

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-1929

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PETER OKECHUKWU AJAEGBU, JAVIER CONTRERAS, and  
COSMOS A. EKWUNIFE a/k/a Steven Cosmos,

Defendants-Appellants.

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Appeal from the United States District Court for the  
Northern District of Texas  
(3:93-CR-088-R)

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(January 13, 1995)

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

PER CURIAM:\*

In this complex conspiracy case, Peter Ajaegbu, Cosmos Ekwunife, and Javier Contreras raise several challenges to their convictions and sentences stemming from their involvement in a heroin smuggling operation. Having considered the arguments presented in the briefs and at oral argument, we conclude that three of their contentions merit discussion: (1) Ajaegbu and

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Ekwunife contend that the district court admitted evidence of unrelated conspiracies and prejudiced their cases in doing so; (2) Ekwunife and Contreras contend that the government's failure timely to disclose certain evidence entitled them to a new trial; and (3) Contreras contends that the trial court erred in determining that he had lied and consequently assessing him a two-point increase for obstruction of justice. We affirm the convictions but vacate Contreras's sentence and remand for resentencing.

I

According to the theory of the government, the defendants, Nigerian men, specifically recruited young white women to carry heroin into the United States on the premise that Customs officials would be less likely to suspect them of smuggling. In its entirety, the indictment charged that

on or before May 1, 1991, and continuing until on or about February 17, 1993, in the Northern District of Texas and elsewhere, the defendants . . . and other persons to the grand jury known and unknown, knowingly, intentionally, and unlawfully did combine, conspire, confederate and agree together and with each other to import in excess of one (1) kilogram of heroin . . . into the United States from places outside thereof, in violation of Title 21, United States Code, Sections 952(a) and 960.

All in violation of Title 21, United States Code, Sections 963 and 960(b)(1).

Viewed in the light most favorable to upholding the jury's guilty verdict, the evidence indicates that the defendants helped these female couriers obtain passports to travel abroad and furnished

them with money, airplane tickets, and instructions that resulted in the importation of heroin into the United States.

## II

We approach the arguments in this case bearing in mind that the indictment alleged and the jury convicted the defendants of one overarching conspiracy. The government's evidence reflects that during the time period specified in the indictment, these female couriers entered the United States through several different entry points with heroin that originated from different sources and that not all of the defendants were personally involved in each instance of importation. We make these observations because certain of the arguments made by the defendants are based on the premise that each instance of importation of heroin into the United States constituted a separate conspiracy, independent of the whole.

In this case, as in most cases, the determination whether the evidence establishes a single conspiracy or multiple conspiracies is a question of fact. United States v. Ellender, 947 F.2d 748, 759 (5th Cir. 1991). The grand jury returned a one-count indictment charging one overarching conspiracy, and the trial jury determined that the defendants were guilty of the offense charged in the indictment. It bears emphasis that all of the events constituting the basis of the conspiracy charge fall within the scope of the indictment, and that the defendants do not challenge either the instructions to the jury on whether the government had proved a single conspiracy or multiple conspiracies, or the

sufficiency of the evidence supporting the jury's determination.<sup>1</sup> Thus, we must address the arguments raised in this case from the unequivocal position that this heroin smuggling scheme was, in fact, a single conspiracy.

The defendants broadly challenge their convictions and sentences but, as we explained at the outset, only three arguments merit discussion.<sup>2</sup> Taking them in order:

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<sup>1</sup>To prevail on a challenge to the jury's determination that the government proved a single overarching conspiracy, the defendants would have to show that, viewed in the light most favorable to the government, the evidence and all reasonable inferences preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt. See, e.g., United States v. Puig-Infante, 19 F.3d 929, 936 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 115 S.Ct. 180 (1994). Relevant to whether a single conspiracy was proved are: "1) whether there was a common goal, 2) the nature of the scheme, and 3) whether the participants in the various deals overlapped." Puig-Infante, 19 F.3d at 936.

