IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 93-1216

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SWANY D. DAVENPORT, RANDY HARRIS,
and ANGELA ELZY,

Defendants-Appellants.

---

Appeals from the United States District Court
for the Northern District of Texas
(3:92-CR-289-H)

---

(September 6, 1994)

Before REAVLEY and JONES, Circuit Judges, and JUSTICE,[1] District Judge.[2]

JUSTICE, District Judge:

Appellants Davenport and Harris are former Dallas, Texas, police officers, convicted of conspiracy, extortion, and drug charges arising out of a scheme to extort cash payments from drug dealers. The third appellant, Angela Elzy, was convicted of conspiracy and extortion charges, but she was acquitted of all drug charges. Appellants maintain that errors were committed by

---

[1] District Judge of the Eastern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the trial court during voir dire, in its evidentiary rulings, in failing to grant a motion for judgment of acquittal as a matter of law, because of the alleged insufficiency of the evidence to sustain a conviction, and in the application of the sentencing guidelines. Having carefully reviewed all of appellants' contentions, we affirm appellants' convictions, affirm Davenport's and Harris' sentences, vacate Elzy's sentence, and remand for a new sentencing of her.

## I. Background

On appeal of a guilty verdict after trial, we view the evidence in the light most favorable to the prosecution, as required by Jackson v. Virginia, 443 U.S. 307, 319 (1979). The testimony adduced at trial indicated that while Davenport and Harris were on-duty Dallas police officers they demanded payments from drug dealers, in exchange for their promising not to raid the dealers' crack houses and agreeing to warn them of impending raids by other law enforcement groups. One dealer upon whom they made such a demand was Maurice Green. Green testified that after he refused to pay the officers, they kidnapped two of his workers, along with their drug supply, and demanded ransom for their return. After negotiations with appellants Davenport and Harris, Green agreed to pay $5,000 for the return of his workers. One of the kidnap victims testified that Davenport called a woman and asked her to do him the favor of picking up a package from Green at a pre-arranged location. Green put $5,000 into a box and took it to the location. Davenport and Harris then called

Green on the mobile phone in his car and told him to give the money to Elzy, who by then had approached Green's car. Davenport and Harris later released Green's workers and, additionally, returned to them a portion of the crack cocaine which they had confiscated earlier.

After this episode, Green began making weekly payments of $1,000 to $2,000 to Davenport and Harris, in person. On one occasion, Davenport and Harris warned Green of an impending raid by officers of the Dallas Police and the Bureau of Alcohol, Tobacco, and Firearms. Although an undercover officer had purchased crack cocaine at Green's crack house only about thirty minutes before the raid, the house was completely empty at the time of the raid itself, because the officers' tip allowed Green enough time to remove his workers and drugs from the location.

Another drug dealer, Mark Frazier, also testified to paying bribes to Davenport and Harris, stating that he paid them $2,000 per week for approximately six months. Most of these payments were arranged when a woman, whom Frazier tentatively identified as Elzy, would page Frazier, leaving on his pager a telephone number at the Veterans Administration Hospital, where she worked. When Frazier called the number, the woman who answered would ask Frazier whether he had any money for Davenport and Harris, arrange for a meeting place, and receive the money from Frazier. Finally, a friend of Elzy testified that Elzy had confessed that she had picked up the money and had asked her friend not to hate her for so doing. Mobile phone records corroborated much of the

testimony of both Green and Frazier.

The three appellants were tried on four counts: one count of extortion under the Hobbs Act, 18 U.S.C. § 1951(a), one count of distribution of a controlled substance under 18 U.S.C. § 2 and 21 U.S.C. § 841, and one count each of conspiracy to commit the substantive violations. Davenport and Harris were convicted on all four counts. Elzy was convicted of conspiracy to violate the Hobbs Act and the substantive Hobbs Act violation, but was acquitted of the drug-related conspiracy and substantive charges. Davenport and Harris were each sentenced to 360 months' imprisonment; Elzy was sentenced to 121 months' imprisonment.

Appellants' points of alleged error fall into four broad categories: (1) the voir dire, (2) evidentiary rulings, (3) sufficiency of evidence, and (4) sentencing guidelines calculations.

## II. Voir Dire

### 1. Racial Prejudice

Appellants, who are African-American, claim that the issue of race was crucial to their case. In this relation, they claimed that they were "set up" by drug dealers Green and Frazier, who are also African-American, and by the Dallas police department, in part to protect the white police officers who were actually committing the alleged extortion. For this reason, appellants urge that it was crucial to inquire into the possible racial prejudice of persons on the venire, and that the district court's failure to do so adequately is reversible error. The

trial court responded to appellants' concerns by asking the jury panel one question regarding whether race might prejudice them.[3] Appellants maintain that the district court erred in failing to conduct unspecified "further inquiry" regarding racial biases of persons on the venire.

This objection fails from the outset because it was waived. Objections to the conduct of voir dire must be made at the time it is preformed; otherwise, the voir dire is reviewed only for plain error. United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985, cert. denied, 476 U.S. 1119 (1986). Although appellants claim that they requested additional questions regarding racial bias, the record does not support their contention.[4]

---

[3] The judge questioned the jury panel as follows:

> [A]ll of the Defendants are of a different race from some of you. We have African Americans on the panel as jurists [sic] and Anglos or Hispanics. The point is there are different races here but would that fact in any way that you are of a different race from one or more of the Defendants bother you or make it difficult for you to reach a fair verdict in this case?

[4] Specifically, appellants claim that the following statement by counsel constituted a request for further inquiry regarding racial bias: "Mr. Anderson had followed up to his problems with his wife. I wonder if the Court perhaps would ask the question has anybody else had any problems?" The Court replied, "No, I think it is prejudicial to ask that kind of question. I have asked it very directly I thought and I have given them one response. I don't see any point of pounding it in. I think that is prejudicial."

The record shows that there were two Mr. Andersons on the venire panel, one of whom mentioned that he might harbor racial bias. However, neither mentioned his wife. A third juror,

Even if appellants had timely objected, we find no error in the district court's conduct. The constitutional requirement for questions regarding race during voir dire is contained in Ham v. South Carolina, 409 U.S. 524 (1973). In Ham, race was a prominent issue in the trial, because the defendant was a African-American civil rights activist who claimed that he was framed by white policemen as a result of racial animus. The court held that, in this context, the trial court refusal to ask any questions regarding racial prejudice of the persons on the venire violated due process. Id. at 527. The Court expanded on Ham in Ristaino v. Ross, 424 U.S. 589, 597 (1976), where it held that a state court was not constitutionally required to inquire into the venire members' attitudes towards race, simply because a criminal case involved a African-African defendant and a white victim. At the same time, the Court noted in dicta that it would reverse, under its supervisory power over the administration of justice in lower federal courts, a district judges's refusal to ask such a question in the same situation. Id. at 597 n.9; Aldridge v. United States, 283 U.S. 308, 315 (1931).

