UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41232
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUNIUS CHARLES,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana
(6:93 CR 60026)

July 7, 1995

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Defendant-appellant Junius Charles (Charles) appeals his convictions and sentence on six counts related to his participation in a carjacking in Louisiana and the subsequent robbery of a convenience store in Texas. Finding no reversible error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

Charles, Willy Leon Kelly (Kelly), and Cleveland Sereal (Sereal) (collectively Defendants) met for the first time on June 14, 1993, in Lafayette, Louisiana. Kelly told the others that he had a job possibility in California, and the three agreed to go to California to find work. To make the trip, they decided to steal a car. Around 10:00 p.m., Defendants approached a car carrying five teenagers that had stopped at a traffic light. Kelly put a gun through the passenger-side window and ordered the teenagers out of the car. Defendants then got in the car and drove away.

Defendants headed for Lake Charles, Louisiana, where Sereal had some relatives who, the Defendants hoped, would give them money. Having no success in Lake Charles, Defendants travelled further west. In Sulphur, Louisiana, they decided to steal gasoline, food, and money from a convenience store. While Kelly pumped gas, Sereal and Charles went into the convenience store, picked up a few items, and put them on the counter. Sereal then went back to the car, and Charles pulled a gun on the clerk, ordering her to give him the money in the cash register. When she refused, Charles left the store, and Defendants sped away in the car. The clerk, Cynthia Carr (Carr), wrote down the license plate number of the car as it pulled away.

Defendants then travelled into Texas, intending to go to Houston, but they missed the turn and ended up in Dallas. Heading further west, Defendants stopped in Clarendon, Texas, where they filled the car with gas and then pulled away without paying. A

local police officer attempted to stop the car, and a high-speed chase ensued. Eventually, Defendants abandoned the car and ran off on foot. All three turned themselves in the next morning in Texas and were returned to Lafayette for trial.

Defendants were charged in a seven-count indictment. Kelly and Sereal entered into plea bargains and testified to the events just described on behalf of the government at Charles's trial. In addition, the government introduced the testimony of two of Charles's fellow prisoners at the Lafayette Correctional Center, Blaine Duhon (Duhon) and Anthony Lane (Lane), who testified that Charles had told them of his involvement in the various charged offenses. Kelly and Sereal affirmed that Charles had been present and had participated in the crimes, and Duhon and Lane testified that Charles had admitted this to them. Although none of the victims had been able to identify Charles in pretrial photographic line-ups, at trial, Carr (the Sulphur convenience store clerk) positively identified Charles as the man who held her at gunpoint. In addition, two of the teenagers who had been riding in the car Defendants stole identified Charles as the person who had held the gun on them,[1] although this testimony contradicted that of Kelly and Sereal, who averred that Kelly was the one who used the gun during the Lafayette carjacking.

The jury found Charles guilty on one count of carjacking, in violation of 18 U.S.C. § 2119 (count I); two counts of possession

[1] One of the teenagers positively identified Charles; the other could only tentatively testify that Charles was the gunman.

of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1) (counts II and IV); one count of conspiracy to interfere with commerce by robbery, in violation of 18 U.S.C. § 1951 (count III); one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (count VI); and one count of interstate transportation of a stolen motor vehicle, in violation of 18 U.S.C. § 2312 (count VII).[2] The district court sentenced Charles to a total of 108 months (concurrent) in prison on counts I, III, VI, and VII, a consecutive 5-year mandatory term of imprisonment on count II, and a further consecutive 20-year mandatory term of imprisonment on count IV; the district court also imposed a 3-year term of supervised release.

In this timely appeal, Charles argues that his conviction was founded on perjured testimony and that the district court erred in denying him an evidentiary hearing to establish that the government knew of the alleged perjury. He further claims that the district court abused its discretion in denying his motion for a mistrial based on certain witnesses' violation of the witness sequestration order. Finally, he contends that the district court improperly imposed the twenty-year mandatory term as to count IV because count IV could not be a "second or subsequent conviction" sufficient to invoke the mandatory term.

Discussion

I. Perjured Testimony

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[2] Charles was charged in only six of the seven counts. Count V charged Sereal with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

At trial, the FBI agent who testified for the government admitted that none of the victims had been able to positively identify Charles in pretrial photographic line-ups. Nevertheless, at trial, Carr and two of the teenagers identified Charles as the gunman in their respective crimes. Charles contends that this discrepancy in the witnesses' identification of him was perjurious. "[T]he knowing use by the prosecution of false evidence or perjured testimony which is material to the issues in a criminal trial is a denial of due process." *United States v. Anderson*, 574 F.2d 1347, 1355 (5th Cir. 1978) (footnotes omitted). To obtain a reversal of a conviction based on allegedly perjured testimony, the defendant must prove that the contested statements were actually false, that they were material, and that the prosecution knew of the falsity. *United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993), *cert. denied*, 115 S.Ct. 102 (1994). Charles has satisfied none of these elements.

