

No. 00-1483

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JABRI JAMISON
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Jabri Jamison was named in all three counts of a superceding indictment. The superceding indictment charged Jamison in Count One with possession of a firearm after having been convicted of a crime punishable for more than one year (18 U.S.C. §922 (g)), in Count Two with an attempted robbery affecting interstate commerce (18 U.S.C. §1951), and in Count Three with possession of a firearm during a crime of violence (18 U.S.C. §924 (c)).

Mr. Jamison was convicted by a jury of all three counts. Jamison was sentenced to 78 months on Counts One and Two to run concurrently with each other. Count Three, a term of 120 was imposed, to run consecutively to Counts One and Two. The total term of imprisonment was 198 months.

The jurisdiction of this Court is invoked under 28 U.S.C. §1291, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Northern District of New York. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure on August 29, 2001.

STATEMENT REGARDING ORAL ARGUMENT

Jennings requests oral argument in this case. This appeal involves a novel question regarding the limits of the government, as authorized by The Commerce Clause, to prosecute attempted robberies that neither occur at a business, nor deplete its assets. The Court would be best served by hearing from counsel.

STATEMENT OF THE ISSUES PRESENTED

- (1) The district court erred by denying Jamison's Motion for Judgement of Acquittal regarding Count Two.
- (2) The district court erred by denying Jamison's Motion for Judgement of Acquittal regarding Count Three.
- (3) The district court erred by charging the jury that proof of an attempted interference of commerce need only be minimal, when it involved an attempted robbery of an individual in a residence.
- (4) The district court erred by allowing the jury to learn about Jamison's prior conviction for forcibly stealing property of another while armed with a pistol.

STATEMENT OF THE CASE

Andre Porter was part-owner of a clothing store called Digital Underground Fashions. A.197. His partner was a William “Pierre” Thompson. A.212. The business was located at 838 Albany Street in Schenectady. A.200.

On January 8, 2000, Porter was living at 414 Brandywine in Schenectady. Porter shared the residence with his mother, girlfriend, daughter, son, and a brother. A.70. On that evening, there were an additional two adults and three children visiting, making a total of eleven persons in the residence. A.73-74.

Earlier that day, Porter traveled near New York City to the Woodbury outlet stores. A.209-210. He spent approximately \$15,000 purchasing clothing to stock his store. A.211. He brought that clothing back to 414 Brandywine at 6:00 or 7:00 p.m. A.121.

Porter answered the door that evening around 9:00 p.m.. A.149, 158. It was unclear whether the man at the door knocked, rang the bell, or was simply seen outside.¹ It was also unclear whether the man was alone or with a companion.²

The man pointed a firearm at Porter. A.123, 215. The firearm discharged striking Porter. A. 85-86, 123, 215. Porter quickly backed away and the man stood

¹ The testimony provided several different versions. A.122, 123, 213.

² Calefia Graves is the only person who claimed to have seen a second man in the house. A. 125. Neighbors saw him outside the house at a distance. A. 151, 180-183.

over Porter demanding a chain Porter was wearing and money. A.215. The chain had a gold cross and a figure of Jesus shaped in diamonds. A.94. Porter snatched the chain from around his own neck, threw it on the floor, and then directed the man toward the bedroom. A.126, 215. The man failed to obtain any property or get any further into the home. Other persons in the house helped Porter subdue the man. A.87. They were joined by neighbors who held the man until police arrived. A.97-98. The man was later identified as Jabri Jamison. A.266.

On the night of the shooting, \$3,310 were recovered from the person of Andre Porter, when he was taken to the hospital. A.306. Porter did not tell police whether there was any other money in the house. A. 236. After release from the hospital, Porter relocated to another residence he owned at 406 Bedford. A.193.

A week or two later, agents of the Drug Enforcement Agency negotiated to buy one ounce of cocaine from Porter. A.285-287. On January 27, 2000, Porter was arrested on federal drug and money laundering charges. A.191. The next day, searches were executed at 414 Brandywine and 406 Bedford in Schenectady. A.287. The search at 414 Brandywine recovered no money, no drugs, only an empty inexpensive safe. A. 294. The search at 406 Bedford resulted in locating \$19, 500 in a rear bedroom and \$800 in the living room, as well as about eight ounces of cocaine. A. 290.