The Ham line of Supreme Court cases mandates that the trial

---

William Lynn Jarvis did mention that he had undergone a grilling by an attorney during his divorce, and that he had a deep resentment from that experience, presumably resentment of attorneys. The statement by counsel, quoted above, and the response to it are thus extremely vague, because the word "race" was never used and counsel's statement regarding Mr. Anderson's problems with his wife do not correspond to any fact in the record. Accordingly, this objection failed to bring the issue of further inquiry regarding race to the attention of the trial court, as required by Fed. R. Crim. P. 51. See United States v. Haynes, 573 F.2d 236, 241 (5th Cir. 1978).

court ask the venire a question regarding racial bias in certain situations. The district court below followed this line of cases by asking just such a question. There is no precedent for the appellants' contention that more than one such question is necessary. To the contrary, "the trial judge was not required to put the question [regarding racial bias] in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so. . . ." Ham, 409 U.S. at 527. The Ham Court expressly approved asking only one "brief, general" question regarding venire persons' ability to be unbiased, regardless of the criminal defendant's race. Id. at 525 n.2, 527. The court's single question in this case was obviously effective, as one juror responded affirmatively when asked whether he "would have a problem" with African-Americans that could influence his decision, despite the fact that such an admission must have been difficult in the presence of African-American defendants and venire persons. This juror was dismissed by the Court.

In addition, despite appellants' argument to the contrary, racial issues were not prominent in this case. All of the key witnesses were African-American, as were the defendants. Only one witness testified that Green stated that he actually paid off white, rather than African-American, police officers, and there is no reference to race in appellants' closing arguments.

Appellants specifically urge that it was error for the district court to refuse to question the venire regarding any

individual member's possible bias toward African-American police officers. Given the broad discretion afforded trial courts in determining the contours of voir dire, especially with respect to ferreting out juror bias, e.g., Mu'min v. Virginia, 111 S. Ct. 1899, 1906 (1991); Rosales-Lopez v. United States, 451 U.S. 182, 188-89 (1981) (plurality), it would be unreasonable to require a specific inquiry regarding African-American police officers when the trial court has made inquiries regarding both African-Americans in general and police officers in general.[5] See United States v. Robinson, 832 F.2d 366, 367-69 (7th Cir. 1987) (trial court's single, general question regarding racial bias was sufficient, in the face of defendant's requests for more detailed questions regarding the role of an African-American police officer in the inner city, where defendant was an African-American vice officer who claimed that he was an innocent bystander to the drug deal for which he was charged), cert. denied, 486 U.S. 1010 (1988). Cf. Ham, 409 U.S. at 527-28 (finding that the requirement of an inquiry into racial bias is based on firmly established precedent and the principal purpose of the Fourteenth Amendment, which does not extend to other biases, such as bias against people with beards).

2. Prior Service on Civil Rights Jury

[5] The question regarding racial bias has already been discussed at note 2, supra. The trial court also asked the following question regarding bias towards police officers: "Have any of you ever had any kind of experience with a member of the Dallas Police Department that it is so good or so bad that it would in any way affect your ability to be impartial in this case?"

Four of the persons on the venire had served as jurors less than one month earlier, in a civil rights case against several Dallas police officers. One of these informed the court that the case involved a false arrest and concluded in a jury verdict for the plaintiffs. Each member of the venire informed the Court that his or her impartiality in the instant case would not be affected by the prior service. The trial court then denied appellants' request to ask a few more questions regarding the factual details of this prior case. Appellants used peremptory challenges to strike all four of these members of the venire, and now argue that their convictions must be reversed because of their inability to further question the four.

The district court's refusal to permit further inquiry into the nature of the civil rights case on which the four members of the venire had sat was error. This circuit has long recognized that criminal defendants have a right to inquire into former jury service by venire members regarding possibly similar cases. United States v. Montelongo, 507 F.2d 639 (5th Cir. 1975). In Montelongo, the defendants' convictions on marijuana charges were reversed because defendants knew that many members of the venire had previously served on juries in narcotics cases, yet the defendants were denied "any opportunity to develop the nature and extent of the prior jury service of" those members of the venire. Id. at 641. Cf. United States v. Henthorn, 815 F.2d 304, 309 (5th Cir. 1987) (declining to apply Montelongo, by reason of the fact that only two persons on the venire had prior relevant

service; defendant knew that such service was in a case involving cocaine, the same drug with which defendant was implicated; and defendant could not prove that he had exercised a peremptory challenge against these two).

Although the trial court erred in this respect, its error was harmless beyond a reasonable doubt. The purpose of the proposed further inquiry was to acquire additional information which would either (1) allow a successful challenge for cause or to permit at least (2) a more informed exercise of peremptory challenges. Appellants first claim is that this prior service, in a case so similar to the instant case, should have resulted in dismissal for cause; or, alternatively, they argue that it might have resulted in such a dismissal, if they had been permitted to explore the factual similarities in more detail.

In fact, the prior case was not sufficiently similar to this case to have justified a challenge for cause. The prior case[6] involved Dallas police officers using unnecessary force and threats in the course of arresting a Spanish-speaking theft suspect and her neighbor, who attempted to help the suspect. The prior case thus involved police brutality and excessive force against a theft suspect, rather than any organized extortion or aiding of criminals involved with drugs;[7] furthermore, no

---

[6] The case is Rusher v. Davison, No. 3-88-1421-R (N.D. Tex.). Our record on appeal has been supplemented with the complaint, answer, jury instructions, and verdict in that case.

[7] Defendants in Rusher were also accused of arresting the plaintiff without probable cause. The jury found for the defendants on this issue.

witness, defendant, or attorney participated in both cases. See United States v. Mutchler, 566 F.2d 1044, 1044 (5th Cir. 1978) (creating a rule of per se reversal when a defendant is not allowed any questioning regarding prior jury service, but only when the prior case and the instant case "involve the same offense, the same prosecuting witnesses and the same prosecutor," thus leaving other circumstances to a case-by-case analysis) (emphasis added), modifying 559 F.2d 955 (5th Cir. 1977). Moreover, "prior service, even in similar cases during the same term of court, cannot support a challenge for cause unless it can be shown that such prior service actually biased the prospective juror." United States v. Mobley, 656 F.2d 988, 989 (5th Cir. 1981). Appellants have not shown actual bias on the part of any of these four members of the venire or even indicated how their proposed additional questioning could have illuminated such actual bias. To the contrary, the court specifically questioned each of these four members of the venire regarding whether their prior service would affect their ability to be fair in the instant case, and each responded that it would not. It is, accordingly, clear beyond a reasonable doubt that no additional questioning in the case before the court would have resulted in excusing these venire members for cause.

