IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3284

Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Salvador Gambino,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 91 367 J)

(November 20, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:[*]

Appellant Salvador Gambino appeals his conviction at trial and sentence on charges of conspiracy, money laundering, and assaulting a federal officer. The district court imposed concurrent sentences confining Gambino for 110 months plus a three-year special parole term. We affirm.

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Gambino runs a lounge in the French Quarter of New Orleans owned by his wife. In addition to this business, he helps put together deals. The evidence at trial proved that among his deals, Gambino acted as a middleman between purported drug traffickers and persons who could launder their illicit profits.

During April 1989, Gambino met his acquaintance Juan Navarette on the street. Navarette informed Gambino that he was laundering money for drug dealers. Unknown to Gambino, Navarette was an informant for the U.S. Customs Service. Several days later, Navarette went to Gambino's nightclub and told Gambino that he had a great deal of money to launder. Gambino passed this information along to his lawyer, Donald Grodsky. Grodsky was amenable to laundering the money and met with Gambino and Navarette at the nightclub. Navarette explained that he could no longer launder money in Florida, and Gambino told Grodsky that a third party would be coming into New Orleans with some money. Grodsky agreed to meet this man when he came to town.

This third party was U.S. Customs Special Agent John Turner, who posed as an Arkansas marijuana grower named John Anthony. Agent Turner met Grodsky and Navarette at the Sheraton Hotel on July 11, 1989. Agent Turner questioned Grodsky about his willingness and ability to launder drug money. Following their meeting, the three men walked to Gambino's nightclub and discussed the deal with him. Grodsky was to receive eight per cent of the amount laundered, and Gambino would receive a fee out of that

commission. Gambino told Agent Turner that he had set up his meeting with Grodsky, through Navarette.

During the next three weeks, Agent Turner gave Grodsky a total of $140,000 cash in two installments. With this money Grodsky acquired $128,800 in cashiers checks and kept the remainder as his fee. The checks were sent to Agent Turner as the proceeds of a fictitious lawsuit settlement. Gambino received $500 from Grodsky as compensation for introducing Grodsky to Navarette and Agent Turner.

After the second cash transfer, Agent Turner went to Gambino's nightclub. Gambino asked him whether he was interested in laundering funds through a bail bond business. Agent Turner said he might be interested, and Gambino arranged a meeting with bondsman Jerry Linam. On September 7, 1989, Gambino, Grodsky, Navarette, Linam, and Agent Turner met at the agent's room at Le Meridien Hotel. The jury saw a videotape of this meeting. Grodsky, Linam, and Gambino tried to persuade Agent Turner to provide funds to start a bail and casualty insurance business. Although Gambino maintains that his sole purpose was to obtain investors for a legitimate business, he referred to washing a package of funds for Turner and returning the funds "clean."

Agent Turner arranged a November 29, 1989, meeting with Linam and Gambino to discuss their plans. Recent arrests for money laundering had been publicized that month. Perhaps suspicious, Gambino asked to meet in the hotel lounge, rather than in Agent Turner's room. Gambino and Linam accused Turner of being a police

officer. While Gambino grabbed Agent Turner by the shoulder, Linam searched him for a microphone or recorder. Gambino said, "Yeah, John, if you had been a cop, we would have to kill you and I would, too." Agent Turner was not wired on that occasion, and the meeting eventually settled down to a discussion of business.

In January, 1990, Gambino called Agent Turner and told him that plans for the insurance business were stalled due to Linam's personal problems. Meanwhile, Agent Turner continued to provide Grodsky funds for laundering. Grodsky, along with Marks Bagalman and Jonathan Share, laundered an additional $440,000. Grodsky testified that Gambino should have been informed of and paid for these transactions, but was not. At the end of 1990, Agent Turner revealed his identity to Grodsky, who agreed to cooperate with the government investigation as part of a plea agreement. Thereafter Grodsky taped several conversations with Gambino which mentioned laundering money for Agent Turner. Gambino reiterated that he wanted a "point," or commission, for such money laundering.

The undercover operation concluded, and Gambino was indicted in July, 1991. The superseding four-count indictment charged conspiracy, in violation of 18 U.S.C. § 371; two counts of aiding and abetting money laundering, in violation of 18 U.S.C. §§ 2 and 1956(a)(3); and intimidating a federal law enforcement officer engaged in the performance of his duties, in violation of 18 U.S.C. § 111. A jury convicted Gambino of all four counts on December 11, 1991. In January, 1992, Gambino moved for a new trial on the

basis of newly discovered evidence that a juror had slept during the trial. This motion was heard and denied on February 19, 1992.

II.