The mere inconsistency between a witness's trial testimony and his prior statements, or between the testimony of two witnesses, does not in itself establish that the testimony is false. Such inconsistencies "can as easily be explained as the result of faulty recollections or differences of opinions." *United States v. Washington*, 44 F.3d 1271, 1282 (5th Cir. 1995), *cert. denied*, 63 U.S.L.W. 3832 (May 22, 1995) (No. 94-8900). Moreover, the government itself admitted at trial that none of the witnesses had identified Charles prior to trial; on cross-examination, Charles's counsel took full advantage of the opportunity to impeach the

witnesses who identified Charles at trial. That the witnesses refused to recant their at-trial identifications and that those identifications were inconsistent with the witnesses' prior inability to positively identify Charles do not establish that their testimony was actually false.

Nor has Charles shown that the statements were material. An allegedly perjured statement is material only "if its use `creates a reasonable likelihood that the jury's verdict might have been different.'" *Id.* (footnote omitted). Charles admitted, however, that he was present during the various incidents; the identification of him as present with Kelly and Sereal when the crimes were committed was not a seriously disputed element in the government's case.[3] Charles's argument might have more force, at least with respect to the carjacking count, if that charge were in some way dependent on his personally having brandished the gun, but there is nothing to suggest that this is the case.[4] In addition, even without the witnesses' identifications, the evidence of Charles's guilt was otherwise overwhelming, so that the statements, even if perjurious, "do[] not cast 'serious doubt' upon the correctness of the jury verdict or the fairness of the trial." *Id.*

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[3] Charles's main defense was that he did not agree with Kelly and Sereal to steal the car or rob the convenience store and that he did not know that the car was stolen or that the others had and used a gun to commit the crimes. With respect to this defense, it was the testimony of Kelly and Sereal, not the victims, which was pivotal.

[4] The indictment charged Charles, Kelly, and Sereal with aiding and abetting one another in the commission of the carjacking.

(footnote and internal quotation marks omitted).

Lastly, there is no evidence indicating that the government actually knew that the witnesses would identify Charles on the stand. Even if a witness's statement is perjurious, "[d]ue process is not implicated . . . unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements." *United States v. Sutherland*, 656 F.2d 1181, 1203 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1451, *and cert. denied*, 102 S.Ct. 1617 (1982) (citation and internal quotation marks omitted). Charles points to a local newspaper article in which the assistant district attorney prosecuting the case stated, "We didn't expect any of the kids to identify him . . . We expect that they'll turn out to have been mistaken."[5] Although Charles baldly asserts that the prosecution was lying when it made these statements, he offers no further proof of this contention.[6] Indeed, we think the prosecutor's statements more

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[5] In one of several post-trial motions, Charles asked the district court to take judicial notice of the prosecutor's statements as reflected in the newspaper article. The district court denied the motion, concluding that the statements were not proper subjects for judicial notice.

[6] Charles further contends that the district court abused its discretion in denying his motion for a new trial, arguing that he was entitled to an evidentiary hearing to determine whether the government knew the allegedly perjurious testimony would be offered. The decision to grant an evidentiary hearing as part of a motion for a new trial rests in the district court's sound discretion, *Blackburn*, 9 F.3d at 358, and we conclude that discretion was not abused here. Charles has his premises backwards; it was his burden in the first instance to put forth evidence indicating that the government knew in advance that the witnesses would make the allegedly perjurious statements. He is

consistent with the theory that the government did not know that the witnesses would identify Charles, a conclusion that is further buttressed by the fact that the government itself admitted that the witnesses had not identified Charles in pretrial line-ups.

We reject Charles's contention that his conviction violated due process.

