UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-10918

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAROLD E. WHITMORE,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(3:93-CR-273-P)

(October 20, 1995)

Before HIGGINBOTHAM, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant Harold E. Whitmore appeals his conviction for conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846; money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(I); possession of cocaine with intent to distribute in violation of 21 U.S.C. § 851(a)(1); and aiding and abetting in violation of 18 U.S.C. § 2. Because we find no error in the proceedings below, we affirm.

---

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Whitmore was a successful drag racer, who became involved with a cocaine distribution ring that was intricately connected to the drag racing world. Clifford Rogers and Charles Allison were drug dealers who distributed multi-kilogram quantities of cocaine. Rogers and Allison bought their cocaine from a variety of larger drug distributors, including Robert McDonald, Charles Evans, and Raymond Lopez (the alleged "head" of the ring). Whitmore, Rogers, and Allison became friends due to their shared interest in cars.

At some point, Whitmore became interested in the drug business. According to testimony, Whitmore loaned large sums of money to both Rogers and Allison for the purchase of cocaine, extracting huge "interest" payments until each returned the money. Whitmore ultimately became "partners" with Allison, and the two split the proceeds of Allison's drug transactions. As evidence of Whitmore's deeper involvement in the drug distribution ring, Whitmore gave increasing amounts of assistance to the drug dealers. On several occasions, Whitmore helped Allison and Rogers by "guaranteeing" payment for large cocaine purchases from drug distributors. In addition, Whitmore purchased two automobiles with cash, one for Evans and one for Rogers. Whitmore also retrieved a kilogram of cocaine that Allison had discarded when he thought the police were chasing him.

Whitmore appeals his conviction on several grounds: (1) that the evidence was insufficient to convict him on both the conspiracy and money laundering charges; (2) that the government concealed

exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); (3) that the state's proof varied materially from the indictment; (4) that the district court improperly rejected his proposed jury instructions; (5) that certain DEA reports were improperly admitted into evidence; and (6) that his criminal prosecution violated the Double Jeopardy Clause of the Constitution.

II

Whitmore argues that the government presented insufficient evidence to support his conspiracy and money laundering convictions. When an appellant challenges his conviction for sufficiency of the evidence, we apply a deferential standard of review: "whether, after viewing the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the prosecution, any reasonably-minded jury could have found that the defendant was guilty beyond a reasonable doubt." *United States v. Triplett*, 922 F.2d 1174, 1177 (5th Cir.), *cert. denied*, 500 U.S. 945, 111 S. Ct. 2245, 114 L. Ed. 2d 486 (1991). The evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with guilt. *Id*. So long as a rational trier of fact could have found the defendant guilty beyond a reasonable doubt, the conviction will stand. *United States v. Smith*, 930 F.2d 1081, 1085 (5th Cir. 1991).

To support a conviction for drug conspiracy, the government must establish, "(1) an agreement existed between two or more persons to violate narcotics laws; (2) each alleged conspirator

knew of the conspiracy and intended to join it; and (3) each alleged conspirator voluntarily participated in the conspiracy." *United States v. Crain*, 33 F.3d 480, 485 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1142, 130 L. Ed. 2d 1102 (1995). The jury may infer the existence of a conspiracy from circumstantial evidence, and may rely on, among other facts, presence and association with other conspirators. *United States v. Fierro*, 38 F.3d 761, 768 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1431, 131 L. Ed. 2d 212 (1995). It is no defense that the defendant's role was comparatively minor. *United States v. Montemayer*, 703 F.2d 109, 115 (5th Cir.), *cert. denied*, 464 U.S. 822, 104 S. Ct. 89, 78 L. Ed. 2d 97 (1983).

