UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50292
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEPHEN R. WOOD and
DAVID B. WAGNER,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas
(SA-93-CR-170)

(June 6, 1995)

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

GARWOOD, Circuit Judge:

Defendants-appellants Stephen R. Wood (Wood) and David B. Wagner (Wagner) appeal their convictions on various counts of conspiracy to counterfeit currency and passing counterfeit currency. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

On January 19, 1994, Wood, Wagner, and Adolfo Magallanez (Magallanez) were charged in a second superseding indictment with one count of conspiracy to make, possess, and pass counterfeited currency, in violation of 18 U.S.C. § 371 (count 1). Wood and Magallanez were charged with one count of manufacturing counterfeit currency, in violation of 18 U.S.C. § 471 (count 2). Counts 3, 4, and 6 charged Wood, Magallanez, and Wagner, respectively, with passing counterfeit currency, in violation of 18 U.S.C. § 472, and count 5 charged both Wood and Wagner with passing counterfeit currency.

Wood, Wagner, and Magallanez were tried together. The evidence presented at trial, largely in the form of eyewitness testimony, revealed that sometime in 1991, Wood began to develop a plan to produce counterfeit $10 bills using the facilities and equipment available at his father's print shop in San Antonio, Texas. Although Wood did not work for his father and did not know how to operate most of the printing equipment, he had keys to the shop and periodically visited it, both during working hours and at night. Wagner, Wood's roommate, often accompanied Wood when he visited the print shop. Wood also knew and occasionally visited his father's employees, including Magallanez, who operated the offset printing press, and Howard Richie (Richie), who made photographic plates.

Wood initially approached Shannon Davey (Davey), a friend and free-lance artist who occasionally did work for Wood's father,

about producing some artwork to counterfeit $10 bills. Wood showed Davey photocopies of various parts of a legitimate $10 bill and said that he planned to make $100,000 in counterfeit currency and pass it at gas stations and convenience stores. Davey declined to help Wood. In January 1992, Wood purchased one ream of 500 sheets of an expensive, low-demand bond paper from a local supply shop. He told his girlfriend, Marchell Pegg (Pegg), that he planned to print counterfeit currency on the paper. Several months previously, Wood had told Pegg that he wanted to counterfeit $10 bills and had showed her enlarged photocopies of various parts of $10 bills.

In 1992, Wood recruited Richie and Magallanez to help him produce counterfeit currency. Richie, who pleaded guilty before trial and testified on behalf of the government, testified that he agreed to help in the scheme because Wood assured him that he (Wood) would only pass the counterfeit bills to drug dealers, an explanation that Richie credited because he knew that Wood and Magallanez were involved in dealing drugs. Having been assured that the counterfeit bills would not be passed to the general public, and thus believing that his chances of being caught were greatly reduced, Richie agreed to make photographic plates from the negatives Wood provided him. Wood also provided Magallanez with paper and ink to produce the counterfeit bills.

The three, together with Wagner, produced approximately $19,200 in fake currency in one printing in October 1992. On the night of October 17, 1992, Wood attempted to pass one of the

counterfeit bills at a local gas station, and Wood and Wagner passed at least four counterfeit bills at a San Antonio night club. Wood and Wagner told Davey and another friend, Butch Akin, who were with Wood and Wagner that night, that the bills were counterfeit. Subsequently, when the news media began reporting that counterfeit $10 bills were being passed in San Antonio, Wood approached both Davey and Akin and told them to keep quiet about the scheme; Wood also told Pegg not to tell anyone what she knew.

The jury found Wood guilty of the conspiracy count and of all the substantive counts in which he was named. Wagner was found guilty of conspiracy and the substantive count in which he was named with Wood, but was acquitted of the other substantive count in which he was named alone.[1] Wood was sentenced to concurrent terms of 37-months' imprisonment and 3 years' supervised release, and Wagner was sentenced to concurrent terms of 15 months' imprisonment and two years' supervised release. Wood and Wagner timely appealed to this Court.