It is clear under this test that the government's proof supports the convictions for a single conspiracy. LaFave and Scott explain that

[o]ne might suppose that the agreement necessary for conspiracy is essentially like the agreement or 'meeting of the minds' which is critical to a contract, but this is not the case. \* \* \* A mere tacit understanding will suffice . . . . It is possible for various persons to be parties to a single agreement (and thus one conspiracy) even though they have no direct dealings with one another or do not know the identity of one another, and even though they are not all aware of the details of the plan of operation or were not all in on the scheme from the beginning.

2 Wayne R. LaFave & Austin W. Scott Jr., *Substantive Criminal Law* § 6.4(d) (footnotes omitted). The crucial question in determining whether the defendants are parties to a single conspiracy is "whether they are aware of each other's participation in a general way and have a community of interest." Id. § 6.5.

<sup>2</sup>The defendants also contend that the district court erred in certain evidentiary rulings, in refusing to sever Contreras's trial, in sentencing them, and failing to prevent racism from

A

First, Ajaegbu and Ekwunife argue that the district court erred when it admitted evidence concerning conspiracies assertedly unrelated to the one general conspiracy that the government charged. Specifically, they argue that certain evidence was not relevant because it related to separate conspiracies that were not charged in the indictment or, alternatively, that if the evidence was tangentially relevant, it was confusing to the point of prejudice. We review evidentiary challenges with deference to the trial court, and we will disturb its rulings only if we find the trial court abused its discretion. See, e.g., United States v. Sparks, 2 F.3d 574, 582 (5th Cir. 1993), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 899 (1994).

We find no such abuse of discretion. Each item of evidence challenged has a direct bearing on the importation of heroin during the time period stated in the indictment. Clearly, therefore, the evidence was relevant, and although the case is factually complex, the evidence was not so confusing as to prejudice to their cases. The district court did not abuse its discretion in its evidentiary rulings.

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affecting the proceedings via statements by the prosecutor and the jury venire. In addition, Contreras contends that the evidence was insufficient to support his conviction. Having studied the arguments on each of these contentions, we conclude that all of them are plainly meritless and do not require further discussion.

B

Second, Ekwunife and Contreras assert that the failure by the government to timely disclose certain evidence entitles them to a new trial. Under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), the government has a duty to disclose exculpatory evidence to the defendants. If such undisclosed evidence is materially favorable--if, in other words, the result of the proceeding might have been different if the government had made the evidence available for the defendant's use--the failure to have disclosed it requires a new trial or resentencing. Ellender, 947 F.2d at 756. It is well settled that our Brady inquiry proceeds by considering the nature and probable effect of the withheld evidence in relation to other independent evidence of guilt. See, e.g., Wilson v. Whitley, 28 F.3d 433, 439 (5th Cir. 1994), cert. denied, 1994 WL 663741 (Jan. 9, 1995) (No. 94-6764).

Ekwunife argues that certain investigation reports compiled by the Drug Enforcement Administration and the Customs Service could have been used to impeach a witness for the government.<sup>3</sup> We disagree. The reports contain nothing inconsistent with the testimony of the government witness. They simply refer to other meetings that were not relevant to the events involving these defendants. Even if the defendants had been able to use the

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<sup>3</sup>The reports were made available to Ekwunife after trial. According to the letter accompanying the reports, the government found them while preparing for trial in a related case, and made them available "for whatever use you deem appropriate."

reports to impeach the witness, there is no reasonable probability that the trial would have led to a different result. The record contains overwhelming evidence independent of that particular witness that supports Ekwunife's conviction. Accordingly, we hold that the government's failure to disclose the investigation reports did not constitute a Brady violation.