Whitmore argues that the evidence was insufficient because no witness testified that Whitmore actually knew of the drug conspiracy. The testimony at trial, however, provided ample evidence from which a jury could infer Whitmore's participation in and knowledge of the conspiracy. Testimony indicated that Whitmore made loans to both Rogers and Allison for the purchases of large quantities of cocaine. Whitmore's involvement was further evidenced by extremely high interest payments made on these loans (for example, $1,000 per week interest on a $6,000 loan). Testimony further indicated that Whitmore would guarantee payment for cocaine that Rogers purchased from McDonald, and that Whitmore and Allison became partners when Whitmore realized how much money could be made ($5,000 to $10,000 per week). In addition, Allison testified that Whitmore had retrieved a kilogram of cocaine which

Allison had hidden when he thought he was being chased by the police. This testimony, viewed in the light most favorable to the state, supports the inference that Whitmore knowingly participated in the conspiracy to distribute cocaine. Accordingly, we hold that the evidence was sufficient to support Whitmore's conspiracy conviction.

A conviction for money laundering, under 18 U.S.C. § 1956(a)(1)(B)(I), requires the government to prove that the defendant knew the money involved in the transaction was from an illicit source, and that the defendant intended the transaction to conceal or disguise the nature, location, source, ownership, or control of the property. *United States v. Tolliver*, 61 F.3d 1189, 1217 (5th Cir. 1995). Whitmore argues that the state failed to provide sufficient evidence that he knew the two automobile purchases involved the proceeds of illegal drug transactions.

Testimony before the jury, however, indicated that Evans told Whitmore that he wanted to purchase a 1989 Silverado pick-up truck, but was afraid of taking the necessary cash to an automobile dealer. Evans did not want the car dealer to make a record of the cash transaction in his name. Whitmore purchased the truck for $16,000, and Evans gave Whitmore a paper bag with $17,000 in $20 and $100 bills. Whitmore then transferred the car's registration to Evans. Evans testified that since Whitmore knew Evans had no job, he must have known Evans was a drug dealer. It was not irrational for a jury to infer from these facts (the unconventional request to purchase an automobile, the cash contained in a paper

bag, and Evans's employment status) that Whitmore knew the money came from an illicit source, and that he made the unconventional transaction to conceal the money's source.

Testimony indicated that Whitmore bought Rogers a Nissan Maxima for $5,500 and that Rogers gave Whitmore $6,500 in cash. Rogers testified that Whitmore knew he was a drug dealer and, like Evans, wanted to keep his name from being associated with such a large cash transaction. Rogers testified that he was unemployed and that he believed that a large cash outlay would draw the IRS's attention. According to other testimony before the jury, the Maxima was only one of several automobiles that Whitmore purchased on behalf of Rogers to disguise drug proceeds. Viewed in the light most favorable to the state, it was not irrational for the jury to conclude that Whitmore knew that the money came from illegal sources, and that he made the transaction on behalf of Rogers in order to conceal the money's origins. Accordingly we hold that there was sufficient evidence to sustain Whitmore's conviction on money laundering charges.

III

Whitmore contends that the government concealed exculpatory evidence in violation of the rule established in *Brady v. Maryland*. Whitmore argues that the government failed to disclose its agreement with three witnesses))Allison, Anthony Johnson, and Leonard Jimenez))that it would file a second motion, pursuant to FED. R. CRIM. P. 35 ("Rule 35"), to reduce each of their sentences

in exchange for their testimony.[1]

A defendant's right to due process is violated when, upon request for exculpatory evidence, the government conceals evidence that is both favorable to the defendant and material to the defendant's guilt or innocence. *Brady*, 373 U.S. at 87-88, 83 S. Ct. at 1196-97. Evidence is material when a reasonable probability exists that its disclosure would have caused a different outcome at trial. *United States v. Bagley*, 473 U.S. 667, 674-75 , 105 S. Ct. 3375, 3379, 87 L. Ed. 2d 481 (1985). A reasonable probability is a probability sufficient to cast doubt on the outcome. *Kyles v. Whitley*, ___ U.S. ___, ___, 115 S. Ct. 1555, 1558, 131 L. Ed. 2d 490 (1995). Materiality is judged according to the cumulative effect of all the undisclosed evidence. *Id*. at 1567. However, impeachment or exculpatory evidence that is "merely cumulative" is not material. *United States v. Weintraub*, 871 F.2d 1257, 1264 (5th Cir. 1989).

