

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40222

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES ALTON SPEED,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Eastern District of Texas  
(4:93-CR-46.1)

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(January 12, 1995)

Before GOLDBERG, JOLLY, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:\*

The defendant, James Alton Speed, appeals the district court's denial of his motions for a new trial, his conviction of murder committed in aid of racketeering activity and, and his convictions on other drug-related charges. For reasons explained below, we affirm the district court's judgment.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Speed was involved in a conspiracy to manufacture and deliver amphetamines. Speed's producer was Jeffrey Oyer, his supplier was the deceased R. C. Campbell (Oyer's brother-in-law), and one of his buyers was Ricky Wilson. At one point, Oyer became upset with Campbell because he was not up-to-date on his payments to Oyer, he had taken money from Oyer, and he was talking openly of the location of Oyer's manufacturing operation. Because of Campbell's conduct, Oyer then skipped over Campbell and began dealing directly with Speed, a move that proved lucrative for both Oyer and Speed. Speed was successful in this venture, receiving both cash and weapons in return for amphetamines. Still angry with Campbell, however, Oyer expressed to Speed his displeasure with Campbell and his desire to kill him. Speed cautioned Oyer against personally taking action regarding Campbell, and, instead, volunteered to do the job. On the night of June 30, 1990, Angela Speed (Speed's wife) drove Speed and his buyer, Wilson, to Campbell's farm, where Speed shot Campbell to death with a .22 caliber rifle. Speed and Wilson promptly disposed of the rifle, and it was never recovered. Speed visited Oyer the next day and shared with him the news of Campbell's death. In return for Speed's taking care of Campbell, Oyer forgave \$2,000 of Speed's debt and paid him \$1,000, some of which he shared with Wilson. Campbell's body was found a couple days later.

The illegal drug ring was eventually discovered by authorities. Speed, Oyer, and Wilson were charged with the murder of Campbell and with several drug-related counts in a September 1993 superseding indictment. Oyer and Wilson worked out a plea agreement with the government. Speed, however, entered a plea of not guilty as to all eight counts of the indictment and proceeded to trial in October. Wilson, Oyer, Angela Speed, and several other witnesses testified against him at trial, implicating him in Campbell's murder and the drug conspiracy. He was found guilty of the following charges: (1) conspiracy to manufacture, deliver, and possess with intent to deliver amphetamines in violation of 18 U.S.C. § 846; (2) use or possession of a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1); (3) committing a violent crime (murder) in aid of racketeering activity in violation of 18 U.S.C. § 1959(a); (4) conspiracy to murder in aid of racketeering activity in violation of 18 U.S.C. § 1959(a)(5); and (5) use or possession of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c)(1) and (2). Based on a total offense level of 48 and a criminal history category of III, Speed was sentenced to life imprisonment plus twenty-five years.

Speed filed two timely motions for a new trial. His first motion for a new trial, filed in November 1993, alleged that Angela Speed had fabricated her trial testimony, as evidenced by an unauthenticated transcript of a phone conversation between her and

Speed, arranged by Speed's mother. The government countered that this conversation was unauthenticated by Angela, and, furthermore, the evidence was cumulative and impeaching. After considering the motion, the district judge denied it in December 1993 with a well-reasoned opinion, stating that an evidentiary hearing was not warranted and that the evidence failed to meet the standards for a new trial set out in either United States v. Nixon, 881 F.2d 1305, 1311 (5th Cir. 1989) or Larrison v. United States, 24 F.2d 82, 87 (7th Cir. 1928). Undaunted, Speed filed a second motion for a new trial in January 1994, alleging new evidence. Speed included a transcript of a telephone conversation between Angela Speed and Speed's private investigator, authenticated by the private investigator, in which Angela recanted her trial testimony implicating Speed in the murder. Speed also included unauthenticated evidence that Wilson and Oyer had recanted their testimony implicating Speed in the murder. He requested an evidentiary hearing. In response to this second motion, the government produced affidavits by Wilson and Oyer stating that their trial testimony had been truthful and again argued that the evidence regarding Angela Speed was cumulative and impeaching. The district court denied the motion in its February 1994 order, stating that the allegations contained in the motion were not sufficient to raise issues that would require an evidentiary hearing and that the motion did not contain information that would support the granting of a motion for a new trial.

Speed now appeals.

## II

Speed raises several issues on appeal. He argues that because key witnesses recanted their trial testimony, the district court erred when it denied his motions for a new trial and his request for an evidentiary hearing. Second, he questions the sufficiency of the evidence to support his conviction for use or possession of a firearm during a drug-trafficking crime. Third, he contends that there was insufficient evidence to prove that there was an effect on interstate commerce where the violent crime of murder was committed in aid of racketeering activity. Finally, he asserts that there was sufficient cumulative error during trial to warrant the grant of a new trial.

After carefully studying the briefs, reviewing the record, and considering the oral arguments, we hold that the district court did not err, and therefore affirm the judgment of conviction in all respects. We find Speed's assertion of cumulative error plainly to be without merit, and, therefore, we will not discuss it. We will, however, address the remaining issues.

## III

### A

We first turn our attention to whether there was sufficient evidence to support his firearm possession conviction. We review this evidence, together with all credibility choices and reasonable inferences, in the light most favorable to the government. United

States v. Maseratti, 1 F.3d 330, 337 (5th Cir. 1993). The verdict must be upheld if we conclude that any rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

At trial, the government produced a photograph, taken by Angela Speed, of Speed with a weapon that had been traded for drugs. Angela Speed identified the picture and confirmed that Speed had obtained the gun in a drug deal.