On June 8, 2000, Porter pleaded guilty to conspiring to distribute cocaine and to money laundering in the Northern District of New York. He only admitted to distributing a single ounce of cocaine. A.226. Porter later stated he also bought five ounces of cocaine. A.196.

The government forfeited all the money seized at 406 Bedford. None was ever returned to Porter. A.237.

In November 2000, Porter testified before a grand jury investigating the shooting of January 8, 2000. A.236. It was on that occasion that Porter claimed that approximately \$18,000 had been located in a safe in a bedroom at 414 Brandywine on the evening of January 8, 2000. A.236.

He repeated that same uncorroborated claim at trial. A.209. He stated the origins of the money were: “Some from the store and also some from drug activity.” A.209. His description of his intentions for the funds were: “drugs or clothing, whatever”. A.217, 218.

SUMMARY OF THE ARGUMENT

The government failed to prove that the attempted robbery affected interstate commerce. Standing alone, robbery of a person in their home does not affect interstate commerce. In this case, the government claimed interstate commerce was affected because money, derived from a clothing business and drug activity, were located in Porter's residence at the time of the attempted robbery. However, the government failed to show how, if the funds had actually been depleted, that this would have affected interstate commerce.

The government never proved what the character of the funds were. Porter claimed he was free to do "whatever" he wanted with the money. He alleged no obligation to his partner or vendors in the clothing business, or his co-conspirators in drug activity. He never indicated any intention to engage in a particular transaction with the money, legal or illegal. To uphold the government's theory would allow federal prosecution of any attempted home robbery. The failure to prove this element invalidates Counts Two and Three. Those convictions should be vacated.

Since the attempted robbery was not directed at a business, the government was required to show a substantial connection to interstate commerce. The charge to the jury did not require such a connection. That was error.

The government also introduced evidence that Jamison had been previously convicted of forcibly stealing property of another while armed with a pistol. Absent valid convictions on Counts Two and Three, Count One must be reversed to allow Jamison a new trial on Count One without identifying the nature of his prior conviction.

ARGUMENT

A. Standards of Review

The standard for assessing sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979). An erroneous jury instruction is reviewed for harmless error in the context of the instructions and the evidence as a whole. *United States v. Ekinici*, 101 F.3d 838, 843 (2d Cir. 1996). When evidence is erroneously admitted under FRE 403, the ruling is reviewed for abuse of discretion. *Old Chief v. United States*, 519 U.S. 172 (1997).

B. Sufficiency of Evidence

1. Count Two

The government proved an attempted robbery of an individual in his home. Absent any additional proof of how this might have affected interstate commerce,

the government's case was insufficient. Counts Two should be vacated.

Porter was not engaged in commerce at the time he was shot. According to the government's theory, Jamison was there to rob Porter. Robbery alone is not commerce. *United States v. Peterson*, 236 F.3d 848, 852 (7th Cir. 2001).

The government argued that a successful robbery would have affected Porter's ability to buy clothes or drugs and thereby affect interstate commerce.

A.347. The government claimed that it was proceeding under a "depletion of assets theory." A.347. The proof did not support these claims.

The character of those assets was never adequately identified. Porter had approximately three thousand dollars on his person and much later claimed that there was about \$18,000 located in a safe in a bedroom.³ He characterized these funds as coming partly from the clothing store and partly from drug activity. Porter stated he could use the money for "drugs or clothing, whatever ."

Porter believed this money was his to do with as he pleased. Since the clothing business was a partnership (not a sole proprietorship), Porter's freedom to spend as he chose indicates that the money did not belong to the business.⁴

Rather, it belonged to Porter. If "whatever" meant spending the money on

³ This was never corroborated.

⁴ Obviously, the government did not believe this either as all the money was forfeited as drug proceeds. A.237.

himself, this affected neither the clothing nor drug businesses.