On behalf of Allison, Johnson, and Jimenez, the government filed two Rule 35 motions to reduce their sentences in exchange for their testimony. Whitmore claims he was never told of the second round of motions. During cross-examination, however, each witness told the jury they were testifying in return for possible reductions in their sentences. In closing argument, defense

---

[1] Whitmore makes an alternative *Brady* argument that the government failed to disclose that one witness, McDonald, told DEA agents that he had never borrowed money from Whitmore to purchase cocaine. This testimony contradicts Rogers' testimony that McDonald had borrowed money from Whitmore to purchase cocaine. This inconsistency, however, in no way prejudiced Whitmore because the government never tried to prove that Whitmore lent money to McDonald, only to Rogers and Allison. Whitmore has thus failed to show how McDonald's statements are material to the jury finding Whitmore guilty of the crimes charged.

counsel told the jury that the witnesses had betrayed Whitmore "when their lives were on the line, when their jail time was on the line." The jury knew that the witnesses were trading their testimony for the possibility of reduced jail time. Thus the jury was free to discount the testimony of these three witnesses, and Whitmore makes no showing that there was a reasonable probability that the jury would have ruled differently had it known of the second round of Rule 35 motions. Accordingly the evidence of a second Rule 35 motion on behalf of each witness is "merely cumulative" and is not material. *See Weintraub*, 871 F.2d at 1264 (holding impeachment evidence withheld from the defense "merely cumulative" and not material where evidence before the jury allowed for adequate impeachment).

IV

Whitmore next argues that the government impermissibly amended the indictment, and in the alternative, that the evidence varied impermissibly from the indictment. Whitmore contends the government, by focusing on the acts of lending money to known drug dealers, was trying to prove conspiracy to launder money, not conspiracy to possess cocaine with intent to distribute, as the indictment charged.

A material variance occurs when there is a variation between proof and indictment without modifying an essential element of the offense charged. *United States v. Puig-Infante*, 19 F.3d 929, 935 (5th Cir.), *cert. denied*,___ U.S. ___, 115 S. Ct. 180, 130 L. Ed. 2d 115 (1994). A court will not reverse a conviction for material

variance unless the variance prejudiced the substantial rights of the defendant. *Id*. at 935-36. When the government proves one conspiracy, the presentation of evidence of other conspiracies does not necessarily create a material variance. *United States v. Valdez*, 861 F.2d 427, 432 (5th Cir. 1988), *cert. denied*, 489 U.S. 1083, 109 S. Ct. 1539, 103 L. Ed. 2d 844 (1989).

The government charged Whitmore with conspiracy to possess cocaine with intent to distribute. The government proved that an agreement existed between Whitmore and others to violate narcotics laws, that each knew of this agreement and intended to join the conspiracy, and that each voluntarily participated in the conspiracy. *United States v. Crain*, 33 F.3d 480, 485 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1142, 130 L. Ed. 2d 1102 (1995). The fact that Whitmore's overt acts (financing drug deals) might also support a conviction for conspiracy to launder money does not amount to a material variance. *Id*. The government simply proved what it had charged Whitmore with, and it is irrelevant that the same evidence might support an additional conviction. We hold that there was no material variance in this case. For the same reasons, we hold that the government did not impermissibly amend the indictment.

V

Whitmore next argues that the district court improperly rejected his proposed jury instruction defining "possession" and the "presumption of innocence." We review a jury charge for abuse of discretion, and to determine whether it clearly and correctly

states the law as applied to the facts of the case. *United States v. Lara-Velasquez*, 919 F.2d 946, 950 (5th Cir. 1990). A trial court has substantial latitude in fashioning instructions that adequately cover the issues in the case. *United States v. Allibhai*, 939 F.2d 244, 251 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072, 112 S. Ct. 967, 117 L. Ed. 2d 133 (1992). We will only reverse if (1) the proposed instruction was substantially correct, (2) the actual instruction did not substantially cover the same issues, and (3) the failure to give the proposed instruction seriously impaired the defense. *United States v. Box*, 50 F.3d 345, 354-55 (5th Cir. 1995).

