

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8043

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANGELINA MARTINEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 91 CR 152 (H))

July 30, 1993

Before KING and JOLLY, Circuit Judges, and PARKER,* District
Judge.

PER CURIAM:**

On November 15, 1991, Angelina Martinez, an agent for the
Internal Revenue Service (IRS), was found guilty in federal
district court of the following offenses: wilfully filing
falsified federal income tax returns for two consecutive years;

* Chief District Judge of the Eastern District of Texas,
sitting by designation.

** 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that this opinion should not be published.

conspiring to impede the lawful functions of the IRS by creating a false writing and record; and wilfully creating a fraudulent writing with the intent of submitting it to the IRS. Martinez's co-defendant, Elmer Whitehead, Jr., was also charged with the final two offenses, but was acquitted by the jury on both counts. The district court initially sentenced Martinez to concurrent three-year terms for each count, then suspended the sentence and placed her on concurrent five-year terms of probation. Martinez appeals from her convictions and sentence. We affirm in part, reverse in part, and remand for reconsideration of the sentence.

I. Factual and Procedural Background

In June of 1987, IRS revenue agent Angelina Martinez was informed by the IRS that an audit was being conducted of her 1985 income tax return. Approximately one month later, Martinez met with another IRS agent, who had been appointed to review her return. At the time of the meeting, Martinez informed the agent that she had made errors on the return; specifically, she admitted that she had made mistakes in her calculations involving a rental property that she and a partner owned jointly. Within a short period of time, the IRS notified Martinez that they planned to audit her 1986 income tax return in addition to the 1985 return. According to government testimony, Martinez then filed an amended income tax return for 1986; according to Martinez, she had filed the amended return before she knew that her 1986 return was to be audited. On both the 1985 return and the original 1986 return, the IRS found that Martinez had overstated or falsified

various itemized deductions and expenses.

One of the many disputed aspects of Martinez's returns involved alleged interest payments to her mother, Josefina Abeyta. Both the 1985 and the 1986 returns indicated that Martinez had paid \$4,800 (a total of \$9,600) to Abeyta for interest on money Abeyta had loaned her to help pay for college tuition. Martinez submitted an affidavit, allegedly sworn by Abeyta, which confirmed that Martinez had in fact paid the interest. The affidavit was dated July 10, 1987, after Martinez had been notified of the audit of her 1985 return, and was notarized by Martinez's co-defendant, Elmer Whitehead. There is some dispute as to the authenticity of the document. At the outset of the investigation, Whitehead could not recall ever having met Abeyta; nonetheless, both he and Martinez testified at trial that Abeyta had been present when the document was notarized. Moreover, a handwriting expert testified for the government at trial that Abeyta's signature was in Martinez's handwriting. Martinez later testified that she had signed her mother's name because her mother was legally blind; however, an IRS agent who obtained a sample of Abeyta's handwriting during the investigation of Martinez testified that Abeyta had no difficulty with the series of signatures requested of her.

On October 16, 1991, Martinez was indicted on four counts: wilfully filing false federal income tax returns in both 1985 and 1986, in violation of 26 U.S.C. § 7206(1); conspiring with Whitehead to submit a false notarized document with intent to

defraud, in violation of 18 U.S.C. § 371; and knowingly and wilfully creating a false writing and record, together with Whitehead, in violation of 18 U.S.C. § 1001. Following a jury trial, Martinez was convicted of each of the charges. Whitehead was acquitted on all counts. The district court placed Martinez on concurrent five-year terms of probation on each of the counts against her and fined her \$5,000 with an additional \$200 special assessment. Martinez timely appealed from her convictions and sentence.

II. Discussion

A. Sufficiency of Evidence, Convictions for Falsified Returns

Martinez argues that the evidence presented at trial was insufficient to sustain her convictions for falsifying her 1985 and 1986 tax returns in violation of 26 U.S.C. § 7206. In reviewing a challenge to the sufficiency of the evidence, we determine whether a rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. See United States v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991), cert. denied, 113 S.Ct. 64 (1992); United States v. Hatch, 926 F.2d 387, 392 (5th Cir. 1991), cert. denied, 111 S.Ct. 2239 (1991). Moreover, "we view all the evidence and any inferences that may be drawn from it in the light most favorable to the government." Ivey, 949 F.2d at 766.