Appellants likewise cannot validly complain that their ability to use their peremptory challenges was impaired by the trial court's stricken actions. Appellants have acquired, on appeal, a wealth of new information concerning the venire members

in question. Some, but not all, of this data would likely have been elicited at trial, if further inquiry about them had been permitted. However, appellants have not pointed out anything they have learned about these venire members which would have made them any more palatable to appellants than at trial, where they felt impelled to challenge them peremptorily. As a result, appellants cannot now claim that they would have accepted these venire members as jurors if they had been allowed the further questioning they requested. To maintain otherwise, appellants would have to argue that, although they mistakenly believed that it was reversible error for the trial court to refuse to sustain their for-cause challenge of these venire members they would not have exercised their peremptory challenges against these venire members after such refusal. Such a position is not tenable. The district court's error in refusing to allow further questioning in this area was thus harmless beyond a reasonable doubt.

3. Batson Challenges

At trial, appellants objected to three of the government's peremptory challenges, contending that such challenges were made solely on the basis of race in violation of Batson v. Kentucky, 476 U.S. 79 (1986). The district court denied these objections. Appellants now urge that these denials were erroneous with respect to two of the venire members in question. The government claimed that it challenged the first juror, Evelyn Davis, because she was a defense witness in an embezzlement case, and the second juror, Barbara Robertson, for a variety of reasons, including her

attitude during voir dire, familial and societal status, and television-watching habits. Appellants contended that these reasons were pretextual.[8] The district court's determinations in this regard are reviewed only for clear error. United States v. Bentley-Smith, 2 F.3d 1368, 1372 (5th Cir. 1993).

During voir dire, Davis stated that she was a witness for the defense in the recent trial of a minister for embezzlement which resulted in a hung jury. The government's attorney stated that he exercised the peremptory challenge against Davis because he was personally acquainted with the minister's case. Specifically, the minister's defense was that the money in question miraculously appeared in his bank account, and that its appearance was an act of God. The government's attorney explained that he did not want anyone on the jury who would believe such a story. This explanation is obviously race-neutral.

---

[8] Normally, there are three phases to a Batson claim. First, the appellants must make out a prima facie case that the peremptory challenge in question was exercised on the basis of race. If this burden is met, the burden shifts to the government to articulate a race-neutral, non-discriminatory basis for the challenge. If this burden is not met, the challenge must be disallowed. If the burden is met, then the burden shifts to the appellants to show that the reason given is a pretext. See Batson, 476 U.S. at 93-94 (citing Washington v. Davis, 426 U.S. 229, 241 (1976)); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In the instant case, both parties contend that the existence of a prima facie case is irrelevant, because the trial court requested the government to articulate race-neutral reasons in any event. See United States v. Maseratti, 1 F.3d 330, 335 (5th Cir. 1993), cert. denied, 114 S. Ct. 1096, 1552 (1994). Appellants do not seriously contend that the explanations offered are not facially race-neutral, but rather contend that they are pretextual.

Appellants counter that this explanation must be pretextual, since the venire person stated only that she was a witness for the defense, not that she believed his theory of defense. However, "the ultimate inquiry for the judge is not whether counsel's reason is suspect, or weak, or irrational, but whether counsel is telling the truth in his or her assertion that the challenge is not race-based." Bentley-Smith, 2 F.3d at 1375. In this case, it is conceivable that a witness for a defendant likely believed in his defense. In addition, Davis made a statement which implied that she accepted a version of the minister's case different from that of the government's attorney.[9] There is no indication that this reason was untruthful, and certainly no basis on which to declare clearly erroneous the trial court's determination that it was not pretextual.

The reasons given with respect to the second person on the venire, Robertson, are more problematic. Those reasons included the following: (1) she was the only person who stood up and said "here" when the clerk called the roll, (2) she had her eyes closed and her head in her hands during voir dire, (3) she was unemployed, (4) she was single, (5) she had three children, (6) she had no stake in the community, (7) she watched three "criminal or cop shows," (8) her eye contact was strange, and (9)

[9] Davis stated that the case involved "a young minister where a banker had put money in an account and he said he had gone back several times to correct them and they said [']No, it is yours' and so finally he just spent it."

her body language indicated that she wanted to be on the jury. Reasons (3) through (6) are particularly troubling in that they are common traits which have no obvious relevance to the case being tried and which, when used as a group, may have a disparate impact on minorities. See Hernandez v. New York, 500 U.S. 352, 363 (1991) ("If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination."); see also Wylie v. Vaughn, 773 F. Supp. 775, 777 (E.D. Pa. 1991) ("Peremptory strikes on the basis of unemployment should . . . be considered suspect."). Additional evidence indicates that at least some of the reasons given were pretextual. For example, reason (5) is inconsistent with reason (6) -- seemingly nothing would give a person a greater stake in the community than having close relatives, especially children, in that community. These factors could justifiably have led the district court to be suspicious of all of the government's explanations for challenging Robertson.

Several other reasons are, however, more substantial. For example, the governments' attorney stated that he did not want a juror who watched "cop" shows on television, because such jurors might apply rules they learned from television, rather than as instructed by the judge. The appellants responded by theorizing that this explanation must be a pretext since many of the jurors must watch such shows. Although the fact that a proffered reason

would apply equally to another venire member who is not challenged is strong evidence that the reason is a pretext. E.g., Jones v. Ryan, 987 F.2d 960, 973-74 (3d Cir. 1993). Appellants here present only speculation, rather than evidence, that other venire members watched such shows. Moreover, appellants do not claim that any other person on the venire had the same combination of factors which the governments cited for challenging Robertson. See United States v. Cobb, 975 F.2d 152, 155-156 (5th Cir. 1992) (accepting as race-neutral prosecutor's reasons for challenging African-American members of the venire, which included age and other factors, despite the prosecutor's failure to challenge other jurors of the same age); Moore v. Keller Indus., Inc., 948 F.2d 199, 202 (5th Cir. 1991) (finding that when a party gives multiple reasons for challenging a person on the venire, "the existence of other jurors with some of their individual characteristics does not demonstrate that the reasons assigned were pretextual").

In addition, because intuition can be a sufficient ground, standing alone, on which to base a peremptory challenge, Bentley-Smith, 2 F.3d at 1374-75 & n.6, Robertson's unusual behavior in answering the roll call, holding her head in her hands during voir dire, and "body language" could all be sufficient reasons to exercise a peremptory challenge. "Eye contact" is a specifically approved legitimate basis for a challenge. Id. at 1374 (citing Polk v. Dixie Ins. Co., 972 F.2d 83, 86 (5th Cir. 1992) (per curiam) (collecting cases), cert. denied, 113 S. Ct. 982 (1993).

Thus, despite the presence of highly suspicious factors in the government's explanation for challenging this venire member, the government also offered several legitimate reasons. Because the trial court's determination that the reason was not pretextual is "a pure issue of fact, subject to review under a deferential standard," Hernandez, 500 U.S. at 364; Batson, 476 U.S. at 98 n.21, that determination should be upheld in the presence of the evidence in this case. This is especially true because the trial court, unlike the appellate court, personally viewed and heard the voir dire, and therefore is in a much better position to assess the validity of the government's explanation with respect to Robertson's behavior at the proceedings.