Whitmore proposed an instruction on the presumption of innocence and which stated that, unless the jury is satisfied beyond a reasonable doubt, "the presumption alone is sufficient to find the defendant not guilty." The actual instruction given on the presumption of innocence stated that the jury must find the defendant guilty beyond a reasonable doubt, or acquit him. As to possession, Whitmore requested that the court tell the jury that mere physical proximity to drugs, or presence in an area with drugs, or association with persons controlling drugs, is not sufficient to find possession. The actual instruction given defined possession in terms of intent and ability to possess or actual control. Although Whitmore argues that his proposed instructions were substantially correct, he fails to show how the actual instructions given either do not accurately and adequately cover the same substantive law or transmit the relevant information

to the jury. Further, Whitmore fails to show how the instructions given seriously impaired his defense. Accordingly, we hold that the court did not err in its charge to the jury.

VI

Whitmore contends that the district court should not have admitted a DEA report of an interview with Allison because it was hearsay. We review evidentiary rulings for abuse of discretion. *United States v. Jimenez Lopez*, 873 F.2d 769, 771 (5th Cir. 1989). If the district court did err in the admission of evidence, we must next determine if the error was harmless, in effect, whether the defendant's substantial rights were adversely affected. *Id*. The district court allowed the report to be introduced to show the nature of a typographical mistake made by a testifying witness. The evidence concerned the amount of cocaine that Whitmore had retrieved for Allison when Allison had been chased by the police. Allison had testified that it was one kilo. The DEA agent testified that in his report Allison had reported "one kilo," but by mistake the Agent had typed "two kilos." The district court then admitted the Agent's report to show the nature of his typographical mistake. Whether or not this evidence was impermissible hearsay, we hold that given the weight of the other evidence presented, the passing nature of this report, and the fact that all witnesses involved were thoroughly cross-examined, the admission of the DEA reports was harmless and therefore not reversible error. *See United States v. Stone*, 604 F.2d 922, 927 (5th Cir. 1979) (affirming district court even though it admitted

impermissible hearsay, because it had no "substantial influence upon the result, and was harmless").

VII

Whitmore argues that by seizing his property and then trying him criminally for the same conduct, the government has violated the Double Jeopardy Clause. We will subject civil forfeiture to Double Jeopardy analysis when the sanction serves a punitive goal. *United States v. Halper*, 490 U.S. 435, 448-49, 109 S. Ct. 1892, 1902, 104 L. Ed. 2d 487 (1989). However, a civil forfeiture will not trigger the Double Jeopardy Clause if the amount seized rationally compensates the government for its law enforcement troubles. *See id*. (holding civil forfeitures not punitive if the amount seized is "rationally related to making the government whole"); *see also United States v. Tilley*, 18 F.3d 295, 299 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 574, 130 L. Ed. 2d 490 (1994) (holding forfeiture of $650,000 worth of property roughly proportional to governmental and societal losses caused by defendants).

The district court convicted Whitmore of conspiracy to distribute in excess of five kilograms of cocaine, and sentenced him on the basis of his participation and involvement in the distribution of approximately four hundred kilograms of cocaine. According to witnesses, the value of this cocaine would be around eight million dollars. Judging from the size of this cocaine distribution ring and the amount of drugs involved, we hold that the seizure of Whitmore's home, vehicles, and cash was rationally

related to the governmental and societal losses associated with Whitmore's conduct. Accordingly, his subsequent trial and conviction does not violate the Double Jeopardy Clause. *See Tilley*, 18 F.3d at 299 (summarizing the societal and law enforcement costs associated with illicit drugs).

VIII

For the foregoing reasons, the judgment of the district court is AFFIRMED.