

No. 99-41095

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JUAN H. VILLARREAL,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLEE

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REQUEST FOR ORAL ARGUMENT

The United States does not object to appellant's request for oral argument.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a judgment of conviction and sentence under the laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. It sentenced defendant on September 16, 1999, and entered final judgment on April 20, 2000 (R. 86, 115).¹ Defendant filed a notice of appeal on September 17, 1999

¹References to “R. ___” are to the docket number on the district court docket sheet. References to “Br. ___” are to page numbers in appellant’s opening brief. References to “R.E. ___” are to document numbers in the Record Excerpts filed by appellant along with his opening brief. References to “Rec. ___-___,” “Supp. Rec. ___-___,” and “2nd Supp. Rec. ___” are to volume and document or page numbers in the Record on Appeal, Supplementary Record on Appeal, and 2nd Supplemental Record on Appeal, respectively. References to “Gov. Ex. ___” are to exhibit

(continued...)

(R. 91).² This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the sentences imposed on Counts 2 and 3 exceed the statutory maximum penalty.
2. Whether the jury instructions on Count 3 addressing the type of document defendant allegedly fraudulently transferred failed to instruct the jury of an essential element of the crime or constructively amended the indictment.
3. Whether the evidence was sufficient to establish that alleged transfer of the City of Laredo Birth Registration Card in Count 3 was “in or affect[ed] interstate or foreign commerce.”

STATEMENT OF THE CASE

A. *Proceedings Below*

At all times relevant to this case, defendant Juan H. Villarreal was employed as a United States Immigration and Naturalization Service (INS) Inspector. His job

¹(...continued)
numbers of the government’s exhibits introduced at trial.

²Defendant’s notice of appeal preceded the entry of final judgment because the district court sought to correct the sentence before issuing a final judgment. This Court, noting that the notice of appeal was premature, issued an order remanding the case to the district court with instructions to enter judgment (Supp. Rec. 1-114). Pursuant to that order, the district court entered the April 20, 2000, judgment (R. 115). Pursuant to Fed. R. App. P. 4(b)(2), a notice of appeal filed prior to the entry of final judgment is treated as filed on the date of entry of judgment. See generally pages 4-5, *infra*; Br. 10-11; R. 114.

included examining and questioning individuals seeking admission to the United States, and detecting and preventing the illegal entry of aliens into the United States.

1. On September 1, 1998, defendant was indicted on five counts: (1) accepting a bribe, in violation of 18 U.S.C. 201(b)(2), in connection with the alleged receipt of \$100 in return for executing immigration documents to permit persons to travel within the United States; (2) accepting a bribe, in violation of 18 U.S.C. 201(b)(2), in connection with the alleged receipt of \$300 in return for executing immigration documents to permit persons to travel within the United States; (3) fraud involving identification documents, in violation of 18 U.S.C. 1028(a)(2), in connection with the alleged transfer of a City of Laredo Birth Registration Card knowing the document was stolen or produced without lawful authority; (4) accepting a bribe, in violation of 18 U.S.C. 201(b)(2), in connection with the alleged receipt of sexual favors in return for permitting the person to enter and remain in the United States contrary to law; and (5) deprivation of a constitutional right under color of law, in violation of 18 U.S.C. 242, in connection with the willful sexual assault of a person (R. 1; R.E. 2). These alleged events took place in the Southern District of Texas between August 1997 and February 1998 (R. 1; R.E. 2).

Prior to trial the United States moved to dismiss Count 4 of the indictment (R. 45; see also R. 86). On November 30, 1998, the case went to trial before a jury on the remaining counts. At the close of the government's case, defendant moved

for a judgment of acquittal, which the court denied (R. 61; Rec. 10-91 to 95).

On December 3, 1998, the jury found defendant guilty on Counts 2 (bribery), 3 (fraud), and 5 (deprivation of rights) (R. 62). The jury did not reach a verdict on Count 1 (bribery), and the court declared a mistrial on that count (R. 62, 71).

On September 16, 1999, the court sentenced defendant to 189 months' imprisonment on each of Counts 2 and 3, and 120 months' imprisonment on Count 5, with the sentences to run concurrently (R. 86). Defendant was also sentenced to three years of supervised release on each count, also to run concurrently. The court waived imposition of a fine, but assessed a total of \$300 in special assessments (R. 86).

