IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-11010

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

CHARLES DELANE HAMLIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:94 CR 120 D)

September 6, 1995

Before SMITH, BARKSDALE, and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Charles Hamlin was convicted of conspiracy to commit payment and acceptance of kickbacks, in violation of 41 U.S.C. §§ 53-54, and mail fraud under 18 U.S.C. § 1341. Finding no error, 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

A.

Hamlin was employed as a buyer for Bell Helicopter Textron, Inc. ("Bell"), from July 1985 through June 1992 on the raw materials desk, until he was transferred to the specification parts desk. Bell was a prime government contractor. Billy Joe Hodge, one of Hamlin's co-workers, was employed as a buyer of electronics in the Standard Vendor Products Group at Bell.

Electro Enterprises, Inc.("EEI"), is a supplier of electronic parts used in the aviation industry. Specialty Manufacturing Company ("Specialty") is a wholly-owned subsidiary of EEI and manufactures cable, cable assemblies, and harnesses used in aircraft. Both EEI and Specialty are owned by Calvin S. Enright II and his family and sold parts to Bell. James Dudley Karels was a Bell buyer who retired in March 1990 and subsequently went to work for EEI.

In an attempt to increase its business with Bell, EEI began to entertain Hodge, Karels, and Hamlin. Hodge eventually received cash payments. Once Karels had left Bell and began with EEI, he frequently entertained Hamlin. Moreover, Karels, at Enright's prompting, arranged for Enright to purchase a boat for Hamlin.

Cynthia Ranne, who worked for EEI in Dallas, testified that Hodge and Hamlin were designated as "special buyers" at EEI. She was told about the boat deal and was instructed to get to know Hamlin. Enright eventually took the boat back after Hamlin had

been transferred within Bell and could no longer procure contracts in favor of EEI.

Hamlin also took a kickback in the form of a motorcycle from Robert Megdal, the owner of Metal Industrial Center who had initially dealt with Karels and then with Hamlin. Following a decline in Bell business, Megdal began to meet with Hamlin and eventually made the motorcycle arrangement.

B.

Hamlin was charged in two counts of a five-count indictment. On April 15, 1994, he entered two not guilty pleas and filed a motion for bill of particulars, which the district court denied. A jury found Hamlin guilty.

II.

A.

Hamlin claims that he was unable to prepare an adequate defense because he was not adequately informed of the charges against him. He contends that the district court committed error when it denied his motion for bill of particulars under FED. R. CRIM. P. 7(f). We review the denial for an abuse of discretion. United States v. Moody, 923 F.2d 341, 351 (5th Cir.), cert. denied, 502 U.S. 821 (1991). We will reverse only if the defendant establishes "actual surprise at trial and demonstrate[s] prejudice to his substantial rights." United States v. Marrero, 904 F.2d 251, 258 (5th Cir.), cert. denied, 498 U.S. 1000 (1990). We have

indicated that the standard for the denial of a motion for bill of particulars is very similar to the criteria for the sufficiency of an indictment. "A bill of particulars is not required if a defendant is otherwise provided, inter alia, with sufficient information to enable him to prepare his defense and avoid surprise." Moody, 923 F.2d at 351. A bill of particulars is not appropriate if used for the purpose of obtaining a detailed disclosure of the government's evidence prior to trial. United States v. Kilrain, 566 F.2d 979, 985 (5th Cir.), cert. denied, 439 U.S. 819 (1978).

The court did not err in denying this motion. The indictment was adequate to apprise Hamlin of the elements of the offense charged and of the charges that he had to be prepared to meet, and it enabled him to plead an acquittal or a conviction in bar to future prosecutions for the same offense. See Moody, 923 F.2d at 351.

The indictment stated that Hamlin was being charged with a conspiracy entered into with Karels and Landers for the purpose of payment and accepting kickbacks and committing mail fraud. The indictment alleged specific overt acts that established the conspiracy. In addition, in response to the motion, the government informed Hamlin of additional co-conspirators and indicated that an additional 177 events of alleged "wining and dining" were not being offered as actual "kickbacks" but merely to show an association between Hamlin and EEI. Accordingly, the district court did not abuse its discretion in denying the motion.

B.

Hamlin contends that a statement testified to by Cynthia Ranne, made by Enright, was improperly allowed into evidence because it constituted impermissible hearsay. Under FED. R. EVID. 801(d)(2)(E), "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is outside of the hearsay rule.

With respect to Enright, Ranne testified:

> He told me that heSSthe way he phrased it was we bought a boat for Charles Hamlin so he will start buying more for us and he has to hurrySSexcuse meSShe has to hurry and get the title out of his name before it gets tracked.

Hamlin argues that this statement in no way furthered the conspiracy as required by the rule.

A statement is made in furtherance of the conspiracy if it advances the ultimate objective of the conspiracy. This requirement "must not be applied too strictly or the purpose of the exception would be defeated." United States v. Snyder, 930 F.2d 1090, 1095 (5th Cir.), cert. denied, 502 U.S. 942 (1991). Whether a statement is made in furtherance of a conspiracy is a question of fact and subject to review for clear error. Id. Whether the court ultimately erred in allowing the statement into evidence is reviewed for abuse of discretion. United States v. Limones, 8 F.3d 1004, 1008 (5th Cir. 1993), cert. denied, 114 S. Ct. 1543, 1562 (1994).

The evidence indicated that Enright wanted Ranne to get to know Hamlin. Irrespective of whether Enright actually wanted Ranne to join the conspiracy, it is plain that he wanted her to cultivate

a good relationship with Hamlin to maintain the arrangement between EEI and Hamlin. Enright was simply informing Ranne as to the nature of the relationship between EEI and Hamlin so that she understood what she was to do with respect to Hamlin. Good relations between EEI and Hamlin were certainly part of the conspiracy. The district court did not abuse its discretion in admitting this statement.

C.

Finally, Hamlin maintains that the court erred in its charge to the jury on count four. He argues that the charge allowed the jury to convict him based solely upon the acts of Specialty, which were not alleged in the indictment. Count 4 covered the boat and alleged that Karels and EEI provided the boat to Hamlin in exchange for favorable treatment. Hamlin apparently made some objection to the charge before it was given. The court changed the wording of the charge accordingly.

There is no indication that Hamlin in fact objected to the instruction on the ground that he now asserts. In any event, any error in the instruction on count 4 is harmless. The evidence presented at trial by the government and the language of the indictment plainly contemplate the transfer of the boat to Hamlin by EEI, Karels, and Enright in contemplation of favorable treatment by Hamlin. The jury had a copy of the indictment during its deliberations, and it was indicated at trial that, while the indictment referenced $13,000 in money, gifts, compensation, and

other things of value in general, the $13,000 represented the value of the boat specifically. There is no indication that the actions of Specialty were even alleged at trial with respect to the $13,000.

AFFIRMED.

BENAVIDES, concurring:

I join the court's opinion except for its analysis in Part IIB. I do not believe that the following statements Enright made to Ranne were in furtherance of the conspiracy: the boat was purchased for Hamlin, and Hamlin was in a hurry to have his name removed from the title of the boat. I specifically disagree with the majority's conclusion that such testimony was made so that Ranne would understand what she was to do with respect to Hamlin. Thus, I am not convinced that the statements were admissible under FED. R. EVID. 801(d)(2)(E). However, because the challenged testimony is cumulative of testimony of other witnesses indicating that the boat was purchased for Hamlin as a kickback in return for business from Bell to EEI, I would find the error in admitting the statements harmless because it did not have a "substantial impact" on the jury's verdict. United States v. Evans, 950 F.2d 187, 191 (5th Cir. 1991).