**III. Evidentiary Rulings**

1. Testimony of Yong Han Lee

At trial, appellants offered the testimony of Yong Han Lee regarding his interrogation by Dallas police. The proffered evidence, contained in Lee's affidavit, indicates that members of the Federal Bureau of Investigation and the Dallas police questioned Lee about his association with appellants and whether he had laundered money for them, all of which he strenuously denied. Later, under suspicious circumstances, Lee bought electronic items on several occasions from undercover police officers. Lee was then arrested and questioned again about appellants. He was told that he was lying and would be prosecuted if he did not cooperate. The district court refused to allow introduction of this testimony at trial, finding it

irrelevant or, alternatively, excludible under Fed. R. Evid. 403. The exclusion of this evidence is reviewed for abuse of discretion. E.g., United States v. Fortenberry, 919 F.2d 923, 925 (5th Cir. 1990) (collecting cases).

Appellants maintain that Lee's testimony would show prosecutorial overreaching by the government, which, in turn, indicates the bias of the government witnesses and the weakness of the government's case. However, Lee's testimony is not relevant to the bias of any government witness. Even if the government conducted an unduly aggressive interrogation of Lee, that does not necessarily indicate that it was unduly aggressive in questioning any of the witnesses who did testify for the government.[10] Similarly, assuming that Lee was subjected to overzealous investigation by the government agents in question, evidence of that fervidness is not relevant to how they conducted their investigation with respect to other witnesses. Fed. R. Evid. 404(b) ("Evidence of other . . . acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

Finally, appellants assert that Lee's testimony was admissible evidence, because the overreaching displayed with respect to Lee evidences that the government realized that it had a weak case against appellants. A similar logic is endorsed by

[10] Lee did testify to some other matters on behalf of the appellants. The appellants do not contend that his experience with the law enforcement officers left him biased against appellants.

Weinstein. See 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 401[5] (1993) (citing McQueeney v. Wilmington Trust Co., 779 F.2d 916, 921 (3d Cir. 1985) (holding that evidence that a party suborned perjury is relevant to show that such party's case is weak). But cf. Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333, 1341 (7th Cir. 1988) (holding that a party's willful misconduct during discovery was properly excluded, by reason of the marginal relevancy of the documents willfully withheld). Under this theory, Lee's testimony is marginally relevant to show that the government believed its own case was weak. Nevertheless, the relevancy here is especially attenuated, since Lee's affidavit does not show any direct or explicit overreaching by the government, but requires the inference that a sting operation was rigged in order to incriminate Lee falsely, and thus to further the government's case against appellants.

As noted by the district court, however, the relevancy of this testimony was substantially outweighed by its tendency to confuse the trial's central issues and waste time.[11] Admitting this testimony regarding this collateral issue would have resulted in a "mini-trial" of Lee's theft charge and the reasons for the sting operation which precipitated it. The district court reasonably concluded that addressing all these issues would take up an excessive amount of time, as well as confusing the

[11] See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

jury, diverting as it would, their attention from the guilt or innocence of the appellants to the guilt or innocence of Lee. Combined with the tenuous relevance of this evidence, as well as its potential to waste the jury's time and cause confusion, rendered its exclusion well within the wide discretion afforded district courts in matters regarding admissibility of evidence.

2. Rodney Miller's Dismissal Order

At trial, appellants moved to introduce into evidence a certified copy of the order dismissing a weapons charge against Rodney Miller, a government witness. The order indicates that the dismissal is "per Chief Rathburn," the Dallas chief of police.[12] Appellants proffered this document to show that Miller's gun charges were dismissed by the police in exchange for his providing them with evidence against appellants. The trial court refused to admit this document, on the grounds of relevancy and because it would unduly confuse the jury.

When appellants moved for the admission of this order, Miller had already testified regarding the charge specified in it. He stated that he was arrested for carrying a gun, but that, in actuality, he never possessed the gun, and that the police who claimed otherwise were lying. He further testified that he did not know why the case was dismissed "per Chief Rathburn," but

[12] No copy of this dismissal has been provided to this court, either as part of the record of the proceedings below, or as a supplement. However, only the admissibility of the document, rather than its content, is disputed. Accordingly, we reach the question of its admissibility, presuming its content to be as represented by counsel at trial.

that the dismissal was based on his innocence and had nothing to do with his testimony regarding appellants.

Under these circumstances, the tendered order was not proper impeachment evidence. Miller never denied that the charges against him were dismissed "per Chief Rathburn." He simply maintained that the charges were dismissed because they were unfounded and that he knew nothing about Chief Rathburn. In this situation, the evidence that charges were dismissed "per Chief Rathburn," did not tend to indicate anything about Rathburn's veracity.

Appellants further argue, however, that the evidence is admissible as indicating Miller's bias, because the police department had his charges dropped in exchange for information against appellants. This argument fails because Miller's own testimony leaves the impression that the charges were dropped upon the request of the police department.[13] The order merely reiterates that the charges were dropped upon police request, so the order itself was cumulative and properly excludable under Rule 403. See United States v. Garza, 574 F.2d 298, 301 (5th Cir. 1978) (holding that when the terms of a witness's agreement with the government are brought out in testimony, the court may properly withhold all tangible evidence related to this agreement from the jury deliberations) (dicta).

[13] In fact, although the document was not admitted, appellants' counsel referred to it in his closing argument, without objection: "Rodney Miller got a gun case in July of 1991. That gets dismissed 'Per Chief Rathburn' like that."

3. Improper Bolstering

At trial, Reed Prospere, a lawyer who had represented two government witnesses, Green and one of his workers, Kevin Hardge, testified as to certain statements made by those witnesses. On cross-examination, the following exchange took place:

> Q: But you are not going to tell this jury that you have never had clients to lie to you, are you?
>
> A: No, I have had clients lie to me.
>
> Q: On many cases?
>
> A: More than rarely. Let me put it that way.

On redirect examination, he was asked if he had any reason to think that the two government witnesses lied to him. He twice stated that he had some independent source of information to corroborate the statements of the two witnesses. The entire exchange is set out in the margin.[14] Both times Prospere was

---

[14]

Q Mr. Prospere, do you have any reason to believe these two people lied to you?
MR. PARKER: Your Honor, I object to that.
THE COURT: Overruled.
A Ladies and gentlemen, let me say this and Mr. Parker asked me concerning talking to Mr. Hale [a Dallas police investigator]. I had been -- I was aware of the fact and had information that Cruiser and Bruiser [street names for Davenport and Harris] were getting protection money --
MR. PARKER: Your Honor, I am not sure this is responding to the question.
THE COURT: I agree it is not responsive I think, Mr. Prospere, if you could answer the question.
A Let me just say this. I took every step legally and forensically possible to independently cooperate [sic] in my mind that these individuals were telling us the truth on the

interrupted by objections, and he was never allowed to state the nature of his corroborating information or its source.

