UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2586

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

APPLIED COATING SERVICES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-214-1)

(January 23, 1995)

Before JONES and STEWART, Circuit Judges, and DUPLANTIER[*], District Judge.

EDITH H. JONES, Circuit Judge:[**]

Applied Coating Services was convicted of illegally storing, transporting and disposing of residue paint and paint thinner produced by its sandblasting and painting of offshore drilling platforms. Although the defendant alleges numerous errors at trial, the government's evidence was impressive. Drums traced

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[*] District Judge of the Eastern District of Louisiana, sitting by designation.

[**] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

to the corporations, some marked "waste", were found dumped overnight in Kennefick, Texas. Other drums traced to Applied Coatings, some of which were leaking yellow paint, were found dumped overnight along the side of some railroad tracks in Houston. Crushed, leaking drums buried at night were also found beside Applied's warehouse. More drums were found stored in its warehouse. Moreover, a white flatbed similar to the one reported to have dumped the drums in Kennefick and near the railroad tracks was found at Applied's facilities with yellow sludge on its truckbed. Based on this evidence, a jury found the appellant guilty of four counts of violating the Resource Conservation and Recovery Act ("RCRA") by:

1. Aiding and abetting in the disposal of ignitable hazardous waste at its own facilities without a permit, 42 U.S.C. § 6268(d)(2)(A);
2. Knowingly storing ignitable hazardous waste at its own facilities without a permit, 42 U.S.C. § 6928(d)(5);
3. Knowingly transporting ignitable hazardous waste without a valid hazardous waste manifest to Kennefick, Texas, 42 U.S.C. § 6928(d)(2)(A);
4. Knowingly disposing of ignitable hazardous waste along the side of a railroad without a permit, 42 U.S.C. § 6928(d)(2)(A).

I.

Hoping to upset its conviction, Applied Coating first contends that the district court committed reversible error by not

tracking the statutory definition of hazardous waste in excluding the phrase "when improperly disposed of, stored or transported."[1] The district court instructed the jury that the government must prove beyond a reasonable doubt that the defendant "knowingly stored or disposed of hazardous waste . . . without a permit" and "knew that [the] substances involved had the potential to harm others or the environment, or in other words, are not innocuous like water." Applied Coating argues that the improper handling, and not the substance's innate potential to harm others or the environment, makes it a hazardous waste because any substance, even water or common table salt, can be hazardous to human health or the environment, but only when improperly handled.

The refusal to deliver a requested jury instruction constitutes reversible error only if the instruction

> (1) is substantively correct; (2) was not substantially covered in the charge actually delivered to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense.

United States v. Grissom, 645 F.2d 461, 464-65 (5th Cir. 1981). In reviewing this instruction, this court does not ask whether the requested instruction is correct and appropriate for all cases but only whether, given the evidence presented and the parties' positions, it was necessary to present an effective defense in this case. Id. at 465.

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[1] Hazardous waste is defined, in part, as waste that poses "a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of." 42 U.S.C. § 6903.

Consequently, Applied Coating fails to demonstrate reversible error. Even if the refused instruction was substantively correct and not substantially covered by the actual charge, the failure to give it did not seriously impair appellant's ability to effectively present a defense. Applied Coating does not specify any way that his defense was based, even in part, on the requested instruction. In fact, the company's owner admitted that it generated waste that had to be disposed of at a licensed incinerator. Nonetheless, Applied Coating was unable to document any such disposal of any hazardous waste in over a year. Moreover, the government introduced the manifest on drums in the appellant's possession that identified the contents as regulated by EPA's provisions.

Furthermore, the requested instruction is incorrect. While the request follows the language of the statute, this court has held that a similar request for an "if improperly disposed of" instruction was substantively incorrect because "there is no requirement [in 42 U.S.C. § 6928(d)(2)(A)] that the defendant must know that the waste would be harmful 'if improperly disposed of.'" United States v. Sellers, 926 F.2d 410, 417 (5th Cir. 1991). See also United States v. Dean, 969 F.2d 187, 193 (6th Cir. 1992) (rejecting defendant's argument that substance was not hazardous waste because it was safely stored and holding that RCA penalizes storage of hazardous substances without a permit, regardless of means of storage), cert. denied, 113 S. Ct. 1852 (1993). While it may be true that any substance could threaten human health or the

