IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-8440
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT ESQUIVE MONSIVAIS,

Defendant-Appellant.

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Appeal from the United States District Court for the
Western District of Texas
(P-92-CR-45-1)

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(September 23, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant Robert Monsivais (Monsivais), convicted on a single count of kidnapping, appeals his conviction complaining of asserted variances between (1) the language of the indictment and the evidence presented at trial and (2) the language of the indictment and the language in the jury

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

instruction. We affirm.

Facts and Proceedings Below

On Friday, January 17, 1992, Monsivais forced his ex-wife, Johanna Monsivais (Johanna), into his vehicle. He then drove her against her will from Fort Stockton, Texas, across the border at Del Rio, Texas, to Acuna, Mexico. Monsivais and Johanna stayed the night at a hotel in Acuna. On Saturday, January 18, 1992, Monsivais reentered the United States and took Johanna to his parents' home in Fort Stockton. On Sunday, January 19, 1992, after Monsivais became violent towards Johanna, Monsivais' parents called the police.

On April 9, 1992, a grand jury issued a single-count indictment charging that Monsivais

> "wilfully [sic] and knowingly did transport in interstate commerce from Ft. Stockton, Texas, Western District of Texas to the United Mexican States, the State of Coahuila, Ciudad Acuna, Johanna C. Monsivais, who had theretofore been unlawfully seized, confined, inveigled, decoyed, kidnapped, carried away and/or held by the said [Monsivais] for ransom, reward and otherwise, in violation of Title 18, United States Code, Section 1201(a)(1)."

Monsivais entered a plea of not guilty and a jury trial began on June 2, 1992. At the end of the government's case, Monsivais filed a motion for a judgment of acquittal, arguing that the government had failed to prove that he had transported the victim in interstate commerce. The motion was denied and the jury found Monsivais guilty. On August 4, 1992, Monsivais was sentenced to 87 months in prison and 3 years' supervised release.

On appeal Monsivais argues that the indictment was

constructively amended by the presentation of evidence that the victim was transported in foreign commerce, as opposed to the interstate transportation charged in the indictment, and by jury instruction that allowed conviction on a foreign commerce basis. In addition, Monsivais asserts that the government failed to prove the jurisdictional element of the kidnapping offense because the evidence shows only that Monsivais transported Johanna in foreign commerce instead of the interstate commerce charged.

Discussion

An indictment cannot be broadened by amendment except by the grand jury. *See Stirone v. United States*, 80 S.Ct. 270, 272 (1960); *United States v. Chandler*, 858 F.2d 254 (5th Cir. 1988). In *Stirone*, the Supreme Court observed that an amendment to an indictment need not necessarily be explicit to constitute reversible error, but may also be implicit or constructive. *Stirone*, 80 S.Ct. at 273. A constructive amendment occurs "when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the offense charged." *United States v. Young*, 730 F.2d. 221, 223 (5th Cir. 1984). Constructive amendments to an indictment are reversible per se because the defendant may have been convicted on a ground not charged in the indictment. *Young*, 730 F.2d at 223. However, mere variations between proof and indictment that do not effectively modify an essential element of the offense charged are evaluated under the harmless-error doctrine. *Young*,

730 F.2d at 223.

This Court's decision in *Young* involved facts similar to the instant case. In that case, Young, a convicted felon, was charged with receiving a firearm transported in interstate commerce in violation of 18 U.S.C.A. § 922(h)(1) (1976). The evidence, however, established that the firearm may have been transported in foreign commerce only. 730 F.2d at 222. Over Young's objection, the district court instructed the jury that interstate and foreign commerce were indistinguishable terms. On appeal, this Court affirmed and ruled that the term "interstate or foreign commerce" as used in 18 U.S.C. § 922(h) was a single unitary concept. *Id*. at 224. The Court concluded that because the expression represented a unitary concept, the difference between the language of Young's indictment and the evidence adduced at trial did not constitute a constructive amendment of the indictment. *Id*. at 224-25.

Monsivais argues that *Young* is not controlling because it dealt with a statute that defined interstate and foreign commerce as a single term.[1] Monsivais urges that the definition of

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[1] In *Young*, interstate and foreign commerce was defined under 18 U.S.C. § 921 which provided:

> "The term 'interstate or foreign commerce' includes commerce between any place in a State and any place outside of that State, . . . but such term does not include commerce between places within the same State but through any place outside of that State."

Id. § 921(a)(2).

interstate and foreign commerce applicable to 18 U.S.C. § 1201,[2] the kidnapping statute, is governed by 18 U.S.C. § 10. Section 10 of Title 18 is entitled "General Provisions" and states

> "The term 'interstate commerce', as used in this title, includes commerce between one State, Territory, possession, or the District of Columbia, and another State, Territory, Possession, of the District of Columbia.
>
> The term 'foreign commerce,' as used in this title, includes commerce with a foreign country."