The practice of introducing evidence to support a witness's character for truthfulness or veracity is limited to situations in which that witness's character for truthfulness or veracity "has been attacked by opinion or reputation evidence or otherwise." Fed. R. Evid. 608(a)(2); United States v. Price, 722 F.2d 88, 90 (5th Cir. 1983). In the instant case, appellants challenged Green's and Hardge's character for truthfulness when, on cross-examination, they asked Prospere whether his clients ever lied to him, and he answered affirmatively.

It is therefore clear that had Prospere stated that he believed Green and Hardge because they were truthful in his opinion or had a reputation for truthfulness, appellants could not have properly objected on the basis of Rule 608(a)(2). However, the reason Prospere gave, that he had corroborating intelligence from another source, created a hearsay problem. Even so, the admission of this statement, not made by the declarant while testifying at the trial, did not constitute reversible error. It was admissible, not for the truth of the

---

issues that we ultimately went to Ronnie Hale with and that had been -- I had a source other than the individuals Maurice Green --

MR. LESSER: Bolstering, Your Honor. I object.

THE COURT: I think the question is answered

MR. WILLIAMSON: Yes, sir.

MR. LESSER: We request the latter part be stricken.

THE COURT: I think the question and the answer was responsive enough in that I won't strike it.

The subject was not broached again.

matter asserted, but to explain why Prospere believed the statements of these two defendants -- a question which appellants' counsel had raised on cross-examination. See Fed. R. Evid. 801(c). In addition, appellants failed to object timely on the basis of hearsay, and therefore waived their right to do so. Any effects of Prospere's statements were also mitigated, since the trial court never permitted them to be fleshed out in any detail.

Second, even if the objection were sufficient and the testimony should have been stricken, the failure to do so was harmless. As already related, Prospere was cut off before he was allowed to give any details of the alleged information, its source, or its nature. Moreover, the government presented substantial evidence, including telephone records, corroborating the statements of Green and his co-worker. Cf. United States v. Church, 970 F.2d 401, 408-09 (7th Cir. 1992) (admission of hearsay evidence not plain error where other evidence tended to show the same facts), cert. denied, 113 S. Ct. 1009 (1993). Finally, appellants themselves minimized the impact of this testimony by intentionally eliciting from another of the government witnesses' attorneys that Prospere did not believe his clients' statements regarding Davenport and Harris until he read about it in the newspaper. In other words, appellants evoked from a different attorney a hearsay statement almost identical to the statement by Prospere to which they now object. Because the similar statement which appellants elicited was already before

the jury, any impact which the similar statement by Prospere had could only have been minimal.

## IV. Sufficiency of Evidence Claims

Each appellant claims that the evidence presented against him or her is insufficient to support that appellant's convictions. In assessing appellants' claims that the evidence was insufficient to convict them, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979).

### 1. Hobbs Act Claims

Appellants allege that the district court's instruction regarding interstate commerce was defective and, additionally, that the evidence adduced at trial was insufficient to show an effect on interstate commerce necessary for conviction under the Hobbs Act counts (1 and 3). Finally, they argue that illegal drug business is not the type of interstate commerce that the Hobbs Act was intended to protect.

The Fifth Circuit has adopted the "depletion of assets" test. Esperti v. United States, 406 F.2d 148, 150 (5th Cir.), cert. denied, 394 U.S. 1000 (1969). Under this theory, taking money away from a business engaged in interstate commerce obstructs, delays, or affects commerce, as required for a Hobbs Act violation. Id. The evidence at trial showed that the defendants took money away from Green's and Frazier's drug

businesses. This court has previously held that "drug trafficking affects interstate commerce." United State v. Gallo, 927 F.2d 815, 823 (5th Cir. 1991). This holding was based on a detailed Congressional finding to that effect. 21 U.S.C. § 801(3) & (4). The extortion at issue here, which depleted funds otherwise available for drug trafficking, therefore impeded interstate commerce sufficiently to implicate the Hobbs Act. Evidence at trial showed that the extorted funds were business funds. See United States v. Boulahanis, 677 F.2d 586, 590 (7th Cir. 1982) (applying depletion of assets theory to extortion of an individual business owner, based on depletion of business assets, when the extortion targeted business activities); United States v. Brown, 540 F.2d 364, 373 (8th Cir. 1976) ("Extortion practiced upon the principals of a business is clearly harmful to that business and a resulting interference with interstate commerce in any way or degree is outlawed by the Hobbs Act."). Therefore, we need not decide whether the depletion of assets theory applies to individuals as well as businesses. Compare Jund v. Town of Hempstead, 941 F.2d 1271, 1285 (2d Cir. 1991) (finding that depletion of individuals' assets leaves them with less money to spend on items involved in interstate commerce, thereby fulfilling Hobbs Act requirements); United States v. Cerilli, 603 F.2d 415, 424 (3d Cir. 1979) (approving depletion of assets theory with respect to individuals), with United States v. Mattson, 671 F.2d 1020, 1024 (7th Cir.) (finding insufficient nexus with interstate commerce where victim, who worked for a

business engaged in interstate commerce, paid a $3,000 bribe to receive his electrician's license), cert. denied, 459 U.S. 1016 (1982).

The jury was also instructed that it could find a connection to interstate commerce if appellants' activities allowed the victims' illegal activities to continue. Appellants did not timely object to this instruction; hence, it is reviewed only for plain error, United States v. Williams, 985 F.2d 749, 755 (5th Cir. 1993), that is, an act "so clearly erroneous as to result in a likelihood of a grave miscarriage of justice." United States v. Birdsell, 775 F.2d 645, 651-52 (5th Cir. 1985) (quotation marks and citations omitted). The instruction was not clearly erroneous. The inference that the Hobbs Act applies to positive as well as negative effects on commerce is supported by United States v. Ambrose, 740 F.2d 505, 512 (7th Cir. 1984) (finding that the Hobbs Act punishes "extortion that promotes illegal commerce as well as extortion that retards legal commerce"), cert. denied, 472 U.S. 1017 (1985), and by the plain language of the Hobbs Act, which applies to "[w]hoever in any way or degree obstructs, delays, or affects commerce . . . ." 18 U.S.C. § 1951(a) (emphasis added). Similarly, the plain language of the Act, quoted above, does not support a limitation to legal or legitimate commerce, as appellants argue, but rather defines "commerce" as "all commerce" occurring within certain geographical limitations. 18 U.S.C. § 1951(b)(3) (emphasis added). The Hobbs Act, therefore, encompasses commerce which is

entirely illegal. Ambrose, 740 F.2d at 511-12 (extortion affecting narcotics trafficking); United States v. Hanigan, 681 F.2d 1127, 1131 (9th Cir. 1982) (kidnap and robbery of illegal aliens), cert. denied, 459 U.S. 1203 (1983).