Speed contends that proof of his receipt of a weapon in exchange for distributing drugs did not establish a violation of 18 U.S.C. § 924(c) absent proof that the firearm was an integral part of the drug trafficking offense. Speed is mistaken in his argument, for we have previously upheld a § 924(c) conviction on the basis that drugs were exchanged for firearms. See United States v. Zuniga, 18 F.3d 1254 (5th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 115 S.Ct. 214 (1994). Speed's conviction on this charge is therefore affirmed.

B

We now turn to Speed's contention that there was insufficient evidence to prove that the murder committed in aid of racketeering activity had an effect on interstate commerce. As we noted above, we accord great deference to the jury's verdict. We also consider that "[e]ven a de minimis effect on interstate commerce will suffice to support Congress' ability to enact a criminal statute

under the Commerce Clause." United States v. Shively, 927 F.2d 804, 808 (5th Cir.), cert. denied, 501 U.S. 1209 (1991).<sup>1</sup>

We believe that the evidence presented here fully satisfies this de minimis standard. The evidence showed that Speed killed Campbell in exchange for Oyer's agreement to forgive Speed's drug liability and to pay him a sum of money. Eliminating Campbell enhanced Speed's position within the organization because Campbell would no longer be a threat to Speed and Oyer's business relationship. Moreover, Oyer testified that the organization sold drugs outside of Texas, and that the enterprise used products from other states to manufacture and deliver the amphetamines. Furthermore, Speed and Oyer made almost four hundred phone calls to each other during the course of the enterprise. Because the evidence sufficiently connects this murder to an enterprise involved in interstate commerce, we find this contention without merit and affirm his conviction.

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<sup>1</sup>Although we recently nullified 18 U.S.C. § 922(q), the Gun-Free School Zones Act, because of the inadequacy of congressional findings on the prohibited activity's impact on interstate commerce, see United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993), cert. granted, \_\_\_ U.S. \_\_\_, 114 S.Ct. 1536 (1994), the instant case does not present us with such a difficult question. The statute involved here, 18 U.S.C. § 1959, is an offshoot of earlier RICO legislation. As the Second Circuit has stated, "§ 1959 complements RICO by allowing the government not only to prosecute under RICO for conduct that constitutes a pattern of racketeering in connection with an enterprise, but also to prosecute under §1959 for violent crimes intended, inter alia, to permit the defendant to maintain or increase his position in a RICO enterprise." United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992). "In addition, a § 1959 'enterprise' is plainly a RICO enterprise." Id. at 380. We agree that § 1959 satisfies the de minimis standard.

We now address Speed's argument that the trial court erred by not granting his motions for a new trial and his request for an evidentiary hearing.

Motions for a new trial based on newly discovered evidence are generally disfavored and are viewed with caution. United States v. Adi, 759 F.2d 404, 407 (5th Cir. 1985). The district court has wide or considerable discretion in its decision on such a motion, and the ruling is reviewed for a clear abuse of that discretion. Id. at 407. We also review for abuse of discretion the district court's decision not to hold an evidentiary hearing. United States v. Chagra, 735 F.2d 870, 873 (5th Cir. 1984). Moreover, the recanting of prior testimony by a witness is ordinarily met with extreme skepticism. United States v. Nixon, 881 F.2d 1305, 1311 (5th Cir. 1988).

We have previously delineated the standards for granting a motion for new trial based on newly discovered evidence as follows: (1) the evidence was discovered after trial; (2) the failure to learn of the evidence was not due to petitioner's lack of diligence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) a new trial would probably produce a new result. Nixon, 881 F.2d at 1311.

Speed presented evidence that Angela Speed, Wilson, and Oyer recanted their testimony against him. The evidence presented by Speed regarding Wilson and Oyer fails the Nixon test because, even



if it were true, he could have discovered it before trial, and the evidence was merely impeaching. Additionally, the evidence was not credible because the so-called recantations were unauthenticated, and both Wilson and Oyer signed affidavits reaffirming their trial testimony. The evidence regarding Angela Speed, on the other hand, warrants further discussion.

Only the evidence regarding Angela Speed might have required a hearing because her second recantation was authenticated in the second motion for a new trial, and the reasons she gave for recanting might have merited further investigation. Although the district court found no reason to suspect wrongdoing on the part of local law enforcement, Mrs. Speed alleged that she was pressured into testifying by the county sheriff, and that she had testified in order to retaliate against Speed for his infidelity. Even if this evidence were true, however, her recantation still fails the Nixon test. First, there is no evidence that Mrs. Speed was unavailable to the defense team before trial. Second, part of the evidence is simply cumulative of impeaching testimony that the defense counsel elicited from her at trial, whereas the rest of it is merely impeaching. Finally, a new trial with this evidence is not at all likely to produce a new result because of the great weight of other evidence implicating Speed in the murder and the other illegal activities. Wilson and Oyer testified as to Speed's involvement in Campbell's murder, and the government presented evidence that Speed admitted to others his involvement in these

activities. Moreover, the prosecution did not plan its strategy around Angela Speed; she only decided to testify for the government at the last minute. Furthermore, the weight of Angela Speed's new testimony would be greatly diminished in view of her earlier testimony, which was consistent with and corroborated by all other testimony and evidence. Thus, because the evidence presented regarding Angela Speed, Wilson, and Oyer failed the Nixon test, a new trial was not warranted.

#### IV

Because the evidence proved that Speed's illegal activities affected interstate commerce, that Speed obtained a firearm in exchange for drugs, and that a new trial was not warranted, the judgment of the district court is therefore

A F F I R M E D.