Gambino argues that the conspiracy and money laundering charges cannot stand because he was entrapped. At trial he moved for acquittal, arguing that the prosecution failed to show that he was predisposed to engage in money laundering before induced to do so by government agents. The Supreme Court held earlier this year that an entrapment defense must be met with sufficient evidence to support a jury verdict that defendant was predisposed, prior to government coaxing, to violate the relevant law. Jacobson v. United States, 112 S. Ct. 1535, 1543 (1992). Gambino's motion for acquittal essentially contended that the government's case lacked sufficient evidence on this point to go to the jury. Therefore, the district court's refusal to grant his motion will be judged according to the sufficiency of the evidence. The test for this issue was stated in United States v. Johnson, 872 F.2d 612 (5th Cir. 1989). "[T]his Court must look to the evidence to determine whether, viewing reasonable inferences and credibility choices in the light most favorable to the Government, a reasonable jury could find, beyond a reasonable doubt, that the defendant was predisposed to commit the offense." Id. at 621 (citing United States v. Duvall, 846 F.2d 966 (5th Cir. 1988)). This test is entirely consistent with Jacobson.[1]

[1]The government need not have a pre-existing basis for suspecting a person of criminal activity before targeting that person in a sting operation. United States v. Allibhai, 939 F.2d

The evidence here, viewed in the light most favorable to the verdict, would allow a reasonable jury to find that Gambino was predisposed to engage in money laundering independent of the government's acts. Specifically, the record demonstrates that Gambino was predisposed to bring individuals together to engage in money laundering. Evidence showed that Gambino promptly informed Grodsky of this money laundering opportunity after learning of it from Navarette. He proposed to arrange their meeting in return for a fee. The verdicts demonstrate that the jury believed this testimony. Even Gambino's testimony, which denied introducing Grodsky to Navarette and Agent Turner, suggests a predisposition:

> I didn't want to put those two together. But if, if he [Grodsky] could have persuaded me, given me a reason to go ahead and introduce a drug dealer to a money broker and I would do it then, I guess, that's business. And if we can get a fee from doing that, then we would do it.

The district court did not err in refusing to direct a verdict of acquittal based on entrapment.

Gambino next contends that there was insufficient evidence to convict him of forcibly intimidating a federal officer. To violate 18 U.S.C. § 111, a defendant must engage in an act of force against a federal officer. United States v. Hightower, 512 F.2d 60, 61 (5th Cir. 1975). On November 29, 1991, Agent Turner went to meet Gambino and Linam in a hotel bar. When he arrived, the two men were sitting with an empty bar stool between them and instructed

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244, 249 (5th Cir. 1991), cert. denied, 112 S. Ct. 967 (1992). Jacobson created no such requirement, and noted that an entrapment claim will fail if the government simply offers defendant the opportunity to commit a crime and he promptly avails himself of it. Jacobson, 112 S. Ct. at 1541.

Agent Turner to sit there. Gambino and Linam accused Agent Turner of being an undercover officer. Gambino grabbed Agent Turner while Linam searched for a wire. Their hostility and suspicion lasted for more than twenty minutes. During that time, Gambino said, "if you had been a cop we have to kill you and I would, too." Agent Turner testified that he had seen Gambino with a weapon before. Also, Agent Turner was smaller than Gambino and Linam, both of whom are over six feet tall.

In Hightower, grabbing the jacket of a wildlife agent was sufficient to uphold a conviction under § 111. 512 F.2d at 61-62. In this case, Gambino grabbed Agent Turner while verbally threatening him. Agent Turner believed that Gambino was capable of harming him. A rational jury could have found from the evidence that Gambino assaulted Agent Turner beyond a reasonable doubt. See United States v. Juarez-Fierro, 935 F.2d 672, 677 (5th Cir.), cert. denied, 112 S. Ct. 402 (1991).

Appellant claims that the district court abused its discretion in denying his motion for a new trial without an evidentiary hearing. Gambino's motion was founded on a claim of newly discovered evidence that a juror had slept during his testimony. The decision to hold an evidentiary hearing to determine whether juror misconduct occurred is committed to the district court's discretion. United States v. Chiantese, 582 F.2d 974, 978 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979). A defendant moving for a new trial based on newly discovered evidence must show, inter alia, that the evidence was unknown to defendant at the time of

trial and that it probably would have made a difference. United States v. Lopez-Escobar, 920 F.2d 1241, 1246 (5th Cir. 1991).

The district court's primary basis for denying the motion was his finding that it was factually incorrect. Gambino submitted affidavits from his wife, mother, and brother, stating that a juror had been asleep. District Judge Patrick E. Carr declined to hold a hearing based on these affidavits, stating:

> I certainly have no recollection at all of any juror sleeping. . . . I don't believe the lady was asleep. I try to watch that as closely as I can and I do know she was having difficulty, but I don't believe she went to sleep.

We have held that a district judge may take judicial notice of whether a juror slept in open court during a trial. United States v. Curry, 471 F.2d 419, 422 (5th Cir.), cert. denied, 411 U.S. 967 (1973). Moreover, the district court found that the affidavits were insufficient, because they did not state precisely when or for how long the juror allegedly slept. Even accepting the affidavits as true, Gambino cannot show that the nap occurred during a material portion of his testimony. When considering a claim of juror misconduct, the more speculative or unsubstantiated the claim, the less the burden on the court to investigate it. See United States v. Cuthel, 903 F.2d 1381, 1383 (11th Cir. 1990).[2] We are not persuaded that the district court abused its discretion in denying this motion without an evidentiary hearing.