Appellant Elzy makes additional arguments regarding her Hobbs Act-related convictions, the only charges of which she was convicted. She claims that there was no evidence that she knew about the conspiracy or agreed to commit a crime, both elements required for conviction of conspiracy. See United States v. Thomas, 768 F.2d 611, 615 (5th Cir. 1985) (collecting cases). Similarly, Elzy claims that the evidence was insufficient to convict her of aiding and abetting the Hobbs Act violation, since she did not knowingly associate with a criminal venture, participate in that venture, and intend to make that venture succeed.

Viewed most favorably to the government, the evidence against Elzy consisted of the following: (1) She was told by Davenport to pick up a package from Green and not to say anything when she did so; (2) after obtaining the package, she counted the money in it -- about $5,000 -- at Davenport's direction; (3) she was present with Davenport and Harris when Green made one of his weekly payments to them; (4) Frazier made his weekly payments for Davenport and Harris to Elzy; and (5) these payments were made when someone would call Frazier's beeper, entering a number at the hospital where Elzy worked. Frazier would call Elzy, who would ask Frazier if he had money for Davenport and Harris,

arrange for a meeting, and pick up the $2,000 payments; and (6) after these events, Elzy told a co-worker that "she was the one who picked up the money and don't hate her for what she did." (R. VIII-76).

This evidence shows that Elzy repeatedly participated over an extended period of time in collecting large payments of cash for Davenport and Harris under highly suspicious circumstances, and that she felt guilty for having done so. Moreover, rather than being a mere passive bystander, she actively participated in arranging the time and place of payments and then personally collected them. As a result, Elzy's conduct does not constitute merely "a climate of activity that reeks of something foul," which would be insufficient for conviction. United States v. Jackson, 700 F.2d 181, 185 (5th Cir.), cert. denied, 464 U.S. 842 (1983). Rather, this evidence supports the jury's finding that Elzy knew of the conspiracy and extortion and took affirmative steps to facilitate them. She had obviously been told or had deduced that Frazier was required to make weekly cash payments to Davenport and Harris, and that such payments were to be made to her surreptitiously. These permissible inferences are sufficient to support her convictions.

The evidence against Elzy is similar to that against the defendant in United States v. Leed, 981 F.2d 202 (5th Cir. 1993). This court found the evidence against Leed sufficient to support conviction of conspiracy to possess a controlled substance, where Leed (1) had received detailed information regarding the

transaction in question -- where it would occur, what car to drive, what signals to give, and what the purchase price was; (2) had obviously communicated with co-defendant who prearranged the transaction; and (3) knew that the operation was covert, as evidenced by his having disguised the money and having looked around before identifying himself. Id. at 205

In the instant case, the evidence also revealed that Elzy had received information regarding the payments to be made by Frazier, was in frequent communication with Davenport and Harris, and knew that the operation was covert. In addition, the jury is permitted to infer that Davenport and Harris would not have entrusted the collection of tens of thousands of dollars in extortion money to Elzy, if she were in fact unconnected to the conspiracy. Cf. United States v. Pruneda-Gonzalez, 953 F.2d 190, 196-97 (5th Cir. 1992) (noting that jury could infer that defendant knowingly and intentionally joined criminal venture when he accompanied conspirators on tasks vital to criminal activity, which indicated knowledge of and participation in that criminal activity); United States v. Chavez, 947 F.2d 742, 745 (5th Cir. 1991) (stating that jury "was entitled to consider the unlikelihood that the owner of . . . a large quantity of narcotics would allow anyone not associated with the conspiracy to be present during the[ir] unloading"). In short, the jury could rationally conclude, based on the evidence presented to it -- Elzy's repeated conduct, over an extended period of time, of surreptitiously arranging for the receipt, and actually

receiving, large amounts of cash for two people she knew to be police officers -- that Elzy knew of and voluntarily joined in the illegal activities of Davenport and Harris. Her "confession" to her co-worker further supports the jury's conclusion.

2. Conspiracy and Aiding and Abetting the Drug Counts

Davenport and Harris contest the sufficiency of the evidence against them respecting the conspiracy and aiding and abetting counts, claiming that there was insufficient evidence of their specific intent to distribute narcotics to support conviction on either count. In reviewing a jury verdict for sufficiency of the evidence, the evidence must be considered in a manner most favorable to the government. Jackson, 443 U.S. at 319. When so regarded, it is clear that the evidence was sufficient to convince a jury that appellants had the requisite intent beyond a reasonable doubt. Not only did appellants extort money from the drug dealers (which appellants correctly note could only have a detrimental effect on their business), but they also returned some of the drugs seized to the drug dealers, refrained from arresting or harassing the dealers or their customers, and even warned them of an impending law enforcement raid. Thus, the appellants, in addition to having a financial stake in the continuing success of the drug operation, also took affirmative steps to support the operation. From this set of facts, intent to further its goals can be inferred. See United States v. Ruiz, 905 F.2d 499, 505-06 (1st Cir. 1990) (finding evidence sufficient to support drug conspiracy charge against police officer who

aided drug dealers by refraining from arresting them, warning them of impending raids, and performing other services).

## V. Sentencing Guidelines Issues

### 1. Davenport's and Harris' Base Offense Level Calculation

Sentencing in this case was properly based on the United States Sentencing Guidelines ("U.S.S.G.") promulgated in November 1990. For sentencing, the trial court grouped offenses pursuant to U.S.S.G. § 3D1, with the result that defendants were sentenced according to the offense level of the most severe offense. U.S.S.G. § 3D1.3(a). For Davenport and Harris, the most severe offense was conspiracy to distribute crack cocaine, a violation of 21 U.S.C. § 846. The appropriate guideline for this offense is § 2D1.4, which refers back to § 2D1.1 and requires a determination of the quantity of drugs involved. Application Note 2 to § 2D1.4 governs the drug quantity calculation in the instant case:

> Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

Following this note, the district court calculated the quantity of drugs, as follows:[15] (1) Appellants received about $80,000 in

[15] Appellants contend that no amount of drugs could be reasonably calculated, and, therefore, the offense level should

proceeds from crack cocaine sales; (2) crack cocaine sells for approximately $50 per gram; (3) therefore, appellants facilitated at least 1.6 kilograms in crack cocaine sales; (4) and finally, because several of these calculations were uncertain, appellants would be sentenced based on a quantity of crack (cocaine base) between 500 and 1,500 grams, which yields a base offense level of 36 under U.S.S.G § 2D1.1(c)(4). The only error in this calculation is that the evidence indicated that the value of crack cocaine was actually $100 per gram. However, this error is harmless beyond a reasonable doubt, because it results in a calculation of 800 grams of crack, well within the range for which appellants were sentenced.[16]

---

have been determined on some other basis. The only case which they cite in support of this proposition, United States v. Perrone, 936 F.2d 1403, 1419, clarified on rehearing, 949 F.2d 36 (2d Cir. 1991), addressed the highly unusual circumstance in which there was no basis to calculate a drug quantity. Specifically, there was no evidence "of any conversations about the amount of drugs that were going to be manufactured or sold, no records of past sales, [and] no money." 936 F.2d at 1419 (emphasis added). In the case before the court, there was ample evidence of the amount of drug money used to pay off appellants. In such situations, the Guidelines clearly instruct the sentencing court to use the amount of money to approximate the amount of drugs. Application Note 2 to U.S.S.G. § 2D1.4. Furthermore, the conversion from money to drugs was reasonable, in that appellants were extremely familiar with drug sales by the dealers, certainly knew that the dealers sold crack, and in all likelihood were familiar with their prices.

