IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3309
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES R. WEIS
and LEE BROWN,

Defendants-Appellants.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-91-432 M
- - - - - - - - - - -
March 19, 1993

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:[*]

James R. Weis and Lee Brown were convicted by a jury of conspiracy to embezzle labor union funds, embezzlement of labor union funds, and failure to disclose material facts in labor union records pursuant to a four-count superseding indictment, in violation of 18 U.S.C. §§ 2 and 371 and 29 U.S.C. §§ 439(b) and 501(c). Weis and Brown argue that because Counts I, II and III of the indictment used the word "and," and the district court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

charged the jury using the word "or," the jury instructions constituted an amendment to the indictment. Weis and Brown argue that this "amendment" to the indictment allowed the jury to convict them on Counts I, II and III upon proof that they either converted the funds to their own use "or" the use of others, whereas the indictment required proof that they converted funds to their use "and" the use of others. The jury instruction tracked the language of the statute, 29 U.S.C. § 501(c), and used the word "or" instead of using "and" as used in the indictment.

Because Weis and Brown did not object to the jury charge at trial, this issue is reviewed for plain error. United States v. Maceo, 947 F.2d 1191, 1198 (5th Cir. 1991), cert. denied, 112 S.Ct. 1510 (1992).

In United States v. Haymes, 610 F.2d 309, 310-11 (5th Cir. 1980), the appellant made an identical argument. The statute used the word "or," the indictment used the word "and," and the court charged the jury using "or." This Court rejected the appellant's argument that by giving the charge, the district court had improperly permitted the Government to amend its indictment. This Court stated that "[i]t is well-established in this Circuit that a disjunctive statute may be pleaded conjunctively and proved disjunctively." Id. at 310. See also United States v. Harrelson, 705 F.2d 733, 736 (5th Cir. 1983). The cases which appellants cite, Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) and United States v. Chandler, 858 F.2d 254 (5th Cir. 1988), do not address the

"and/or" situation and are not on point. They have shown no error.

AFFIRMED.