environment if improperly handled, the environmental laws do not attempt to regulate the handling of every substance. Instead, they regulate the handling of substances which, regardless of handling, pose a substantial hazard to human health or the environment, and, for this reason, they must be handled with special care and precautions. Allegedly safe storage or disposal does not make a substance that otherwise is hazardous waste not hazardous waste. Dean, 969 F.2d at 193 (holding that waste was hazardous even though safely stored); Sellers, 926 F.2d at 417 (stating that still hazardous waste even if disposed of in proper containers). The "knowing" requirement in 42 U.S.C. § 6928 means knowing that the substance it is handling "has the potential for harm to others and the environment." United States v. Baytank (Houston), Inc., 934 F.2d 599, 613 (5th Cir. 1991).[2] Therefore, the district court properly denied this requested instruction.

II.

The district court instructed the jury that a "liquid waste is considered 'ignitable' when a representative sample of the waste has a flash point of less than 60°C (140°F) using appropriate test methods." Applied Coating contends that the instructions given to the jury were erroneous because they did not require that

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[2] The defendant asks this Court to "continue the journey in Comment Note 25 of Baytank" by having the instruction on knowing track the statutory definition of hazardous waste. That footnote suggests that if a defendant did not know that a substance had the potential to be harmful to others or the environment, then the defendant might have to know that the substance is listed as a hazardous waste under RCRA. Because evidence supports the jury finding that the defendant knew that the substance had the potential to be harmful to others or the environment, this note is irrelevant. Nothing more is required.

the testing be done in the manner specified by the regulations promulgated under RCRA.

The regulations promulgated by the EPA for the Identification and Listing of Hazardous Waster state that waste is ignitable if it "has flash point less than 60°C (140°F), as determined by a Pensky-Martens Closed Cup Tester, using the test method specified in ASTM Standard D-93-79 or D-93-80, or a Setaflash Closed Cup Tester, using the test method specified in ASTM Standard D-3278-78, or as determined by an equivalent test method approved by the Administrator . . . ." 40 C.F.R. § 261.21(a)(1).[3]

Because the statute patently incorporates these particular standards, such an instruction was not only appropriate but would have been required upon the proper request of the defendant. An instruction of this type would have focused the jury on the defendant's argument at trial that the government, by not properly conducting the tests, failed to prove that the drums in question contained hazardous waste. Nevertheless, this court cannot reverse the district court for abuse of discretion.

The actual instruction proffered by Applied Coating incorrectly stated the law. Its proposed instruction excluded the third prescribed testing method. The regulations allow the flashpoint to be "determined by an equivalent test method approved by the Administrator." 40 C.F.R. § 261.21(a)(1). The district

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[3] These regulations were promulgated pursuant to 42 U.S.C. § 6921(a), which required the EPA to develop criteria for the identification and listing of hazardous waste.

court could have properly denied the proposed instruction on this basis.

Despite this failure, Applied Coating did preserve by virtue of its motion for acquittal the objection to the sufficiency of the evidence that one of these tests had been satisfied. Further, we agree that the defendant could not violate this statute unless "representative samples" of the material exhibited flashpoints below 60°C as measured by these specified tests or by an equivalent method as approved by the Administrator.[4] Consequently, the government must prove beyond a reasonable doubt that the samples were "ignitable" as defined in the regulations.

Yet the government need not prove the tests themselves were actually used. That a substance have a flashpoint below 60°C according to the EPA-prescribed test methods is an element of the offense, and on review of a conviction, this court asks whether sufficient evidence exists that any rational trier-of-fact could have found the element proved beyond a reasonable doubt. See United States v. Cordova-Larios, 907 F.2d 40, 41 (5th Cir. 1990). Hence the narrow question presented is whether a rational trier-of-

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[4] Neither Baytank, 934 F.2d at 614, nor United States v. Self, 2 F.3d 1071 (10th Cir. 1994) support the government's argument to the contrary. Baytank did not relieve the United States of its obligation to prove that samples would (beyond a reasonable doubt) satisfy the tests for ignitability identified by the regulations. Instead, this court concluded that a jury could infer from the defendant's own records and documents (including inventories, hazardous waste logs, and internal memoranda) that the material in the drums constituted a listed hazardous waste. Id. And although Self does contain language that could support the government's argument, the Tenth Circuit ultimately relied on the presence of an identified waste in the defendant's mixture. Self, 2 F.3d at 1086-97. In addition, the government utilized the defendant's own signed records to establish that the substances constituted "waste." This is untroubling. Surely, if Applied Coating had prepared its own (signed) internal documents listing the material as ignitable below 60°C as measured by the Setaflash or Pensky-Martens Closed Cup tester the government could avoid sampling.