[16] The district court sentenced appellants on the basis of the quantity of drugs the dealers would have been required to sell in order to raise the extortion money paid appellants. In affirming the district court, we express no opinion regarding the government's contention at trial that appellants' sentences could have been founded on the total quantity of drugs sold by the dealers while under appellants' extortion-induced protection. See United States v. Collins, 972 F.2d 1385, 1413 (5th Cir. 1992) (district judge convicted of receiving a bribe in exchange for a

2. Elzy's Base Offense Level Calculation

Elzy's most serious offense was aiding and abetting extortion under the Hobbs Act, 18 U.S.C. §§ 2 & 1951(a). Under U.S.S.G. § 2X2.1, aiding and abetting is punished in the same manner as the underlying offense. The section applicable to this particular Hobbs Act violation is § 2C1.1. See U.S.S.G. § 2E1.5. The district court found that the bribe in question facilitated the distribution of crack cocaine, and therefore applied § 2X3.1, and sentenced Elzy as an accessory after the fact to the drug crime. See U.S.S.G. § 2C1.1(c)(1). Elzy objects, claiming that she, unlike Davenport and Harris, did not know the purpose of the extortion scheme and could not reasonably have known the amount of drugs, or even the type of drugs, involved in the scheme.

No evidence regarding Elzy's involvement with or knowledge of illegal drugs was adduced at trial. This fact is reflected in the jury verdicts of acquittal on both drug-related charges. However, the district court had additional information available to it at sentencing. Elzy made a statement to investigators, admitting that she believed Green and Frazier were drug dealers, for the reason that they were paying off Davenport and Harris.[17]

---

more lenient sentence, could be sentenced based on the total amount of drugs involved in the offense for which the sentence was being given), cert. denied, 113 S. Ct. 1812 (1993).

[17] First, the investigator was asked, "And Ms. Elzy identified that she knew these people were known to be drug dealers?" To this inquiry he replied, "No." Later, he was asked, "And [Elzy] didn't tell you they were drug dealers?" The investigator replied, "She said she believed that they were drug dealers. She said, 'Why else would they be paying Mr. Davenport and Mr. Harris?'" These two hearsay statements are the only

There was no testimony whatever regarding her knowledge of the type of drug involved. The district court realized this uncertainty when he pronounced sentence on Elzy:

> It is clear to me that Ms. Elzy knew that this conspiracy for extortion and this extortion with which she was convicted of aiding and abetting, knew that it had to do with illegal drugs. What is not as clear is whether she knew how much or what she could . . . reasonably have foreseen. In my judgment she is charged properly and properly assessed in the Probation Officer's Report with foreseeing at least, that is that there would be distributed in the conspiracy to distribute at least 500 grams and up to 1.5 Kilos . . . .

We find clearly erroneous the district court's determination that Elzy could have foreseen that at least 500 grams of crack cocaine would be distributed. It may have been reasonable, based on Elzy's level of involvement in the extortion scheme, to conclude that she could have reasonably foreseen the full $80,000 amount. However, the connection to a specific quantity of a specific type of drug is simply too tenuous.

We are mindful of the rule that a sentence may be grounded on conduct for which Elzy was acquitted, such as the drug conspiracy. E.g. United States v. Carreon, 11 F.3d 1225, 1241 (5th Cir. 1994). However, the applicable Sentencing Guideline allows the sentencing court to base sentence only on relevant conduct, defined in part as "acts and omissions committed or aided and abetted by the defendant, or for which the defendant

---

evidence which indicates in any way Elzy's knowledge of any connection between her acts and the drugs.

would be otherwise accountable . . . ." U.S.S.G. § 1B1.3 (1990). It is clear from the evidence that Elzy neither committed nor aided and abetted any drug offense. These are crimes which require specific intent that drugs be possessed or distributed; yet, at best, Elzy inferred only that the victims of her crimes were drug dealers. The records is simply devoid of evidence that she specifically intended that a drug or violations should occur.

The only remaining question, then, is whether her co-conspirators' conduct with respect to the drugs was so reasonably foreseeable to her that she is responsible for it. We find that it was not. This court has repeatedly held that, even when a defendant is convicted of a conspiracy to distribute drugs, his or her sentence must be based on distribution of a quantity of drugs by co-conspirators, if that quantity was reasonably foreseeable to the defendant. United States v. Maseratti, 1 F.3d 330, 339-40 (5th Cir. 1993) (the entire amount of drugs involved in the conspiracy may not be used as the point of departure in calculating the sentence of a defendant convicted of conspiracy, but only the amount reasonably foreseeable to them); United States v. Mitchell, 964 F.2d 454, 457-61 (5th Cir. 1992) (same); United States v. Puma, 937 F.2d 151, 159-60 (5th Cir. 1991) (same). In the present case, Elzy was acquitted of conspiracy to distribute crack cocaine. There was no evidence to conclude that she had participated in such a conspiracy, even if the lower standard, preponderance of the evidence, were employed for sentencing purposes. Carreon, 11 F.3d at 1241. Yet, even if she

had been convicted of such a conspiracy, the record is also devoid of evidence that she could have foreseen either the type of drug (crack cocaine) or the quantity thereof (at least 500 grams) for which the district court held her responsible. The single fact she inferred, that the victims of an extortion scheme carried out by police officers patrolling a poor neighborhood were most likely drug dealers, cannot support a finding that it was foreseeable to her that the extortion furthered the distribution of at least 500 grams of crack cocaine. Accordingly, such appellant's sentence shall be vacated and her case remanded to the trial court for resentencing.

3. Enhancement for Abuse of Position of Trust

Appellants Davenport and Harris object to a two-level enhancement for abusing a position of trust, arguing (1) that such abuse is inherent in the definition of a Hobbs Act violation, (2) that one of the grouped violations for which they were sentenced, was under U.S.S.G. § 3D1.1, and (3) that the enhancement is, therefore, illegitimate. However, the Sentencing Guidelines specifically address this issue, resolving it in favor of allowing the enhancement imposed by the trial court. Application Note 3 to U.S.S.G. § 2C1.1 (the guideline governing the Hobbs Act violation) states, "Do not apply § 3B1.3 (Abuse of Position of Trust or Use of Special Skill) except where the offense level is determined under §2C1.1(c)(1) or (2)" (emphasis added). Since appellants were sentenced under § 2C1.1(c)(1), the enhancement applies. United States v.