Porter's "drug activity" was also ambiguous. He admitted to selling an ounce of cocaine one to two weeks *after* the attempted robbery. Eight ounces of cocaine were found in a residence over two weeks *after* the attempted robbery. Porter also admitted to buying 5 ounces of cocaine on some unspecified date.

There was no proof of what, if any, drug activity Porter was involved with on or before January 8, 2000. The government failed to elicit any proof of what drug proceeds were possessed by Porter on January 8, 2000, or that he ever received any income from drug activity. Given that the jury was given two potential sources of interstate commerce to choose from (selling clothes or drugs), this is particularly troublesome.⁵

These facts are significant in light of *United States v. Lopez*, 514 U.S. 549 (1995) (Voided section of Gun-Free School Zones Act of 1990). "Per *Lopez*, a small sum stolen from a private individual does not, through aggregation, affect interstate commerce merely because the individual happens to be an employee of a national company, or happens to be on his way to a store, or happens to be carrying proceeds from a restaurant." *United States v. Wang*, 222 F.3d 234, 239

⁵ When a jury may have based the connection to interstate commerce on improper grounds, the conviction must be reversed. *United States v. Peterson*, *supra*, at 857.

(6th Cir. 2000).

Since *Lopez*, other circuits have heightened their scrutiny of non-business robberies. In a case where the defendant was accused of attempting to rob an individual victim, the government has been required to prove a *substantial* connection between the attempted robbery and its effect upon the victim's business. *United States v. Wang, supra*, at 239.

In *United States v. Wang*, the victims were the owners of a restaurant who had returned home with some of the business's cash receipts. They were robbed by a former employee. The court of appeals held that a single robbery, occurring away from the business, has only a speculative, indirect effect on business and will not satisfy the jurisdictional requirement of the Hobbs Act. *Id.*, at 238.

In *United States v. Quigley*, 53 F.3d 909 (8th Cir. 1995), the court of appeals found that robbery of persons who were on their way to a store did not substantially affect interstate commerce as a matter of law. Criminal acts directed towards individuals rather than businesses may violate the Hobbs Act only if (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce, (2) the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce, or (3) the acts cause or are likely to cause the individual victim to deplete the

assets of an entity engaged in interstate commerce. *id.*, at 910, *citing*, *United States v. Collins*, 40 F.3d 95 (5th Cir. 1995) (Robbing employee of national company did not substantially affect interstate commerce).

In this case, none of the three criteria apply. Porter was not directly engaged in interstate commerce at the time of the attempted robbery. There was only one alleged victim. There was no proof that assets were depleted.⁶ There was no proof that a successful robbery would have affected interstate commerce. Porter never stated that the funds belonged to a business. Purchases of “clothing, drugs, whatever” could have well been for his own personal use.

Even in a case where a victim was robbed of marijuana and guns in a home where he sold marijuana, the government failed to show a *de minimus* impact on interstate commerce. *United States v. Peterson, supra*. The court of appeals found that the mere allegation that the victim was in the drug business was not sufficient to show a nexus to interstate commerce. The court held that while the Controlled Substances Act (21 U.S.C. §801 *et. seq.*), does not require proof of a commerce connection in each case, the Hobbs Act does, and therefore the government cannot merely rely on the fact that the victim was a drug dealer.

⁶ “Deplete” means to empty out or exhaust. THE CONCISE OXFORD DICTIONARY (6th Ed.). Merely taking what the victim had at the time is not sufficient. *see United States v. Quigley, supra* (Emptying out victim’s pockets not enough for depletion).

Additionally, when an attempt is charged, the burden is on the government to prove that the defendant had the specific intent to commit the offense attempted. *United States v. Kwong*, 14 F.3d 189 (2d Cir. 1994). Here the jury was charged that intent to affect interstate commerce was unnecessary if commerce was actually affected.⁷ However, there was neither proof of Jamison’s intent to affect commerce, nor any actual effect upon interstate commerce.

In *United States v. Jones*, 30 F.3d 276 (2d Cir. 1994), this Circuit found that the robbery of an undercover police officer had a sufficient nexus to interstate commerce to violate the Hobbs Act. Below, the district court erroneously relied upon *Jones* to deny Jamison’s Motion for Judgement of Acquittal.