Under this standard, we must reject Martinez's argument. The relevant section of 26 U.S.C. § 7206 makes it a felony to willfully mak[e] and subscrib[e] any return, statement, or other document, which contains or is verified by a

written declaration that it is made under the penalties of perjury, and which [the defendant] does not believe to be true and correct as to every material matter . .

. .

26 U.S.C.A. § 7206(1) (West 1986). There is ample evidence in the record to support the conclusion that Martinez had willfully filed false returns. At trial IRS agents testified that on her 1985 return, Martinez overstated or falsified itemized deductions by more than \$8,000. They also alleged that Martinez overstated expenses on a rental property by more than \$4,000. Martinez herself admitted from the outset that she calculated the rental expenses incorrectly. Testimony at trial indicated that when she was asked why she did not amend her return when she discovered her mistake, she explained in part that she "just wasn't satisfied with the system." The 1986 return had similar, although larger, errors. Again Martinez admitted to a number of the errors. When asked, again, why she did not file an amended return when she discovered that her estimates were incorrect, she responded that she did not have the money to pay the additional taxes that she knew she would owe.

Given Martinez's own admissions, the jury had ample basis to determine that she submitted incorrect information to the IRS on her return. The jury next had to find that Martinez submitted the incorrect information wilfully. Taken in the light most favorable to the government, the fact that Martinez herself had been employed as an IRS agent for a number of years supported a reasonable juror in the belief that mistakes on her own income tax returns were made knowingly and wilfully, as opposed to

carelessly. Her statements of dissatisfaction with the system and disinclination to pay when she was short of funds further support the conclusion that her mistakes were intentional rather than careless. We accordingly reject the argument that the evidence was insufficient to support her convictions under 26 U.S.C. § 7206.

B. Sufficiency of Evidence, Conviction for Conspiracy

Martinez also argues that the evidence was insufficient to sustain her conviction for conspiring with Whitehead to create a false writing and record under 18 U.S.C. §§ 371 and 1001. She contends that her innocence is reflected by the fact that Whitehead was acquitted of the conspiracy charge. She distinguishes cases like United States v. Zuniga-Salinas, 952 F.2d 876 (5th Cir. 1992), which have held that an inconsistent verdict does not bar conviction, on the grounds that Whitehead's acquittal could have resulted only from an insufficiency of the evidence to establish the existence of a conspiracy.

In Zuniga-Salinas, this court, sitting en banc, specifically held that the conviction of one co-conspirator is not barred by an inconsistent verdict in which all other co-conspirators are acquitted. Zuniga-Salinas, 952 F.2d at 878. We based our holding both on the possibility of mistake, compromise, or lenity by the jury and on the availability of sufficiency of the evidence reviews for the convicted defendant. Id. In other words, an inconsistent verdict can stand if it resulted from such factors as mistake, compromise, or lenity on the part of the

jury, but not if there is insufficient evidence to support the conviction.

However, under the strict standard for reviewing a challenge to the sufficiency of the evidence claims, see supra Part II.A., we find that there was sufficient evidence to support Martinez's conviction for conspiracy. In order to convict Martinez, the jury had to find, first, the existence of an agreement between her and Whitehead to

knowingly and wilfully . . . make a false writing and record, a State of Texas notarized statement which recited that during 1985 Josefina M. Abeyta received \$4,800 in interest from Angelina Martinez, dated July 10, 1987, knowing the same to be falsely made and fraudulent, with intent to defraud

The jurors also had to find an overt act by either Martinez or Whitehead in furtherance of the conspiracy. See United States v. Romero, 600 F.2d 1104, 1106 (5th Cir. 1979), cert. denied, 444 U.S. 1077 (1980).

If we view the record in the light most favorable to the government, a reasonable jury in this case could have found that the evidence established beyond a reasonable doubt the existence of an agreement to make a false writing and an overt act. First, the evidence is such that a reasonable jury could find that the affidavit was false in either or both of two respects: (1) Abeyta did not receive the interest in question; and (2) Abeyta did not sign the affidavit in Whitehead's presence, contrary to what the affidavit represents. A jury could certainly find that Whitehead knew of the latter falsity. Numerous contradictory statements by Whitehead about the notarization support that