2. On September 17, 1999, defendant filed a notice of appeal (R. 91). At that time, however, the district court had not entered a final judgment. On the same day that the district court issued its sentence, it realized that it "misspoke" in sentencing defendant to 189 months' imprisonment on each of Counts 2 and 3, since the statutory maximum for each count is 180 months. See generally Br. 10-11; Rec. 13-2. The court attempted to reach the attorneys to correct the sentence, but they had already departed. The court set a new hearing for November 15, 1999, to modify the sentence (R. 87). At that hearing, the defendant asserted that the court did not have jurisdiction to correct the sentence because more than seven days had elapsed from sentencing (Rec. 13-4 to 7). See Fed. R. Crim. P. 35(c). The court asked for briefing on this issue and set another hearing (R. 13-9).

On December 7, 1999, the court held another re-sentencing hearing (R. 102). In view of concerns that pursuant to Fed. R. Crim. P. 35(c) the court no longer had jurisdiction to correct the sentence, the court declined to re-sentence defendant and instructed the defendant to pursue the appeals process (R. 102; 2nd Supp. Rec. 4-2 to 19). For the same reason, the court stated that at that point it would not sign the judgment but would let this Court determine how the case should proceed (2nd Supp. Rec. 4-8, 10, 12).

On April 4, 2000, this Court issued an order stating that the notice of appeal was premature because it was filed before the entry of final judgment (Supp. Rec. 1-114). The Court remanded the case to the district court with instructions for that court to sign and enter judgment (Supp. Rec. 1-114). On April 20, 2000, the district court entered final judgment (R. 115; Supp. Rec. 1-115).

B. Facts

In this appeal, defendant challenges only his conviction and sentence on Count 3 of the indictment, and his sentence on Count 2 of the indictment. He does not challenge his conviction on Count 2 for violating 18 U.S.C. 201(b)(2),³ or his conviction on Count 5 for violating 18 U.S.C. 242 or the sentence of 120 months'

³Defendant's conviction on Count 2 arose out his sale of immigration documents to undercover agents of the Department of Justice's Office of Inspector General. See generally Br. 5-6.

imprisonment on that count.⁴ As a result, we briefly summarize the facts only as they relate to Count 3 of the indictment.

Defendant's conviction on Count 3 for transferring a City of Laredo Birth Registration Card knowing that the card was stolen or produced without lawful authority stemmed from an undercover operation. Sergio Amar, acting as an agent of the Department of Justice's Office of Inspector General, met defendant at a motel in Laredo, Texas, posing as a Mexican national in need of documents to remain in the United States (Rec. 9-6 to 8). During a lengthy conversation concerning various documents, defendant suggested that an American birth certificate was the agent's best option (Rec. 9-10). Ultimately, defendant sold a City of Laredo Birth Registration Card (Gov. Ex. 7) in the name of a deceased person to the undercover agent for \$625 (Rec. 9-21; Rec. 11-78). Agent Amar was wired for audiotaping during the transaction and was videotaped (Rec. 9-11, 16). During their conversations, defendant spoke at length with Agent Amar about how to deal with immigration officers to get through the border (Rec. 11-90).

⁴As defendant's own brief explains (Br. 7-8), the conviction for violating 18 U.S.C. 242 arose out of defendant's sexual assault of a woman he interviewed at the Laredo port of entry. The victim was in possession of a social security card and birth certificate that she admitted did not belong to her. Defendant told her she could have her papers back if she had sexual relations with him, and when she protested he gave her the choice of going to jail or having sex with him. Defendant ultimately sexually assaulted the woman at a motel. At trial, defendant maintained that the sexual encounter was consensual (Rec. 10-47 to 53).

Transcripts of the conversations were introduced as evidence at trial (Rec. 8-38; see Gov. Ex. 6aT.1, 6aT.2). See generally Br. 6-9.⁵

SUMMARY OF THE ARGUMENT

1. We agree that the sentences imposed on Counts 2 and 3 exceed the statutory maximum and, therefore, that defendant must be re-sentenced on those counts. The district court recognized its mistake in imposing the 189-month sentences on these counts, but also concluded that it lacked jurisdiction to correct the sentences.

2. The jury instructions on Count 3 referring to an “identification document,” and not to the “City of Laredo Birth Registration Card” referred to in the indictment, did not permit the jury to convict the defendant on a factual basis that modified an essential element of the offense charged. The record as a whole reflects that defendant and his counsel understood at trial that under Count 3 the government was prosecuting defendant for selling the “City of Laredo Birth Registration Card” expressly cited in the indictment, and that was presented to the jury as Government Exhibit 7. Even though the language used in the jury instructions may not have accurately described the City of Laredo Birth Registration Card (using the broader term “identification document”), the jury was well aware that it was to determine whether defendant unlawfully transferred that

⁵At trial, defendant asserted that he knew the “buyer” was a law enforcement agent and that he pretended to sell the document because he wanted to expose corruption by other INS personnel (Rec. 11-40 to 45, 79, 145-146).