Contreras also raises a Brady claim based on the government's failure to disclose a report of a prior inconsistent statement made by another government witness. Contreras asserts that the testimony of that witness "was the only damaging evidence against" him, and reasons that if he could have impeached her, the result of the trial might have been different. He argues that the government failed to disclose a report of a prior statement by the witness that was inconsistent with her testimony at trial, and that he could have used the inconsistency to impeach her credibility on cross examination.<sup>4</sup>

Contreras's argument that the testimony of this witness was the only damaging evidence against him rests on the proposition, which we have rejected, that each separate instance of importation constituted a separate conspiracy. Assuming that the withheld evidence could have been used to impeach the witness, it does not follow that, within a reasonable probability, the outcome would

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<sup>4</sup>The witness testified at trial that she had been paid for a certain trip by Ajaegbu, but she had stated before trial that she had been paid by "a man named Young."

have been different. Contreras's contentions notwithstanding, testimony from other witnesses also implicated him in the conspiracy charged in the indictment. Accordingly, we reject his argument.

C

Finally, Contreras challenges the trial court's determination that he had obstructed justice and therefore warranted a two-point increase in his total offense level pursuant to U.S.S.G. § 3C1.1. We uphold a trial court's sentence unless it is clearly erroneous, which we find when we are left with "a firm and definite conviction that a mistake has been committed," even though the record may contain some evidence to support the district court's determination. United States v. Bermea, 30 F.3d 1539, 1575 (5th Cir. 1994). In undertaking that review, we consider the record in a light that is most favorable to the defendant. U.S.S.G. § 3C1.1 Application Note 1.

The sentencing guidelines mandate a two-point increase in the offense level of a defendant, among other instances, for defendant's "committing, suborning, or attempting to suborn perjury." U.S.S.G. § 3C1.1 Application Note 3(b). Upon objection to the increase, the district court "must review the evidence and make independent findings necessary to establish a willful impediment or obstruction of justice, or an attempt to do the same." United States v. Laury, 985 F.2d 1293, 1308 (5th Cir. 1993) (internal quotation marks omitted). We have held such findings by



the district court to be sufficient so long as they "encompass[] all of the factual predicates for a finding of perjury." Id. Those predicates include, at the least, findings that the defendant (1) was untruthful at trial (2) with respect to material matters in the case, (3) that the untruthfulness was "designed to substantially affect the outcome of the case," and (4) that, by virtue of the untruthfulness, an increase in the defendant's offense level is mandated. Laury, 985 F.2d at 1308 and n.19 (5th Cir. 1993).

At the sentencing hearing, the government based its request for the increase on

Mr. Contreras's testimony that [two women] wanted a passport for an identification, I believe his testimony was, to get into a bar. And that these girls were looking to date Nigerian men. And that he borrowed \$2,000 from [another courier], but it had nothing to do with his involvement in recruiting her to go or any drug relation whatsoever.

In granting the government's request, the trial court stated:

As to Mr. Contreras, the story which he gave about the \$2,000 was a very clear lie. From the evidence that was established, he did introduce a number of people to, quote, Nigerian men, that went over a period of years, and he was simply not credible.

We cannot determine from the record with any certainty whether the trial court determined that Contreras testified truthfully or untruthfully that the women wanted passports for identification purposes, instead of travel purposes. The court clearly determined that Contreras lied when he testified that money he received from one of the couriers was only a loan to be repaid, and not payment

for his role in a drug transaction, and that he further lied when he testified concerning his introducing the couriers to Nigerian men. The trial court made no findings, however, as to whether the asserted lies pertained to material matters in the case or were "designed to substantially affect the outcome of the case." Lacking those findings, and bearing in mind our twin obligations simultaneously to view the evidence in the light most favorable to the defendant, but to defer to the district court's determinations, we find ourselves unable to review meaningfully whether the district court clearly erred when it increased Contreras's offense level for obstructing justice. Accordingly, and with some reluctance to send this case back for further proceedings, we vacate his sentence and remand to the district court to reconsider its conclusion that Contreras obstructed justice and to articulate more fully the basis for its findings.

### III

The convictions of the three defendants are AFFIRMED. Because the record does not permit a meaningful review of the district court's determination that Contreras obstructed justice, we VACATE his sentence and REMAND for further proceedings consistent with this opinion.

AFFIRMED in part; VACATED and REMANDED in part.