determination. According to Whitehead's own testimony, when the IRS first questioned him about the incident, he denied ever having notarized a document by Abeyta. He then recalled the notarization but stated that he had seen Abeyta sign the document herself. By the time of the trial he asserted that Abeyta had been present at the notarization but that the document had been signed before he arrived. Further testimony at trial indicated that Whitehead changed his story after speaking to Martinez, who telephoned him when she learned that she was being audited. Finally, Whitehead testified that he had read the affidavit and that he understood that the purpose of the affidavit would be to substantiate an interest deduction on an income tax return. The above evidence, combined with testimony that Martinez and Whitehead were both business associates and dance partners outside of their work together at the IRS, is sufficient to have convinced a reasonable jury of the existence of an agreement between them to create a false document with intent to submit it to the IRS. Martinez's actual submission of the document to the IRS provided undisputed evidence of an overt act in furtherance of an agreement, if one were found. We therefore affirm her conviction on this count.

C. Inconsistency, Indictment Charge and Jury Instruction

Martinez further argues that the district court's jury instruction on the false writing charge against her constituted a constructive amendment of the indictment and was accordingly fatal error. She notes that Count Four of the indictment alleged

that she

knowingly and wilfully did make a false writing and record, that is, a State of Texas notarized statement dated July 10, 1987, which recited that during 1985 Josefina M. Abeyta received \$4,800 in interest from ANGELINA MARTINEZ, knowing the same to be falsely made and fraudulent, as the defendant well knew, in that Josefina M. Abeyta was not present and that this writing and record would be presented by Angelina Martinez to the Internal Revenue Service (emphasis added)

She contrasts this with the language of the jury instruction, which charged that to find her guilty of making a false writing and record, the jury must find:

First: That the Defendant made or caused to be made a false writing, that is, a notarized statement dated July 10, 1987, for the purpose of submitting it to the Internal Revenue Service, which statement purported to bear the signature of Josefina M. Abeyta;
Second: That the Defendant knew at the time that the writing was false in that it did not bear the signature of Josefina M. Abeyta; (emphasis added)

She argues that this instruction changed the character of the falseness of the writing. In other words, the grand jury alleged that the document was false "in that Josefina Abeyta was not present," whereas the jury was instructed that the document was false in that it "purported" to bear the signature of Josefina Abeyta when in fact she had not signed it. Martinez thus contends that the district court in its instruction impermissibly modified an essential element of the charge against her, allowing the jury the potential of convicting her of an offense differing from the one with which she had been charged.

It is well established that an indictment's charges, once established, can only be broadened by the grand jury itself.

See Stirone v. United States, 361 U.S. 212, 215-16 (1959); United States v. Young, 730 F.2d 221, 223 (5th Cir. 1984). The amendment need not be formal; a "constructive" amendment is sufficient to create fatal error if the effect of a court's actions is to alter the indictment's charges in such a way as to create uncertainty over whether the defendant was convicted solely on the charges made in the indictment that the grand jury returned. Stirone, 361 U.S. at 217. This court has a clearly developed standard for determining when a constructive amendment has been effected:

Stirone requires that courts distinguish between constructive amendments of the indictment, which are reversible per se, and variances between the indictment and proof, which are evaluated under the harmless error doctrine. The accepted test is that a constructive amendment of the indictment occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged. In such cases, reversal is automatic, because the defendant may have been convicted on a ground not charged in the indictment. If, on the other hand, the variation between proof and indictment does not effectively modify an essential element of the offense charged, "the trial court's refusal to restrict the jury charge to the words of the indictment is merely another of the flaws in trial that mar its perfection but do not prejudice the defendant."

United States v. Young, 730 F.2d at 223 (citations omitted) (quoting United States v. Ylda, 653 F.2d 912, 914 (5th Cir. 1981) (emphasis added); see also United States v. Green, 964 F.2d 365, 373 (5th Cir. 1992), cert. denied, 113 S. Ct. 984 (1993); United States v. Baytank (Houston), Inc., 934 F.2d 599, 610 (5th Cir. 1991); United States v. Moree, 897 F.2d 1329, 1334 (5th Cir. 1990).