fact here could have found beyond a reasonable doubt that the drums attributed to Applied Coating contained substances with flashpoints below 60°C as measured by EPA-approved tests. In other words, the government is allowed to prove that beyond a reasonable doubt these wastes would have "ignited" as gauged by the "correct" devices.[5]

Often this might be a rigorous obstacle for the government, but examination of the record here easily justifies such a conclusion.

First, an EPA laboratory tested the drums found alongside the railroad in accord with the regulations.[6] In these tests, some of the samples exhibited flashpoints substantially below 60°C. The EPA also tested samples taken from the facilities of Applied Coating. Testimony from technicians established that this material was tested via a Setaflash Closed Cup Tester according to EPA methods. Once again, the observed flashpoints were substantially below 60°C. Although this witness never specified the date of currency of the Setaflash Closed Cup method utilized, compliance with EPA methods by an EPA employee if taken in the light most favorable to the government suffices to allow the conclusion that the material would have ignited at a temperature below 60°C as

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[5] This also appears to be the most natural reading of the United States v. Dee, 912 F.2d 741, 746-47 (4th Cir. 1990). The government otherwise could never convict under the statute if defendants skillfully disposed of all the waste.

[6] The regulations prescribe the use of test method ASTM Standard D-3278-78. The EPA chemist testified that he followed STM method D-3278. The "-78" refers to the year of original adoption or, in the case of revision, the years of last revision. STM stands for standard test methods set up by the American Society of Testing Methods (ASTM). Therefore, a rational jury could find that the chemist followed the prescribed procedure.

marked by the Setaflash Closed Cup Tester "using the test method specified in ASTM Standard D-3278-78."[7]

Finally, a private laboratory tested the drums found in Kennefick by means of a Pensky-Martens Closed Cup Tester. Two chemical technicians at this lab hired by the government to test the samples testified that they used the "correct" device. Instead of tracking the language of the regulation which requires a Pensky-Martens device using the method specified in "ASTM Standard D-93-79 or D-93-80," they observed that the Pensky-Martens Closed Cup Tester used the method prescribed by the lab's "standard operating procedure." Again the material tested consistently with the flashpoints of the substances taken from the other locations and tested by the EPA -- significantly below the familiar 60° threshold. Interpreted in the most favorable light, the jury could resolve -- beyond a reasonable doubt -- that any difference between a Pensky-Martens Closed Cup Tester using the method specified in "ASTM Standard D-93-79 or D-93-80" and the same Pensky-Martens Cup employing the method identified by the laboratory's "standard operating procedure" was not material enough to produce a

[7] That the substance was often tested below 20°C by a reliable measure also permits confidence that it would have tested below 60°C by the exact Setaflash Cup "D-3278-78" method. In the extreme, a rational jury could conclude, for example, that a substance that would ignite at zero degrees Celsius as measured by any scientific device would beyond a reasonable doubt ignite at below 60°C according to this test.

difference of virtually 40°C in ignitability.[8] Denial of the motion was thus not an error.

III.

Applied Coating next argues that the district court committed reversible error with regard to count two (waste stored in warehouse) and count three (waste transported to Kennefick) by denying its request for an instruction that a substance is not hazardous waste if it is recycled.

A defendant is entitled to an instruction on a defense only if it specifically and timely requested such an instruction and its theory has a legal and evidentiary foundation. United States v. Erwin, 793 F.2d 656, 663 (5th Cir. 1986), cert. denied, 107 S. Ct. 589 (1986). While the government argues that there was sufficient evidence for a jury to find that the material was not hazardous waste because it was not recycled, it misapprehends the appropriate standard of review. If the proposed instruction has a legal and evidentiary foundation, the verdict must be reversed if the failure to give the requested instruction prevented the jury from considering the defendant-appellant's defense. United States v. Bentley-Smith, 2 F.3d 1368, 1378 (5th Cir. 1993) (finding no reversible error because supplemental instructions substantially covered the requested charge).