II. Violation of the Witness Sequestration Order.

Pursuant to Fed. R. Evid. 615, the district court ordered the witnesses sequestered during trial. Counsel for Charles learned that Kelly, Sereal, Lane, and Duhon had nevertheless talked with one another prior to testifying. During his cross-examination of Duhon, defense counsel asked Duhon, in the jury's presence, what the four witnesses had been discussing. The following transpired:

> "Q [by defense counsel]: What specifically was said between you two?
>
> A [by Duhon]: Between who?
>
> Q: Mr. Kelly and yourself, the conversation?
>
> A: There's four of you back there. We all talking at once. I mean, I'm not asking him if he's going fishing tomorrow or nothing like that. But what you want me to say to you?
>
> Q: Did you discuss this case with him at all?
>
> A: He was talking about why they even taking this to trial, why Charles don't take a plea bargain.
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> Q: Anything else?
>
> A: That's about it.
>
> Q: Did you have a conversation with Mr. Sereal,

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not entitled to an evidentiary hearing to merely fish for support for his otherwise baseless allegations.

Cleveland Sereal?

A: Yes, I did.

Q: And what was discusssed between you two?

A: It's not just between me and him. It's between all of us.

Q: Well, can you elaborate and be more specific what was discussed?

A: He's saying the same thing, stupid to take it to trial.

Q: Who said that?

A: Sereal.

Q: Stupid to take it to trial?

A: Because he's going to lose.

Q: We'll see about that."

Later, out of the jury's presence, defense counsel requested a mistrial. The district court denied the motion, finding that defense counsel had invited the statement, but it then strongly cautioned the jury to disregard the statement. Later, during his cross-examination of Lane, defense counsel asked him, out of the jury's presence, what he had discussed with Kelly. Lane stated that Kelly "told me that he tried to get Charles to take his rap because he was in so much trouble," but that Lane told Kelly "`I'm not going by what you're saying.'"

The rule providing for sequestration of witnesses is designed "to aid in detecting testimony that is tailored to that of other witnesses and is less then candid." *United States v. Wylie*, 919 F.2d 969, 976 (5th Cir. 1990). The district court has discretion, however, to permit a witness who has violated the rule to testify.

United States v. Lassiter, 819 F.2d 84, 87 (5th Cir. 1987). In determining whether an abuse of discretion has occurred, "the focus is upon whether the witness's out-of-court conversations concerned substantive aspects of the trial and whether the court allowed the defense fully to explore the conversation during cross-examination." *Wylie*, 919 F.2d at 976. The defendant must show both an abuse of discretion and that he suffered "sufficient prejudice" to warrant reversal. *Id.* (citation omitted).

We note initially that Charles does not demonstrate how the witnesses' testimony was tailored or was otherwise less than candid; indeed, Lane's comments seem to demonstrate that he refused to tailor his story to Kelly's. What Charles really seems to be complaining about, and the statement on which he based his request for a mistrial, was Duhon's testimony that the witnesses thought Charles was going to lose at trial. Although Charles's chances of acquittal are arguably a substantive issue, the statement does not demonstrate that the witnesses tailored their testimony.

Moreover, Charles has failed to demonstrate sufficient prejudice to warrant a reversal. It was defense counsel's decision to question Duhon in the jury's presence, thereby opening the door that allowed Duhon to make the arguably damaging statement. Moreover, the district court carefully instructed the jury to disregard the statement; we presume that juries follow the instructions they are given. *United States v. Willis*, 6 F.3d 257, 263 (5th Cir. 1993). We are unable to conclude that the district court abused its discretion in denying the motion for a mistrial.

III. Sentencing

Charles was convicted on two counts of possession of a firearm during a crime of violence. Count II was related to the Lafayette carjacking, and count IV to the Sulphur convenience store robbery. The statute provides,

> "Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . ., be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years. " 18 U.S.C. § 924(c)(1).

Charles argues that the district court erred in accepting the presentence report's (PSR) recommendation to apply the mandatory enhancement required by 18 U.S.C. § 924(c)(1) for defendants convicted of a "second or subsequent" violation of the statute. He claims that the two charges were part of one continuous course of conduct and that Congress did not intend to classify multiple counts of the same offense as a second conviction for purposes of sentencing.

The Supreme Court has already squarely rejected this interpretation of section 924(c)(1). In *Deal v. United States*, 113 S.Ct. 1993 (1993), the Court held that "[i]n the context of § 924(c)(1), . . . `conviction' refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction." *Id.* at 1996. Thus, a defendant may be subject to the "second or subsequent conviction" enhancement even though the first conviction is part of the same indictment and/or the same course of conduct. *See id*. at 1997 n.1. This Court has

already determined that *Deal* precludes an argument that offenses that are part of a "continuing criminal spree" cannot be the basis for the "second or subsequent conviction" enhancement of this section. *See United States v. Gary*, No. 94-10467 (January 13, 1995) (unpublished) at 6-7. The district court did not err in imposing the enhancement.

Conclusion

For these reasons, the district court's judgment is

AFFIRMED.