In *Jones*, an undercover police officer gained the confidence of a drug organization by repeatedly buying cocaine in larger quantities from various members. Finally, he purchased cocaine from the head of the organization and agreed to a second, larger purchase. Before the transaction, the organization designed a plan to rob their customer, not knowing he was a policeman. They robbed the officer and that robbery became the basis for a Hobbs Act charge.

⁷ “In the case of an attempt, all that need be shown was the possibility of an effect on interstate commerce, not an actual effect. Furthermore, it is not necessary that the defendant have the intent to interfere with interstate commerce; it is sufficient that one of the effects of the offense is an obstruction of that commerce.” A.373-374.

The officer and the dealers were engaged in a series of drug transactions. Those transactions were clearly commerce. The question was whether illegal commerce was sufficient to violate the Hobbs Act. The Circuit found that it did.

In this case, the government never claimed that Porter was engaged in a commercial transaction with Jamison. The government never claimed Porter was involved in any commercial transaction at the time he was shot. The government never claimed any connection to interstate commerce except that Porter made his livelihood as a haberdasher and from drug activity. *Jones* involved the obstruction and interference of a specific transaction of interstate commerce. This case did not.

The Circuit in *Jones* commented approvingly upon the district court's charge to the jury that it could not convict "if all that it found was an intent to steal money from officer Ortiz." *at*, 285. Absent the drug transactions, there clearly would have been no basis for conviction in *Jones*.

In this case, the government focused on the language in *Jones* about the "depletion of assets theory." The Circuit stated in *Jones*, that because the robbery depleted funds from the officer, it affected his ability to purchase cocaine in the future. However, the Circuit could not possibly have meant that whenever *anyone* is robbed that interstate commerce is affected simply because of their decreased buying power. That would render the commerce element meaningless. The Circuit

must have based its holding on the fact that a specific transaction of interstate commerce was prevented by the robbery. *see United States v. Thomas*, 159 F.3d 296 (7th Cir. 1998) (Upholding Hobbs Act conviction for robbery of an informant during a drug transaction). A broader interpretation of *Jones* cannot be reconciled with *United States v. Lopez*.

In this case, the government attempted to create federal jurisdiction in what is traditionally a state prosecution for attempted robbery. None of the reasons provided by the government were sufficient to prove the element of an affect upon interstate commerce.

2. Count Three

For the same reasons that Count Two is deficient, Count Three also fails. Count Three alleged that Jamison brandished a firearm during a crime of violence. 18 U.S.C. 924 (c). The crime of violence alleged is the conduct named in Count Two. Since the crime of violence must be a violation of federal law, an attempted robbery with no interstate commerce nexus, is insufficient as a matter of law. *see United States v. Wang, supra; United States v. Collins, supra* (Failure of Hobbs Act count also voided firearm count). Count Three should be vacated.

C. Jury Instruction

At the close of evidence the district court charged the jury in part as

follows:

“Third element, to obstruct, delay, or affect commerce, or the movement of any article or commodity in commerce, in any way or degree, includes interference or attempted interference in any manner whatever, even when the effect of such interference or attempted interference is minimal or *de minimus*, which means minimal. It is not necessary that the robbery had been successful, or that anything have been taken, in order for the statute to have been violated. In the case of an attempt, all that need be shown was the possibility of an effect on interstate commerce, not an actual effect. Furthermore, it is not necessary that the defendant have the intent to interfere with interstate commerce; it is sufficient that one of the effects of the offense is an obstruction of that commerce. This nexus with interstate commerce may be satisfied under the so-called depletion of assets theory, where the defendant’s illegal acts deplete the victim’s assets, therefore affecting the victim’s ability to purchase commodities that travel in interstate commerce. Now where the victim of an attempted robbery customarily obtains articles through interstate commerce, the diminution of the victim’s resources impairs his purchasing power and may therefore be found to affect interstate commerce, for the purpose of satisfying this element. Here, the Government contends that a successful robbery would have depleted Andre Porter’s assets in two types of interstate commerce, the retail clothing business, and the buying and selling of cocaine. With respect to the retail clothing business, if you find a successful robbery would have prevented the use of that money in purchasing

