

Similar factors are present here. As in *Shaw*, the Board does not classify persons by race when it chooses which items to include on a test. Rather, it classifies test items. Under the consent decree, the Board is aware of race and racial impact when selecting test items, but this awareness, as in *Shaw*, “does not lead inevitably to impermissible race discrimination,” *id.*, because, under Title VII, the creation of a test as a selection procedure for employment demands that the test creator be aware of race and avoid imposing an unnecessary discriminatory impact on African-American candidates. Application of *Shaw* here leads to the conclusion that the district court did not abuse its discretion in refusing to modify the consent decree. The decree does not permit racial considerations to predominate over legitimate testing principles. Indeed, it does just the opposite. As the district court explained, “[v]alidity and soundness trump any need to redress discriminatory impact.” *Allen*, 976 F.Supp. at 1431. Because the Board has failed to show any change in the law rendering the consent decree’s future testing provisions invalid under the Equal Protection Clause, the district court did not abuse its discretion in denying the Board’s Rule 60(b) motion on this ground.

Accordingly, the judgment of the district court is AFFIRMED.



UNITED STATES of America,
Plaintiff–Appellee,

v.

Silvio GOMEZ, Defendant–Appellant.

No. 96–9455.

United States Court of Appeals,
Eleventh Circuit.

Jan. 14, 1999.

Rehearing and Suggestion for Rehearing
En Banc Denied March 9, 1999.

Defendant was convicted after jury trial in the United States District Court for the Southern District of Georgia, No. CR496–76–WTM, William T. Moore, J., of conspiracy

to possess with intent to distribute heroin, cocaine, and crack cocaine, and he appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) given defendant’s denial that he sold drugs to anyone, his proposed jury instruction regarding insufficiency of buyer-seller relationship to convict one as a co-conspirator on drug conspiracy charges did not deal with an issue properly before the jury and, thus, district court did not abuse its discretion in refusing to give it, and (2) defendant’s uncharged cocaine sales to specified individual were not part of the “same course of conduct” as the conspiracy and, thus, should not have been included in calculating defendant’s base offense level.

Affirmed in part, vacated and remanded in part.

1. Criminal Law ⇌1152(1)

Court of Appeals reviews district court’s refusal to give defendant’s requested jury instruction for abuse of discretion.

2. Criminal Law ⇌1152(1)

Refusal to give jury instruction constitutes abuse of discretion only if, inter alia, proposed instruction dealt with issue properly before the jury.

3. Criminal Law ⇌814(5)

Where defendant charged with drug conspiracy denied that he sold drugs to anyone, his proposed jury instruction regarding insufficiency of buyer-seller relationship to convict one as a co-conspirator on drug conspiracy charges did not deal with an issue properly before the jury and, thus, district court did not abuse its discretion in refusing to give it; if jury believed defendant, it would have concluded that he was entirely innocent of wrongdoing, while if jury believed government witnesses, it would have concluded that defendant engaged in pattern of sales sufficient to link him to the conspiracy, but under neither scenario could jury have reasonably concluded that defendant was in mere buyer-seller relationship with members of conspiracy.

4. Drugs and Narcotics ⇌133

Sentencing guidelines create differing base offense levels for drug offenses depending on quantity of drugs involved. U.S.S.G. § 2D1.1(c), 18 U.S.C.A.

5. Criminal Law ⇌1244

Defendant's uncharged cocaine sales to specified individual were totally unrelated to drug conspiracy in which defendant was involved and, thus, those sales should not have been included in calculating defendant's base offense level for his drug conspiracy conviction; "course of conduct" on which indictment and trial focused was not merely the distribution of cocaine but, rather, was the distribution of cocaine through a certain car wash operation, and individual at issue was in no way connected to car wash operation. U.S.S.G. § 1B1.3(a)(2), 18 U.S.C.A.

6. Criminal Law ⇌1244

Under the sentencing guidelines, defendant may be held accountable at sentencing for illegal conduct not in furtherance of the offense of conviction if that conduct was part of the same course of conduct or common scheme or plan as the offense of conviction. U.S.S.G. § 1B1.3(a)(2), 18 U.S.C.A.

7. Indictment and Information ⇌98

When act of misconduct can be easily distinguished from the charged offense, separate charge is required.