Monsivais, citing *United States v. McRary*, 665 F.2d 674, 679-80 (5th Cir.) *cert. denied* 456 U.S. 1011 (1982), notes that even if a federal offense may be predicated upon an alternative basis for federal jurisdiction, a defendant's conviction cannot be based on a jurisdictional basis different from that charged in the indictment. He contends that since interstate commerce and foreign commerce are defined separately under Title 18, foreign commerce is an alternative basis of jurisdiction that was not alleged in the indictment.

In *McRary*, the indictment charged kidnapping under 18 U.S.C. § 1201 (a)(1) and based jurisdiction on transportation in foreign commerce. The jury was also instructed that the government had to prove that McRary transported the crew in foreign commerce. However, the evidence reflected that McRary transported the crew

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[2] Section 1201 (a) provides the jurisdictional bases for the offense of kidnapping. The statute provides in part that a kidnapping occurs if a person is unlawfully abducted when "(1) the person is willfully transported in interstate or foreign commerce; (2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States; [or] (3) any such act against a person is done within the special aircraft jurisdiction of the United States . . . ." *Id*.

only on the high seas, and therefore the only available basis for federal jurisdiction was the maritime and special territorial jurisdiction of the United States pursuant to 18 U.S.C. § 1201(a)(2). The Court held that "the only jurisdictional basis upon which the judge instructed the jury did not exist," and therefore reversal of the conviction was required. *Id*. at 679-80. The *McRary* case, however, does not help Monsivais because although the opinion held that special maritime jurisdiction was an alternative basis of jurisdiction, the Court also observed that "foreign commerce" and "interstate commerce" were equivalent terms. The Court noted that Congress, in enacting the original kidnapping statute, "meant both interstate and foreign commerce to include transportation from one state to another state or foreign country." *Id*. at 677-78. The Court observed that in the 1948 revisions the initial definitions of the terms contained in the kidnapping statute were transferred into section 10, but that the 1948 revisions did not evidence a change in the original legislative intent. *Id*. at 678 n.6. The Court further stated that "[t]he word 'commerce' is consistently preceded in the statute by 'interstate or foreign' without any hint that 'commerce' should have separate meanings for each." *Id*. at 678. Based on the rationale in *McRary*, interstate and foreign commerce are not distinct, alternative bases for jurisdiction under section 1201(a).

Because the indictment charging that Monsivais transported the victim in interstate commerce did not present an allegation

of a basis for jurisdiction alternative to and distinct from foreign commerce, proof and instruction on foreign commerce constitutes a variance rather than a constructive amendment of the indictment. *See Young*, 730 F.2d at 224-25. Therefore, this Court's remaining concern is whether the variance between the indictment and proof (or the jury instruction predicated thereon) prejudiced Monsivais. The Supreme Court has held that

> "The true inquiry . . . is not whether there has been a variance of proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense."

Berger v. United States, 55 S.Ct. 629, 630 (1935).

The facts alleged in the indictment were that Monsivais transported the victim from Texas to Mexico. The factual basis for jurisdiction alleged in the indictment was identical to the factual basis for the conviction, both in the proof and in the jury charge. The factual allegations in the indictment placed Monsivais on notice that he was being charged with transporting the victim in foreign commerce. The precise transportation alleged was that proved (and instructed on) at trial. In addition, Monsivais was in possession of the FBI investigative report prior to trial, but he did not file any pre-trial motions for a bill of particulars seeking clarification of the indictment or for a continuance based on surprise. *See Young*, 730 F.2d at

225. Monsivais cannot claim prejudicial lack of notice. Moreover, as this Court has held that "interstate or foreign commerce" is a unitary concept, Monsivais does not face any risk of a subsequent prosecution for the same act should the government later discover that he had transported Johanna in interstate commerce. *Young*, 730 F.2d at 225. The variance between the indictment and the proof has not prejudiced the substantial rights of Monsivais. For the same reasons, the complained-of portion of the jury charge in respect to foreign commerce was not error or prejudicial.

Conclusion

Monsivais was not convicted on a set of facts different from those charged in the indictment, nor was the jurisdictional basis of his conviction different from that alleged in the indictment. Therefore, the difference between indictment and proof was simply a variance rather than a constructive amendment. The discrepancy between the indictment and proof did not prejudice Monsivais, and therefore is not reversible error. The same is all true as to the complained-of portion of the jury charge.

Monsivais' appeal presents no reversible error. His conviction and sentence are accordingly

AFFIRMED.