Gonzalez, 16 F.3d 985, 991-92 (9th Cir. 1993) (affirming enhancement for abuse of position of trust for INS agent who received a bribe to allow drugs to cross the border); United States v. Clark, 989 F.2d 447 (11th Cir. 1993) (affirming an enhancement for abuse of position of trust where a police officer was convicted of accepting bribes to protect a drug transaction). This court has previously followed the official commentary to the Sentencing Guidelines in United States v. Guerra, 962 F.2d 484, 486 (5th Cir. 1992), and United States v. Arellano-Rocha, 946 F.2d 1105, 1108 (5th Cir. 1991).

4. Enhancement for use of a Weapon

Appellants Davenport and Harris were given a two-level increase for use of a firearm during the commission of the offense, under § 2D1.1(b)(1). They assert that this enhancement was erroneous, inasmuch as (1) carrying a firearm, was simply a part of Davenport's and Harris' duties as police officers, and (2) it was clearly improbable that the guns in question were connected to the offense. Both contentions are without merit.

Although it is true that the officers carried the guns as an incident to their status as peace officers, and that such status (or the appearance thereof) is one of the elements of a Hobbs Act violation, the Hobbs Act may easily be violated by a public official who is not required to carry a weapon. As a result, the guidelines applicable to the Hobbs Act do not assume that a firearm is involved. A Hobbs Act violation committed by a person with a firearm is reasonably considered more severe and dangerous

than one committed without such a weapon; consequently, the enhancement is valid.

The Sentencing Guidelines provide for a two-level enhancement whenever a firearm is possessed during the commission of a drug offense. U.S.S.G. § 2D1.1(b)(1). Application Note 3 states that "[t]he adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." The trial judge's determination that appellants failed to prove that the firearms were unrelated to the extortion is not clearly erroneous. Indeed, both appellants' guns appeared to facilitate their crimes, especially the kidnapping of two of their victims. See United States v. Sivils, 960 F.2d 587, 596 (6th Cir. 1992) (affirming the enhancement for possession of a gun by a police officer who was on duty at the time of the crime in question, and therefore was required to possess a firearm); United States v. Ruiz, 905 F.2d 499, 507-08 (1st Cir. 1990) (same); see also United States v. Contreras, 950 F.2d 232, 241-42 (5th Cir. 1991) (upholding statutory enhancement for using or carrying a firearm during a crime of violence, where defendant was on-duty police officer required to carry a gun, even though he did not fire or brandish the gun during his crimes).

5. Enhancements for Obstruction of Justice

All three appellants contest as clearly erroneous the district court's findings that they obstructed justice. The parties agree that an enhancement is appropriate, if the

appellants threatened or intimidated witnesses or lied under oath about the case. See Application Note 3 to U.S.S.G. § 3C1.1. The district court's finding will be reviewed only for plain error; if sufficient evidence exits to support the district court's finding, the convictions will be affirmed. United States v. Velgar-Vivero, 8 F.3d 236, 242 (5th Cir. 1993).

The enhancement with respect to Davenport was based on: (1) one conversation with Elzy's brother in which Davenport allegedly threatened her brother and (2) conversations between Davenport, Harris, and two government witnesses, Green and Miller, who reasonably felt intimidated thereby. The crux of Davenport's argument is that the statements from Green and Miller are conclusory and unreliable, and that Davenport's statements to Elzy's brother were not in the form of a threat but, a chastisement for throwing appellant Elzy out of his house.

That the governmental witnesses who stated that Davenport intimidated them are convicted felons or drug users bears only on their credibility which is to be determined by the factfinder and does not wholly negate their statements. United States v. Ruff, 984 F.2d 635, 642 (5th Cir.), cert. denied, 114 S. Ct. 108 (1993). In addition, Davenport's argument regarding the possible interpretations of his statement to Elzy's brother is misplaced. Davenport asked Elzy's brother: "If your wife and all your family is dead whose funeral are you going to go to?" Although this question is susceptible of several innocent interpretations, the district court's interpretation of it as a threat is

certainly not clearly erroneous.

The evidence of Harris' obstruction of justice is vastly stronger. The evidence indicates that Harris contacted government witness Frazier several time regarding testimony in the case, and that Frazier was concerned for his personal safety. The district court listened to the recording of one of these conversations. In addition to the conversations with Davenport and government witnesses, noted above, Harris also attempted to bribe government witnesses Green and Frazier into perjuring themselves in the case. Although Harris claims that he told Frazier to tell the truth to the grand jury in the taped conversation, the district court listened to the tape, and its conclusion, based on the context and tone of the conversation, that Harris was attempting to suborn perjury was not clearly erroneous.[18] In addition, although most of the sources of the information against Harris with respect to obstruction of justice were disreputable drug dealers, the district court did not commit clear error in crediting their statements on this subject.

Finally, the district court gave Elzy an enhancement for obstruction of justice, by reason of her conduct in giving a detailed statement of her involvement to law enforcement officials and afterwards giving contradictory testimony before the grand jury. Elzy contests the enhancement, claiming that a

[18] Specifically, Harris told Frazier: "I can't tell you what to say. The only thing I can do is tell you to tell the truth and the truth is the statement you gave us, you know? If you say anything different from that that's the only way they can get you for perjury."

charge of perjury for her testimony at the grand jury was still pending, and that she would be required to give up her Fifth Amendment rights, in order to defend herself against the obstruction of justice enhancement. The Supreme Court has upheld the enhancement for perjury under these circumstances. United States v. Dunnigan, 113 S. Ct. 1111 (1993). There, it was held that a person whose sentence is enhanced for perjury could later be charged with perjury as a substantive offense, and that this fact does not invalidate the enhancement. Moreover, Elzy was given the enhancement because she gave authorities two contradictory statements, in addition to the fact that she committed perjury. Therefore, in the instant case, the district court's finding that she obstructed justice is not clearly erroneous.

6. Three-level reduction for Elzy's participation

The trial court gave Elzy a three-level reduction for participation categorized as between minimal and minor. Given her repeated participation in the criminal conduct set forth above, there is no indication that she is entitled to a four-level reduction, and the trial court's decision on this question shall stand.

We **AFFIRM** the judgments of conviction and sentences of appellants Harris and Davenport. We **AFFIRM** the judgment of conviction of appellant Elzy, but **VACATE** her sentence and **REMAND** for resentencing consistent with this opinion.

REAVLEY, Circuit Judge, concurring in part and dissenting in part:

I would affirm in all respects. Although the punishment of Elzy may seem excessive, the district judge correctly applied the guidelines. The judge had evidence to support the finding that Elzy knew she was facilitating the traffic in illegal drugs and that she could forsee the extortion of $80,000. Whether she had knowledge of the type of illegal drugs is of no consequence. The sentence for her was properly decided by the conversion of $80,000 into the quantity of drugs being sold under her protection.