8. Criminal Law ⇌1244

Uncharged criminal activity outside of charged conspiracy may be included in sentencing in calculating base offense level if such uncharged activity is sufficiently related to the conspiracy for which defendant was convicted. U.S.S.G. § 1B1.3, 18 U.S.C.A.

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Appeal from the United States District Court for the Southern District of Georgia.

Before TJOFLAT and HULL, Circuit Judges, and KRAVITCH, Senior Circuit Judge.

1. These witnesses were originally Gomez' co-defendants in the conspiracy charge; they pled

TJOFLAT, Circuit Judge:

The appellant, Silvio Gomez, was convicted by a jury on one count of conspiracy to possess with intent to distribute heroin, cocaine, and crack cocaine, in violation of 21 U.S.C. § 846. The conspiracy operated out of the Sparkling City Car Wash in Savannah, Georgia. Gomez, a resident of Miami, was alleged to be one of the operation's suppliers. Government witnesses who were involved in the operation testified that Gomez sold them powdered cocaine on repeated occasions over the course of a two-year period; they in turn sold the cocaine (in powdered or "crack" form) out of the Sparkling City Car Wash.¹ Each sale by Gomez involved at least one-quarter kilogram of cocaine. Another Government witness, Leonor Leal, was not involved in the Savannah operation but testified that, near the time Gomez allegedly began supplying drugs to that operation, he sold two kilograms of cocaine to her boyfriend, Danny Saldana.

At trial, Gomez testified on his own behalf and denied any involvement in the conspiracy. He denied selling any cocaine to the alleged co-conspirators or to Danny Saldana; indeed, he stated that he had never sold drugs to anyone.

I.

[1, 2] Gomez' main contention on appeal is that the district court should have given the following requested jury instruction:

Members of the jury, if, from the evidence presented, you find that only a buyer and seller relationship existed between this Defendant and the witnesses who have admitted their participation in the Sparkling City Car Wash operation, then, in such event you must acquit this Defendant. Mere proof of the existence of a Buyer–Seller relationship is not enough to convict one as a co-conspirator on drug conspiracy charges.

We review the district court's refusal to give the requested instruction for an abuse of guilty prior to trial.

discretion. See *United States v. Trujillo*, 146 F.3d 838, 846 (11th Cir.1998). Refusal to give a jury instruction constitutes an abuse of discretion only if, *inter alia*, the proposed instruction dealt with an issue properly before the jury. See *United States v. Lyons*, 53 F.3d 1198, 1200 (11th Cir.1995).

[3] The proposed jury instruction did not deal with an issue properly before the jury. The jury in this case had to make a credibility choice between Gomez, who denied any drug sales, and the Government's witnesses, who stated that Gomez made repeated sales of substantial quantities to them. If the jury believed Gomez, it would conclude that he was entirely innocent of wrongdoing because he had sold no drugs whatsoever. If the jury believed the Government's witnesses, it would conclude that Gomez had engaged in a pattern of sales sufficient to link him to the conspiracy—the quantity and frequency of the sales would have put Gomez on notice that the drugs were being purchased with an intent to distribute. See *United States v. Cordova*, 157 F.3d 587, 597 (8th Cir.1998) (noting that a buyer-seller jury instruction “is appropriately given in a single transaction case involving small quantities of drugs consistent with personal use”); *United States v. Berry*, 133 F.3d 1020, 1023 (7th Cir.1998) (noting that “[e]vidence of a conspiracy, as opposed to a buyer-seller relationship, may include transactions involving large quantities of drugs [and] prolonged cooperation between the parties”). Under neither scenario could the jury reasonably conclude that Gomez was in a mere buyer-seller relationship with the members of the conspiracy. See *United States v. Canino*, 949 F.2d 928, 941 (7th Cir.1991) (holding that where the Government alleged sales of large quantities of drugs and the defendants's defense was improper venue, a buyer-seller instruction “would have been an absurdity given the evidence submitted at trial”). The district court therefore did not abuse its discretion in refusing to give the proposed instruction.

II.