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[8] The jury could also infer from the fact that the government sent the material to this particular lab as a substitute for the EPA facilities that its standard operating procedure was equivalent or reasonably equivalent with the methods authorized by the EPA. Although not assured by any means, certainly this constitutes a reasonable inference.

Such an instruction on recycling has a legal foundation because it correctly states the law. A substance is not hazardous waste if it is reused as an effective substitute for a commercial product. 40 C.F.R. § 261.2(e)(1)(ii). Therefore, the requested instruction must be given if it has an evidentiary foundation, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. United States v. Molina-Uribe, 853 F.2d 1193, 1206 (5th Cir. 1988), cert. denied, 109 S. Ct. 1145 (1989).[9]

Applied Coating did timely and specifically tender a instruction on "recycled products." And the defendant did supply an evidentiary basis for the instruction with regard to the charge of storing waste in the warehouse without a permit. Defense testimony revealed that the company transported and stored material on its premises for reuse as paint thinner, and that it is impossible to determine which drums contained reusable material by sight.[10] Although the defendant was entitled to a properly crafted instruction explaining that recycled products were not waste within the statutory ambit, we cannot reverse the defendant's conviction on the storage count because we are unable to discern that it ever submitted a correct instruction to the trial court.

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[9] However, even if the material was recyclable, it still is hazardous waste if it was abandoned or recycled in a manner constituting disposal. 40 C.F.R. § 261.2(a)(2), (c)(1).

[10] The government responds that many of the drums in the warehouse contained hard paint pigment, that the defendant-appellant's owner stated that the drums contained material that had to be disposed of by a licensed incinerator, and that even if the material was recyclable, it still constituted hazardous waste because it was recycled in a manner constituting disposal.

This circuit requires that an alternative instruction proposed by the defendant be "substantially correct." Unfortunately, Applied Coating appears to have failed to include the proposed wording of the "recycled product" exemption instruction in the record. This court is unwilling to assume that it must have been proper without the opportunity to review its language. Moreover, the defendant "failed to object to the court's closing jury charge thereby waiving any objection to the closing charge." United States v. Vaquero, 997 F.2d 78, 86 (5th Cir. 1993), cert. denied, 114 S. Ct. 614 (1994).

Reviewed under the "plain error" standard, Applied Coating's attack is doomed. "Error in a charge is plain only, when considering the entire charge and evidence presented against the defendant, there is a likelihood of grave miscarriage of justice." Sellers, 926 F.2d at 417 (citation omitted). Because defendant's counsel was permitted to argue this theory of defense to the jury and Applied's account was implausible in light of most of the evidence presented, it is difficult to discern much -- if any -- risk of injustice.[11]

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[11] The requested instruction has no evidentiary basis with regard to the offense of transporting waste to Kennefick, Texas without a valid manifest. Those drums contained bright yellow, red and reddish brown liquids. While the defendant-appellant contends that the drums contained paint thinner that it reused, the defendant presented no evidence that these colored liquids were paint thinner. In addition, the drums were found dumped overnight beside a road in Kennefick, Texas, hardly the way a company would store materials it intended to reuse. Therefore, even if it was recyclable material, it is still discarded material (and hence, hazardous waste) because it was recycled in a manner constituting disposal.

IV.

Applied Coating challenges the sufficiency of the evidence on all but the charge of transporting the waste to Kennefick. In reviewing the sufficiency of the evidence, this court inquires whether any rational trier of fact could find the elements of the offense beyond a reasonable doubt, drawing all reasonable inferences and credibility choices and viewing all the evidence in the light most favorable to the government. United States v. Cordova-Larios, 907 F.2d 40, 41 (5th Cir. 1990). Applied Coating wisely concentrates its challenges to a few specified elements that it believes were not established.

To be ignitable hazardous waste, a "representative sample" of the material in the drums must have a flash point below 60°C. 40 C.F.R. § 261.21(a). A sample is representative if it "can be expected to exhibit the average properties of the universe or whole." 40 C.F.R. § 260.10. Applied Coating asserts that the samples were not representative because the investigators failed to follow the sampling methods recommended in the regulations. See 40 C.F.R. § 261 app. I.

The appendix, however, notes that the methods and equipment used for sampling waste material will vary, and that the following methods will be considered representative of the waste. 40 C.F.R. § 261 app. I. It does not state that the described methods are the only means of creating representative samples. Therefore, a rational jury could find that the samples were

representative even though the exact methods described in the appendix were not followed.