Discussion

I. Wagner's Claims

On appeal, Wagner claims that the magistrate judge who, with the consent of all parties, conducted the jury voir dire erred in not utilizing Wagner's proposed question concerning the legal doctrine that mere presence or knowledge is insufficient to convict

[1] Magallanez was found guilty of the conspiracy and manufacturing counts, but was acquitted of the passing count in which he was named alone. Magallanez has not appealed his convictions.

a defendant of conspiracy. The magistrate judge refused the requested question because he felt that delving into the details of conspiracy law on voir dire would confuse the venire and that Wagner's concern would be adequately addressed by the district court's ultimate instructions to the jury. Wagner claims that the magistrate judge's refusal to question the venire on this point violated his due process right to a fair and impartial jury.

The scope and content of voir dire is entrusted to the broad discretion of the district court, and we will not disturb its judgment to exclude a proposed question unless the party claiming error shows both an abuse of discretion and that he was likely prejudiced thereby. *United States v. Okoronkwo*, 46 F.3d 426, 433 (5th Cir. 1995). It is not an abuse of discretion to fail to ask a proposed question on voir dire if the overall voir dire examination and the instructions given at trial adequately protect the party's interests. *United States v. Williams*, 573 F.2d 284, 287 (5th Cir. 1978). That stricture was observed here. The magistrate judge's voir dire adequately established that the venire members understood and would abide by the presumption of innocence, would hold the government to proof of the charges beyond a reasonable doubt, and would not consider the indictment or any failure of any of the defendants to testify as evidence of guilt. These questions were more than adequate to ensure that the venire would follow the law; the magistrate judge did not abuse his discretion by failing to question the venire on the more particular details of the defense's legal theories. *See id.* at 287-88 (when

trial court's questions adequately probed potential jurors' biases, it was not an abuse of discretion to refuse to question the venire concerning their understanding of particular legal matters). Moreover, at the conclusion of the evidence, the district court gave a detailed and legally accurate instruction on mere presence and mere knowledge in relation to the crime of conspiracy. *See Williams*, 573 F.2d at 287. No error occurred here.

Wagner also argues that the district court plainly erred in admitting testimony from two co-conspirators concerning their convictions following plea agreements with the government. We review for plain error because there was no objection at trial to the admission of the allegedly prejudicial testimony. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc), *cert. denied*, 115 S.Ct. 1266 (1995). Wagner's reliance on our decision in *United States v. Leach*, 918 F.2d 464 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 2802 (1991), however, is misplaced. Although in *Leach* we recognized "that evidence about the conviction of a coconspirator is not admissible as substantive proof of the guilt of a defendant," *id.* at 467 (footnote omitted), and therefore "[w]e consistently have held a prosector's reference to such convictions to be plain error," *id.*, we made clear that the admission of this evidence was problematic *because* the convicted co-conspirator did not testify at trial. *Id.* at 467 n.4, 468.

In contrast, evidence that a *witness* is testifying as a result of a plea agreement with the government is valid for purposes of impeachment, and we have consistently recognized that the

prosecution may "blunt[] the sword of anticipated impeachment by revealing the information first." *Id.* at 467 (citation and internal quotation marks omitted); *see also id.* at 467 n.4 ("Preemptively introducing this evidence merely attempts `to take the wind out of the defendant's sails regarding the witness' credibility,' but does so with no prejudice to the defendant.") (citation omitted). Indeed, we applied this very principle in *Leach* itself, finding no error in the prosecution's eliciting evidence of a testifying witness's plea agreement. Here the testimony of the witnesses showed their guilt; the defense attacked their credibility on the basis of their plea agreements. The district court committed no error, much less plain error, in admitting this testimony.