[4] Gomez also challenges the calculation of his offense level under the Sentencing

Guidelines. The Sentencing Guidelines create differing base offense levels for drug offenses depending on the quantity of drugs involved. See United States Sentencing Commission, *Guidelines Manual*, § 2D1.1(c) (Nov. 1, 1995). The district court, in calculating Gomez' base offense level, determined that Gomez was responsible for selling three and one-quarter kilograms of cocaine; this amount included the two kilograms sold to Danny Saldana. This resulted in a base offense level of twenty-eight, see U.S.S.G. § 2D1.1(c)(6), to which two points were added for obstruction of justice, resulting in a total offense level of thirty.² Gomez had a criminal history category of three; thus, the applicable sentencing range was 121–151 months. See U.S.S.G. ch. 5, pt. A. He was sentenced to 136 months imprisonment.

[5, 6] The district court erred in including the cocaine sold to Danny Saldana in calculating Gomez' base offense level. Under the sentencing guidelines, a defendant may be held accountable at sentencing for illegal conduct not in furtherance of the offense of conviction if that conduct was “part of the same course of conduct or common scheme or plan” as the offense of conviction. U.S.S.G. § 1B1.3(a)(2). Whether two acts are part of the “same course of conduct” depends largely on how the relevant “course of conduct” is defined. If the course of conduct in this case is merely the distribution of cocaine, then the sale to Saldana would certainly be part of that course of conduct. This, however, seems too broad of a characterization. The course of conduct on which the indictment and the trial focused was the distribution of cocaine *through the Sparkling City Car Wash operation*, out of which the conspiracy operated and from which the relevant “intent to distribute” applied. Therefore, only sales that are related to the Sparkling City Car Wash operation should be considered part of the same course of conduct.

Danny Saldana was in no way connected to the Sparkling City Car Wash operation; the

never sold drugs.

2. The obstruction of justice points were based on Gomez' alleged perjury in testifying that he had

testimony relating to his cocaine purchases presumably was elicited pursuant to Federal Rule of Evidence 404(b) merely as evidence of Gomez' intent to distribute. See *United States v. Hernandez*, 896 F.2d 513, 521–22 (11th Cir.1990). Consequently, the sales to Saldana were not part of the “same course of conduct” as the conspiracy, and should not have been included in calculating Gomez' base offense level.

[7] Looking at the issue another way, the background commentary to U.S.S.G. § 1B1.3(a)(2) states that it is generally meant to apply to offenses that “involve a pattern of misconduct that cannot readily be broken into discrete, identifiable units.” When an act of misconduct can be easily distinguished from the charged offense, a separate charge is required. See *United States v. Blanc*, 146 F.3d 847, 852–54 (11th Cir.1998). In this case, the sale to Saldana is conceptually distinct from the Sparkling City Car Wash conspiracy, and easily could have been brought as a separate charge against Gomez. It was therefore inappropriate to use this sale in calculating the sentence for Gomez' conspiracy conviction.

Finally, we note that this case is virtually indistinguishable from *United States v. Maxwell*, 34 F.3d 1006 (11th Cir.1994). In that case, Maxwell was indicted for conspiracy to possess with intent to distribute dilaudid. The conspiracy operated as follows: Maxwell and another individual supplied dilaudid (and, on one occasion, cocaine) to an individual named Lundy; Lundy then sold the drugs to three other individuals who sold them to the end users. The Government, in order to prove criminal intent on the part of Maxwell (who had pled not guilty), introduced evidence of Maxwell's other drug dealings. This evidence included the sale of 546 grams of cocaine to an individual not in the conspiracy; these 546 grams were then added to the cocaine sale that Maxwell had made as part

of the conspiracy in calculating his sentence. We vacated Maxwell's sentence on the ground that the district court clearly erred in including the 546 grams in determining Maxwell's base offense level.³

[8] This is not to say that, in calculating a defendant's base offense level for a drug conspiracy conviction, uncharged drug sales to persons outside of the conspiracy can never be included. On the contrary, we have previously held—and continue to hold—that uncharged criminal activity outside of a charged conspiracy may be included in sentencing if the uncharged activity is sufficiently related to the conspiracy for which the defendant was convicted. See *United States v. Fuentes*, 107 F.3d 1515, 1525–26 (11th Cir.1997); *Maxwell*, 34 F.3d at 1011; see also U.S.S.G. § 1B1.3, comment. (n.9)(B) (giving examples of factors to be considered in determining whether an offense is part of the “same course of conduct” as another offense, including “the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses”). Under the facts of this case, however, the uncharged drug sales were totally unrelated to the conspiracy, and thus should not have been included in calculating the defendant's base offense level.