We have applied this standard fairly strictly. For instance, in United States v. Salinas, 601 F.2d 1279 (5th Cir. 1979) (Salinas I), the indictment charged two defendants with wilfully misapplying bank funds with intent to defraud when they served as directors of a bank. The district court charged the jury that in order to convict the defendants, they had to find that a given defendant was "an officer, director, agent, or employee of the bank" at the time of the offense. This language was consistent with the broader language of the statute under which the defendants were indicted. Id. at 1287. We held that this instruction constituted a constructive amendment of the indictment, as it "modified an essential element of the . . . offense charged;" and we reversed the defendants' convictions. Id. at 1290. Similarly, on the appeal of the remand of Salinas I, this court held that the district court committed fatal error when it instructed the jury to convict the defendant if they found that he had aided and abetted "a principal" in misapplying bank funds with intent to defraud, rather than specifically with aiding and abetting his friend Lewis Woodul in that crime, as charged in the indictment. United States v. Salinas, 654 F.2d 319, 322-23 (5th Cir. 1981). Moreover, in Young, this court suggested that a district court would commit fatal error if it were to allow the jury to convict a defendant of receiving one kind of firearm when the indictment had charged him or her with receiving a different kind of firearm. Young, 730 F.2d at 224.

In light of this precedent, we find that the district

court's jury instruction in the case at hand constituted a constructive amendment of the indictment. The indictment charged Martinez with wilfully submitting to the IRS with intent to defraud a document which was false "in that Josefina M. Abeyta was not present" at the time that it was notarized. The jury instruction, however, allowed the jury to convict Martinez if they believed that the document was false "in that it did not bear the signature of Josefina M. Abeyta," regardless of whether Abeyta was present when the document was notarized. The instruction thus permitted the jury to convict Martinez on a factual basis that effectively modified an essential element of the false writing charge against her.² We accordingly reverse Martinez's conviction under 18 U.S.C. § 1001 for the creation of a false document.

D. Refused Jury Instruction

Finally, Martinez argues that the district court erred when it refused her proposed jury instruction regarding the charges against her of falsifying income tax returns in violation of 26

² Martinez was convicted under 18 U.S.C. § 1001, which reads:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

U.S.C. § 7206. She requested that the district court submit to the jury an instruction which read,

"Wilfully" means that the defendant acted with the intent to violate a known legal duty. Proof of wilfulness is essential to support a conviction under 26 U.S.C. § 7206(1) and neither a careless disregard nor gross negligence in signing a tax return will suffice.

The district court instead submitted the following instruction:

"Wilfully" means with intent to violate a known legal duty. For you to find the Defendant Angelina Martinez guilty of this crime as charged . . . you must be convinced that the Government has proved each of the following beyond a reasonable doubt: . . . [t]hat the Defendant made the statement on purpose, and not as a result of accident, negligence, or inadvertence.

Martinez contends that the district court's instruction worked to her detriment because it replaces "gross negligence" with "negligence." She argues that throughout the trial she had sought to prove to the jury that she had acted inadvertently or with gross negligence, rather than wilfully. She contends that

the jury very well could have believed that her conduct was grossly negligent, but absent [her] requested instruction . . . [she] probably could have been convicted . . . based upon the jury believing that conduct of gross negligence satisfied the legal definition of wilfulness. (emphasis in original)

We review a district court's refusal to submit a proposed jury instruction for abuse of discretion. United States v. Rochester, 898 F.2d 971, 978 (5th Cir. 1990). The district court is afforded wide latitude in the formulation of instructions, and this court will not find an abuse of discretion if the instructions "fairly and adequately cover the issues presented by the case." Id., (citing United States v. Mollier, 853 F.2d 1169

(5th Cir. 1988)). In the case at hand, the district court followed clearly established law in its choice of instruction. This court has consistently held that in the context of falsification of income tax returns, "wilful" means the intentional violation of a known legal duty. See United States v. Buford, 889 F.2d 1406, 1409 (5th Cir. 1989); United States v. Burton, 737 F.2d 439, 441 (5th Cir. 1984); see also United States v. Pomponio, 429 U.S. 10 (1976). The district court's instruction included this language and thus adequately and fairly covered the issue of wilfulness. In light of the inclusion of this language, the difference between "careless disregard [o]r gross negligence," as proposed by Martinez, and "accident, negligence, or inadvertence," as submitted by the district court, is insufficient to constitute abuse of discretion. We accordingly reject Martinez's argument.

III. Conclusion

For the foregoing reasons, we AFFIRM Martinez's convictions for falsifying her income tax returns and for conspiracy and REVERSE her conviction for creation of a false writing in violation of 18 U.S.C. § 1001. We REMAND for re-sentencing in accordance with our holding.