II. Wood's Claims[2]

Wood initially contends that the evidence was insufficient to support his convictions. His argument amounts to no more than a series of contentions that the witnesses against him were not credible. The credibility of witnesses, however, is a matter left solely to the jury. *United States v. Layne*, 43 F.3d 127, 130 (5th Cir.), *cert. denied*, 115 S.Ct. 1722 (1995). The evidence of Wood's guilt was overwhelming. Viewing all the evidence and the

[2] In his reply brief, Wood, who is pro se on appeal, attempted to adopt the arguments presented by Wagner, who is represented by appointed counsel, in his brief. We do not consider arguments raised for the first time in a reply brief. *United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir.), *cert. denied*, 110 S.Ct. 321 (1989). Moreover, because we have concluded that none of Wagner's arguments on appeal presents a claim of reversible error, Wood's attempted incorporation would be unavailing in any event.

reasonable inferences therefrom in the light most favorable to the verdict, as we are required to do in reviewing a challenge to the sufficiency of the evidence, we conclude that a reasonable jury could have found Wood guilty beyond a reasonable doubt of the conspiracy, manufacturing, and passing offenses with which he was charged. *United States v. Nguyen*, 28 F.3d 477, 480 (5th Cir. 1994).

Next, Wood argues that the district court erred in refusing his motion for a severance of his trial from Magallanez's on the ground that Wood and Magallanez presented irreconcilable defenses at trial. Wood's defense at trial was that he was not involved in the conspiracy; Wood claims this defense was inconsistent with Magallanez's contention that he (Magallanez) was pressured by Wood into participating in the scheme because he feared losing his job.

As a general rule, defendants indicted for conspiracy should be tried together. *United States v. Neal*, 27 F.3d 1035, 1045 (5th Cir.), *cert. denied*, 115 S.Ct. 530 (1994), *and cert. denied*, 115 S.Ct. 1165 (1995). We review the denial of a motion for severance for abuse of discretion. *Id.* The Supreme Court has recently stated that Rule 14 does not require severance as a matter of law when co-defendants present mutually exclusive defenses.[3] *Zafiro v. United States*, 113 S.Ct. 933, 937-38 (1993). Defendants properly joined for trial should not be severed unless "there is a serious

[3] "Defenses are antagonistic if they are mutually exclusive or unreconcilable, that is, if the core of one defendant's defense is contradicted by that of another." *Neal*, 27 F.3d at 1046 (citation and internal quotation marks omitted).

risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 938. Even if prejudice is shown, severance is not mandatory, and the district court acts within its broad discretion in determining that some other remedySQfor example, a proper jury instructionSQshould be granted. *Id.*

We conclude that the district court did not abuse its discretion here. Putting aside the fact that Magallanez's suggestion that he was pressured into joining the conspiracy is not properly considered a "defense,"[4] the government elicited testimony from a number of witnesses that Wood had no authority at the print shop whatsoever, clearly demonstrating that Magallanez's contention that he feared losing his job if he did not participate was far-fetched at best. Under these circumstances, it is difficult to see how Wood was prejudiced by the denial of the severance motion. Moreover, the district court gave an appropriate limiting instruction admonishing the jury to consider the evidence separately as to each defendant, a remedy specifically approved by the *Zafiro* Court. *Id*. at 939. Such an instruction was undoubtedly

[4] Magallanez did not testify, and neither did Wood or Wagner. Magallanez's lawyer attempted to raise the "pressure" theory by cross-examination of government witnesses. He did not argue that Magallanez was truly coerced into participation. Coercion may be a legal defense to some crimes. As the district court explained in its unchallenged instructions to the jury, however, Magallanez's contention that he was pressured into participating was not a denial of guilt, but more in the nature of a request for mitigation of punishment, a matter for consideration only at sentencing.

sufficient to cure whatever conceivable prejudice might have arisen from the joinder of the co-conspirators.

