephenson entered guilty pleas to all of these charges on the same day, and received concurrent sentences, the charges involved completely different facts, dates, and docket numbers.[10] *See* PSR

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[9] The district court skipped a criminal history category (from category II to category IV) in departing upward to a sentence of 144 months. *See* U.S.S.G. Sentencing Table. Although the district court may have erred in failing to explain why an incremental increase in Stephenson's criminal history category))from category II to category III))did not provide an adequate upward departure, *see United States v. Lopez,* 871 F.2d 513, 515 (5th Cir. 1989) (requiring sentencing courts to explain why lesser adjustments are inadequate), Stephenson has not raised this issue below or in his appellate brief. Therefore, we do not address it. *See Joseph v. New Orleans Elec. Pension,* 754 F.2d 628, 630-31 (5th Cir.) (declining to address issue not raised in the district court or in brief on appeal), *cert. denied,* 414 U.S. 1006, 106 S. Ct. 526, 88 L. Ed. 2d 458 (1985).

[10] Stephenson was placed in the criminal history category of II (2-3 criminal history points) because the convictions for his five prior unrelated offenses were consolidated for sentencing. *See* PSR at 8-9; U.S.S.G. §4A1.2 comment. (n.3) (defining prior sentences as related where they result from

at 8-10. Because the inadequacy of a criminal history category in reflecting a defendant's past criminal conduct is a permissible reason for an upward departure, *see United States v. Webb,* 950 F.2d 226, 232 (5th Cir. 1991); U.S.S.G. §4A1.3, the district court did not abuse its discretion in departing upward from the guidelines. *See* U.S.S.G. §4A1.2 comment. (n.3) ("[T]here may be instances in which [defining prior unrelated sentences as one sentence when they result from offenses that were consolidated for sentencing] is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public.").[11]

E

Stephenson also argues that the district court abused its discretion by denying his motion for new trial without an evidentiary hearing. Brief for Stephenson at 9-12. He claimed that the affidavits which the court refused to accept in support of his motion represented newly discovered evidence of prosecutorial

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offenses that were consolidated for sentencing). Thus, Stephenson could only receive a maximum of three points for his criminal history score. *See* U.S.S.G. §4A1.2(a)(2) ("Prior sentences imposed in related cases are to be treated as one sentence . . . ."); §4A1.1(a) ("Add 3 points for each prior sentence of imprisonment exceeding one year and one month.").

[11] Stephenson also argues that he received inadequate notice of the court's intention to depart upwardly. *See* Brief for Stephenson at 18-19. The Supreme Court has held that "before a district court can depart upward on a ground not identified as a ground for upward departure either in the presentencing report or in a prehearing submission by the Government, [Fed. R. Crim. P.] 32 requires that the district court give the parties reasonable notice that it is contemplating such a ruling." *Burns v. United States,* ___ U.S. ___, 111 S. Ct. 2182, 2187, 115 L. Ed. 2d 123 (1991). The ground identified by the district court as the basis for its upward departure was clearly identified in the PSR. *See* PSR at 13-14. Therefore, Stephenson's argument is without merit.

misconduct during the course of the trial.[12] *See* Record on Appeal, vol. 7, at 9. We review for abuse of discretion the court's decision not to hold an evidentiary hearing. *United States v. MMR Corp.,* 954 F.2d 1040, 1046 (5th Cir. 1992).

The district court refused to allow Stephenson to enter the affidavits into the record, stating that:

> I don't think there's any place in this proceeding for that affidavit, Mr. Pinkston [Stephenson's counsel]. If you have some claim for prosecutorial misconduct, you have to file it with the grievance [sic] committee with the state bar commission. Looking at the Dondi case and it says that when matters of ethics come up, they should go to the Bar Association and shouldn't be made a part of this case here. So if you've got an affidavit that involves prosecutorial misconduct and an ethics violation, you should let the U.S. Attorney, Mr. Morello's boss or the Bar Association look at it.

Record on Appeal, vol. 7, at 15. While the case cited by the district court))*Dondi Properties Corp. v. Commerce Savings & Loan Ass'n,* 121 F.R.D. 284 (N.D. Tex. 1988))does state that alleged ethical violations by attorneys are most appropriately left to the adjudication of grievance committees, *see id.* at 290, this case is distinguishable because it was a civil case. We have consistently held that the prosecution's use of testimony that it knew or should have known was perjured may warrant a new trial. *United States v. Antone,* 603 F.2d 566, 569 (5th Cir. 1979) (citing *Giglio v. United States,* 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)); *see also Johnson v. Hargett,* 978 F.2d 855, 861 (5th Cir. 1992) (stating

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[12] In his brief on appeal, Stephenson claims that the affidavits established that one of the prosecutors had relayed information concerning prior testimony to government witnesses who had not yet testified, and that the verdict was based on testimony which the prosecutors knew or should have known was perjured. *See* Brief for Stephenson at 11.

that the deliberate use of perjured testimony could in appropriate circumstances constitute good cause for reversal). In addition, the record indicates that the jury sequestration rule of Fed. R. Evid. 615 was invoked following the testimony of the government's first witness. *See* Supplemental Record on Appeal, vol. 1, at 140-41. Stephenson's allegation that one of the prosecutors violated this rule by relaying information concerning prior testimony to government witnesses who had not yet testified, if true, could in appropriate circumstances constitute a valid ground for a new trial. *See United States v. Wylie,* 919 F.2d 969, 976 (5th Cir. 1990) (violation of Rule 615 may warrant reversal of conviction); *United States v. Womack,* 654 F.2d 1034, 1040 (5th Cir. 1981) (same), *cert. denied,* 454 U.S. 1156, 102 S. Ct. 1029, 71 L. Ed. 2d 314 (1982).

When presented with charges of prosecutorial misconduct, we have held that a district court does not necessarily abuse its discretion in denying a motion for new trial without an evidentiary hearing. *MMR Corp.,* 954 at 1046 (citing *United States v. Chagra,* 735 F.2d 870 (5th Cir. 1984)). However, we have done so only where the motion for new trial was based on evidence that was part of the trial record, thereby permitting a thorough inquiry into the basis for the motion without an evidentiary hearing. *See id.* ("The motion [for new trial] was not based primarily on `newly discovered evidence' in the sense of matters not discussed at trial; . . . ."); *Chagra,* 735 F.2d at 874 ("However, in the decisions relied upon by the defendant, the alleged governmental misconduct

could not be shown except by an evidentiary hearing, because it was (as alleged) extraneous to and outside of the trial record."). Here, Stephenson's allegations of prosecutorial misconduct))knowing use of perjured testimony and violation of the sequestration rule))were matters outside the trial record. Therefore, the district court abused its discretion by not allowing Stephenson to file affidavits in support of his motion for a new trial. Accordingly, we remand to the district court with instructions to permit the filing of such affidavits and to rule on Stephenson's motion for new trial with an explanation for such ruling.

III

For the foregoing reasons, we **AFFIRM** Johnson's conviction and Stephenson's sentence, but **VACATE** the district court's denial of Stephenson's motion for new trial and **REMAND** for proceedings not inconsistent with this opinion. We further hold in abeyance Stephenson's sentence pending the outcome of the district court's proceedings.