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[2]The district court also doubted that this alleged fact was newly discovered evidence unknown to Gambino at trial. The court found it incredible that Gambino's family did not bring such information to his or his counsel's attention during trial.

The remaining issues all relate to Gambino's sentencing. Appellant complains of three guideline applications. First, Gambino maintains that the district court should not have considered all of the money laundered by Grodsky when sentencing Gambino. Second, he faults the four point offense level increase given him as an organizer of the conspiracy. Third, Gambino argues that he should not have been given a two point increase for obstructing justice.

Gambino claims that the evidence was insufficient to support a finding that he was responsible for more than $140,000 in money laundering transactions. Factual findings of the district court are subject to the clearly erroneous standard of review. United States v. Morales-Vasquez, 919 F.2d 258, 263 (5th Cir. 1990). In sentencing, a conspirator may be held accountable for all conduct in furtherance of the conspiracy that was foreseeable to him. See U.S.S.G. § 1B1.3(a)(1), comment. (n.1); United States v. Patterson, 962 F.2d 409, 414 (5th Cir. 1992). Gambino contends that the evidence did not establish that it was reasonably foreseeable that Grodsky would launder more than the $140,000 that he expressly told Gambino about. We disagree. Appellant brought Grodsky together with purported drug dealers so that drug money could be laundered. Gambino testified to telling Grodsky that Navarette was involved in washing "boxcar loads of money" for drug traffickers. Although Grodsky informed Gambino of only the initial $140,000 he laundered, the district court did not clearly err in concluding that it was

reasonably foreseeable to Gambino that further laundering would take place.

Next, Gambino faults the offense level increase under U.S.S.G. § 3B1.1(a), which adds four points for organizing a criminal activity involving five or more participants. Gambino argues that the evidence does not show that he attempted to bring five individuals together for the purpose of money laundering. Application of § 3B1.1 requires consideration of the entire underlying scheme, including all conduct linked to the transaction. See United States v. Rodriguez, 925 F.2d 107, 111 (5th Cir. 1991). All participants need not be charged or convicted in order to be counted for § 3B1.1(a) purposes. United States v. Manthei, 913 F.2d 1130, 1137 (5th Cir. 1990). Gambino set the stage for the entire laundering scheme by arranging for the initial meeting of Grodsky and Agent Turner. He brought Linam to a meeting which discussed washing money. Later Gambino introduced Dan Kinard to the scheme. Grodsky enlisted Bagalman and Share to aid the conspiracy. Even excluding Agent Turner, see § 3B1.1, comment. (n.1), the money laundering conspiracy here involved more than five persons, including Gambino himself.

In response to Gambino's claim that he did not organize the activity, the record shows that he was the catalyst for the money laundering scheme. We have held that a middleman who coordinates drug purchases can be an organizer for guideline purposes. United States v. Barreto, 871 F.2d 511, 512 (5th Cir. 1989). Similarly, Gambino brought together the parties with cash and the parties with

the means to launder it. He was to receive a commission for the money laundered. Gambino has failed to show that the findings underlying the application of § 3B1.1 were clearly erroneous. See United States v. Rodriguez, 897 F.2d 1324, 1325 (5th Cir.), cert. denied, 111 S. Ct. 158 (1990).

Finally, Gambino argues that his offense level should not have been increased by two points for obstruction of justice. He contends that § 3C1.1 does not encompass his conduct in threatening Agent Turner. The application notes referred to by Gambino do not provide an exclusive list of obstructive conduct. See United States v. Rivera, 879 F.2d 1247, 1254 (5th Cir.), cert. denied, 493 U.S. 998 (1989). Section 3C1.1 provides for a two-point increase in the offense level "[i]f the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." In this case, Agent Turner was carrying out an undercover investigation of Gambino's criminal activities. As discussed above, Gambino became suspicious of Turner and told him that if he were an undercover police officer, he would be killed.

Whether a defendant has obstructed the administration of justice is a factual question, and the district court's decision will stand unless clearly erroneous. United States v. Franco-Torres, 869 F.2d 797, 800 (5th Cir. 1989). Contrary to Gambino's contention, his conduct can fall within the ambit of § 3C1.1. The Eighth Circuit has approved an obstruction of justice increase based on similar circumstances. In United States v. Williams, 879

F.2d 454 (8th Cir. 1989), the defendant suspected that a confidential informant was a "Narc" and threatened him with harm and retaliation. The court affirmed the application of § 3C1.1. Id. at 457. Cf. Franco-Torres, 869 F.2d at 800 (approving § 3C1.1 increase when defendant fled and shot at police officer who witnessed crime). The district court did not clearly err in finding that Gambino obstructed justice within the meaning of § 3C1.1.

AFFIRMED.