Finally, Wood alleges that the district court erred at sentencing in adjusting his Guidelines offense level based on its determinations that he was a leader or organizer of the conspiracy and that he obstructed justice. Wood's presentence report (PSR) recommended both adjustments. The district court generally may rely on the PSR in making sentencing decisions. *United States v. Gracia*, 983 F.2d 625, 629 (5th Cir. 1993). Apart from his bare objections to the PSR's recommended adjustments, Wood presented nothing that would undermine the reliability of the PSR's determination that the adjustments were warranted. *See United States v. Ayala*, 47 F.3d 688, 690 (5th Cir. 1995) ("The defendant bears the burden of demonstrating that the PSR is inaccurate; in the absence of rebuttal evidence, the sentencing court may properly rely on the PSR and adopt it. The court is free to disregard a defendant's unsworn assertions that the PSR is unreliable.") (citations omitted). In addition, the evidence presented at trial overwhelmingly tended to indicate that Wood was the motivating force behind the conspiracySQthat he recruited the participants, supplied the necessary materials, and exercised a significant amount of control over the entire operation, including both the manufacturing and the distribution of the counterfeit bills. As to the obstruction adjustment, three witnesses testified at trial that, after it became known that the Secret Service was investigating the origin of the counterfeit bills, Wood told them

to keep quiet about the scheme and counseled one of them to lie to investigators if questioned. The adjustments were proper.

III. Admission of Evidence of Drug Use

Both Wagner and Wood allege error in the admission in evidence of the testimony of various witnesses concerning Wagner's and Wood's prior drug use and their drug relationships with Magallanez. They claim this was improper extrinsic character evidence and should have been excluded. *See* Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). We review the district court's decision to admit such evidence only for abuse of discretion. *United States v. Davis*, 19 F.3d 166, 171 (5th Cir. 1994).

In this case, the district court found that the drug evidence was "intrinsic" to the conspiracy charges. "Evidence that is `inextricably intertwined' with the evidence used to prove a crime charged is not `extrinsic' evidence under Rule 404(b). Such evidence is considered `intrinsic' and is admissible `so that the jury may evaluate all the circumstances under which the defendant acted.'" *United States v. Royal*, 972 F.2d 643, 647 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1258 (1993) (citation omitted). The district court found that the drug evidence was intrinsic because it helped the jury understand the full nature of the relationship between the conspirators and explained why Wood trusted each of them, as well as the testifying witnesses, with the details of the counterfeiting scheme. The court also explicitly found that, to

the extent such evidence was not intrinsic to the conspiracy charges, it was relevant to prove motive, opportunity, intent, and preparation, and that its probative value was not outweighed by its prejudicial effect. *See* Fed. R. Evid. 404(b).

We have held that evidence that helps the jury understand the nature of the relationship between the conspirators and evaluate the likelihood of their having conspired as charged is intrinsic to the conspiracy. *Royal*, 972 F.2d at 648; *United States v. Stovall*, 825 F.2d 817, 825 (5th Cir.), *amended*, 833 F.2d 526 (1987). In this case, Richie testified that he agreed to participate in the conspiracy because Wood assured him that the counterfeit bills would be passed only to drug dealers and that he credited this assertion because he knew of Wood's and the other conspirators' involvement in drugs. We agree with the district court that most, if not all, of the other witness testimony concerning Wood's and Wagner's involvement in drugs helped to explain how the conspirators came together and why they trusted one another. As such, the evidence was intrinsic and properly admitted.

To the extent that any of this evidence was not intrinsic, we conclude that the error in admitting it was undoubtedly harmless. The evidence against the conspirators was otherwise overwhelming. *See United States v. Ortiz*, 942 F.2d 903, 915 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 2966 (1992) (error is harmless if it is obvious that same result would have been reached even if the error had not occurred). The court also was extremely vigilant in cautioning the jury, both during the trial and in its final

instructions, of the limited use which could be made of this evidence. In addition, and most significantly, as noted above, much of the evidence was properly admitted; once the defendants had been tarred with that brush, any further such evidence that may have been improperly admitted undoubtedly did not affect the result in this case. The fact that Wagner was acquitted of one of the counts for which he was indicted shows that the evidence did not unduly influence the jury and further supports our conclusion that its admission did not prejudice the defendants.

Conclusion

The defendants' convictions and sentences are

AFFIRMED.