Removing the two kilograms sold to Danny Saldana from the calculation brings the total quantity of drugs attributable to Gomez down to one and one-quarter kilograms, resulting in a base offense level of twenty-six. See U.S.S.G. § 2D1.1(e)(7). This, combined with two points for obstruction of justice and a criminal history category of three, results in a sentencing range of 97–121 months. See U.S.S.G. ch. 5, pt. A.

III.

For the foregoing reasons, the case is remanded for resentencing. In all other respects, the judgment of the district court is affirmed.⁴

3. *Maxwell* is slightly different from this case in that Maxwell's side dealings involved cocaine while the conspiracy with which he was charged involved dilaudid, whereas Gomez' side dealings and the conspiracy with which he was charged both involved cocaine. Maxwell, however, as noted above, distributed at least some cocaine as part of his conspiracy. More importantly, the fact that Maxwell's side dealings involved a dif-

ferent narcotic while Gomez' side dealings involved the same narcotic simply is not a substantial distinction.

4. Gomez also raises challenges to the sufficiency of the evidence, to the admission of certain evidence relating to prior convictions, and to the admission of the testimony of Leonor Leal. We

AFFIRMED in part, VACATED and RE-MANDED in part.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Manuel GUERRA, Defendant-Appellant.

No. 97-4576.

United States Court of Appeals,
Eleventh Circuit.

Jan. 14, 1999.

Defendant was convicted in the United States District Court for the Southern District of Florida, No. 96-588-CR-NCR, Jacob Mishler, J., of armed robbery of service station in violation of the Hobbs Act. Defendant appealed. The Court of Appeals, Marcus, Circuit Judge, held that evidence was sufficient to show that robbery affected interstate commerce, as required to support conviction under the Hobbs Act.

Affirmed.

1. Criminal Law ⇨1139, 1144.13(3, 5)

Court of appeals reviews a challenge to the sufficiency of the evidence supporting a conviction de novo, and considers that evidence in the light most favorable to the government, drawing all inferences and credibility choices in favor of the jury's verdict.

2. Robbery ⇨24.10

Evidence was sufficient to show that defendant's armed robbery of service station, from which defendant obtained \$300, affected interstate commerce, as required to support robbery conviction under the Hobbs Act; service station was part of a national chain, station sold fuel products drawn from outside the state, station was forced to close for more than two hours while police investigated the robbery, and station lost business over next several days. 18 U.S.C.A. § 1951(a).

have reviewed these challenges and determined

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Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, BARKETT and
MARCUS, Circuit Judges.

MARCUS, Circuit Judge:

Appellant Manuel Guerra seeks to overturn his conviction for the armed robbery of an Amoco gas station, arguing that some \$300 taken during the course of the robbery was an insufficient evidentiary foundation to satisfy the jurisdictional requirement of the Hobbs Act, 18 U.S.C. § 1951 (1994). We have repeatedly held that the government needs to establish only a minimal effect on interstate commerce to support a violation of the Hobbs Act. That standard has been met here. Accordingly, we AFFIRM his conviction.

I.

The facts surrounding this robbery are straightforward. On April 16, 1996, at approximately 10:00 p.m., Guerra entered an Amoco service station in Hialeah, Florida, produced two hand grenades, pulled the pin from one of the grenades, and demanded all of the store's money from the store clerk, Jorge Rodriguez. Guerra pointed at one of the grenades and asked Rodriguez, "Do you know what this is?" Soon thereafter, Guerra stated, "I'm not playing, give me all of the money. I'll blow this place up, I don't care." Rodriguez gave Guerra approximately \$300 in cash; Guerra put the hand grenades into his pocket and left the store. Rodriguez called the police. A short time later, he spotted Guerra in a bar across the street from the Amoco station. The police approached Guerra and, realizing that appellant held a grenade in his hand, grabbed the grenade from Guerra. A struggle ensued over control of the grenade and Guerra was arrested.

that they are without merit.