articles which travel through interstate commerce, you may find that this element is satisfied. With respect to the business of buying and selling cocaine, cocaine is a commodity, albeit illegal, about which you have heard testimony. Agent James DiCaprio of the DEA testified that cocaine comes from outside of New York and, therefore, would have to travel in interstate commerce when it is found in New York. If you find that a successful robbery would have prevented the use of money which was to be used to purchase cocaine, then you may also find this element satisfied.

A.373-375. Jamison timely objected that the charge did not require the jury to find the attempted robbery had a substantial connection to interstate commerce. A.333.

A “depletion of assets theory” contemplates an indirect affect upon interstate commerce. *United States v. Collins*, at 99. Where the criminal act is directed at a private citizen, the connection to interstate commerce is much more attenuated than when directed at a business. *United States v. Wang*, at 238.

“[W]hen the Government seeks to satisfy the Act’s jurisdictional nexus by showing a connection between an individual victim and a business engaged in interstate commerce, that connection must be a substantial one – not one that is fortuitous or speculative.” *Wang*, at 239-240.

The above charge did not address these concerns at all. The jury was instructed that it must accept Porter’s alleged role as clothing magnate and drug

dealer, and that the mere possibility that he might have later spent money of these enterprises was enough to find the attempted robbery affected interstate commerce. These instructions would allow a federal conviction for any attempted robbery of any person, no matter how speculative its affect upon interstate commerce. For that reason, Counts Two and Three should be reversed for a new trial.

D. Admission of Prior Conviction

Jamison agreed to stipulate that he had previously been convicted of a crime punishable for more than one year. A.273. The stipulation was only relevant to Count One. Over Jamison's objection, the court allowed the government to expand that stipulation to include language describing the prior conviction as "forcibly stealing property of another while armed with a pistol."A.273, 308. The court allowed this expansion in order to address Jamison's defense to Counts Two and Three. A.273.

If the Circuit were to vacate Jamison's convictions of Counts Two and Three, then a new trial of Count One would be required. In *Old Chief v. United States*, 519 U.S. 172 (1997), the Supreme Court held that proof by the government of a prior conviction, over defendant's offer to stipulate to the existence of that prior, was an abuse of discretion. In that case, the defendant was charged with

possession of a firearm by a felon. The court allowed the government to introduce evidence of the defendant's prior felony assault, despite the defendant's offer to stipulate that he had a prior felony.

In this case, although the government did not introduce all the facts underlying the prior robbery, the jury was still told that the defendant had been convicted for robbery and that he used a pistol. That was not relevant to the proof of Count One. Like *Old Chief*, its prejudice outweighed its probative value. Absent its admission under FRE 404 (b) regarding Counts Two and Three, its admission was an abuse of discretion. Count One should be reversed for a new trial.

CONCLUSION

Counts Two and Three were insufficient as a matter of law and should be vacated. The jury instructions regarding Counts Two and Three were erroneous and those counts should be reversed for a new trial. Absent convictions for Counts Two and Three, Count One should be reversed for a new trial because the court admitted the identity of a prior conviction after Jamison offered to stipulate to that element.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lillian Spagnola, certify that today, December 28, 2001, a copy of the brief for appellant, a copy of the record excerpts, and the official record in this case, consisting of one appellate brief and appendix, were served upon Ms. Barbara Cottrell, Assistant United States Attorney, Northern District of New York, by first class mail, postage prepaid to her at Office of the U.S. Attorney, 445 Broadway, Albany, NY 12207.

Lillian Spagnola

CERTIFICATE OF COMPLIANCE

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7).

1. Exclusive of the portions exempted by 2ND CIR. R. 32, this brief contains 4349 words.
2. This brief has been prepared in proportionally spaced typeface using Corel WordPerfect 8.0 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.
3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court's striking this brief and imposing sanctions against the person using the brief.

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