Contesting this conclusion, Applied Coating contends that the samples taken with the backhoe bucket were not in fact representative because the bucket was not decontaminated prior to sampling. The government used a backhoe to excavate drums buried near the defendant-appellant's warehouse. During the excavation, they discovered that the buried drums were crushed and leaking. They then took samples by collecting the liquid in the backhoe and by sampling the buried drums themselves.

According to the defendant, the samples taken with the thieving tool (a long rod that is stuck into the top of the drum and pushed to the bottom) could not be representative because a thieving tool does not take proportionate samples from drums containing liquids and solids. Allegedly, such samples would be representative only if the liquids were sampled with a Collowasa and the solids with a Teier. The government responds that the thieving toll is the best tool for taking representative samples from drums, and, regardless of that, all the samples taken from the drums containing liquids and solids were representative because the investigators took separate representative samples of the liquid and solid materials.

Given this conflicting evidence, the district court properly denied this part of the motion to acquit because a rational trier of fact could find that the samples taken were representative.

V.

Applied Coating next argues that its conviction must be reversed for insufficient evidence because the government neglected to prove that it did not have a permit under the Marine Protection Research and Sanctuaries Act, 33 U.S.C. § 1411 et. seq. ["MPRSA"]. This novel theory is easily dismissed because the defendant was found guilty only of knowingly storing and disposing of hazardous waste without a permit under RCRA. Applied Coating does not contest that the government established that no RCRA permit had been issued by either the state or the EPA.

The statute Applied Coating violated, 42 U.S.C. 6928(d)(1)(A), reads in relevant part:

> Any person who knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter [RCRA] without a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act shall, upon conviction . . . .

Despite the appellant's creative effort at fusion, the statute establishes two distinct offenses: one on land that requires the government to prove a lack of a RCRA permit and one at sea that demands proof of the absence of an MFRA permit. Accordingly, the statute prohibits the treatment, storage or disposal of hazardous waste without the appropriate permit. Imagining the government had proven that Applied Coating did in fact possess a MPRSA permit, illustrates how Applied Coating's preferred reading of the statute leads to absurdity. The defendant would still be guilty of improper treatment, storage and disposal of hazardous waste because

no authorization for the activities it engaged in on land would exist. In contrast, Applied Coating's theory on appeal is that the government should have proved no MPRSA to obtain conviction under the statute. Obviously the defendant's statutory construction must be flawed where the government can prove either the presence or absence of a permit.

VI.

Finally, Applied Coating insists that its conviction for aiding and abetting the illegal disposal of hazardous waste must be reversed for insufficient evidence because its co-defendant was acquitted of the same aiding and abetting offense. Hence it argues the government failed to prove that the defendants were "aided and abetted by each other", as the indictment and jury charge read. Instead, Applied Coating urges the government was required to use the phrase "aiding and abetting each other and others unknown."

Because aiding and abetting an offense is not a separate crime, it does not require that anyone else be found guilty of the crime. United States v. Pearson, 667 F.2d 12, 13 (5th Cir. Unit B 1982). Rather, 18 U.S.C. § 2 "allows a jury to find a person guilty of a substantive crime even though that person did not commit all the acts constituting the elements of the crime." Id.[12] As long as the government proves that each element of the crime was committed by someone, a defendant can be convicted for aiding and abetting in the commission of that crime, even if the principal was

[12] This treatment differs from the treatment of a conspiracy. Because a charge of conspiracy is a separate criminal offense, a person cannot be found guilty of conspiracy if the only co-conspirator is acquitted. Pearson, 687 F.2d at 13.

acquitted of the underlying offense or never even identified. United States v. Robins, 978 F.2d 881, 885 (5th Cir. 1992).

The words "aided and abetted each by the other" in the indictment "were wholly extraneous and had no effect on the crime charged." Pearson, 687 F.2d at 14 (these words do not add an offense or limit the crime because all indictments for a substantive offense implicitly embody the alternative indictment for aiding and abetting in that offense. See also Robbins, 978 F.2d at 885 (holding defendant could be convicted of aiding and abetting the crime, even though the indictment read aiding and abetting a named principal who was acquitted).

For the foregoing reasons, the conviction of Applied Coating, Inc. is **AFFIRMED**.