(and only that) card. Accordingly, any error in the jury instructions, to which defendant did not object, and any variance between the indictment and the jury instructions, was harmless and did not result in a “grave miscarriage of justice.”

3. The evidence was sufficient to establish that, under Count 3, the transfer to an undercover agent of the City of Laredo Birth Registration Card was “in or affect[ed] interstate or foreign commerce” within the meaning of 18 U.S.C. 1028(c)(3)(A). The legislative history of the statute makes clear that this provision was intended to provide “broad federal jurisdiction” and requires only “a minimal nexus with interstate or foreign commerce.” The record reflects that defendant sold the birth registration card for the purpose of permitting the buyer to travel between Mexico and the United States, and well as to other states within the United States. For example, the transcripts of the undercover purchase of the birth registration card show that there was an extensive discussion of how the card should be used, and how the agent should behave at the border with the card, to facilitate his movement across the border. The transcripts also indicate that they discussed the agent’s traveling to other states within the United States. This evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that the transfer of the City of Laredo Birth Registration Card was intended to affect interstate or foreign commerce.

ARGUMENT

I

THE SENTENCES IMPOSED ON COUNTS 2 AND 3 EXCEED THE
STATUTORY MAXIMUM; THEREFORE, DEFENDANT MUST BE
RE-SENTENCED ON THOSE COUNTS

Defendant argues (Br. 15-16) that the 189-month sentences the district court imposed on each of Counts 2 and 3 exceed the statutory maximums for those offenses, and, therefore, this Court must vacate the sentences and remand for re-sentencing. We agree. Both 18 U.S.C. 201(b)(2) (Count 2) and 18 U.S.C. 1028(a)(2) (Count 3) have a 15-year (180-months) maximum sentence.⁶ As discussed above (pp. 4-5), the district court recognized its mistake in imposing 189-month sentences on these counts, but ultimately concluded that it lacked the power to correct the sentences. This Court should vacate the sentences on these counts and remand the case for re-sentencing.

⁶18 U.S.C. 1028(a)(2) has a maximum 15-year penalty where the identification document involved is, among other documents, a birth certificate. See 18 U.S.C. 1028(b)(1)(A)(ii) (15-year sentence where document is a “birth certificate, or a driver’s license or personal identification card”). See Issue II, *infra*, addressing nature of the identification document at issue in this case.

II

THE JURY INSTRUCTIONS ON COUNT 3 DID NOT PERMIT THE
JURY TO CONVICT THE DEFENDANT ON A FACTUAL BASIS
THAT MODIFIED AN ESSENTIAL ELEMENT OF THE OFFENSE
CHARGED IN THE INDICTMENT

Defendant argues (Br. 17-26) that his conviction on Count 3 for violating 18 U.S.C. 1028(a)(2) must be reversed because although he was indicted and sentenced for the unlawful transfer of a “personal identification card, that is a City of Laredo Birth Registration Card” (see R.E. 2), the jury was instructed that it must find that defendant transferred an “identification document” (R.E. 6). A “personal identification card” (defined in 18 U.S.C. 1028(d)(4)), and a birth certificate, are two kinds of “identification document[s]” (defined in 18 U.S.C. 1028(d)(2)). Under the statute, the unlawful transfer of a “personal identification card” or a birth certificate has a longer maximum penalty (15 years) than the unlawful transfer of other, non-specifically identified “identification document[s]” (3 years). As noted above (p. 4), defendant was sentenced to 189 months on Count 3. Although defendant did not object to the jury instructions during trial (see Br. 17), he now argues that in these circumstances the conviction must be reversed because: (1) the jury was not instructed that it must find an essential element of the offense for which he was indicted and sentenced, *i.e.*, that the document was one of the specific types subject to the 15-year maximum penalty (Br. 17-23); and (2) the jury instructions as given (referring only to an “identification document”) constructively

amended the indictment by referring to a broader class of documents than the actual one transferred (and for which the higher penalty applies) (Br. 24-26).

Since defendant did not object to the jury charge, it is reviewed for plain error. Thus, the question is whether, “considering the entire charge and evidence presented against the defendant, there is a likelihood of a grave miscarriage of justice.” *United States v. Estrada-Fernandez*, 150 F.3d 491, 495 (5th Cir. 1998) (citation omitted). Since, viewing the record as a whole, there is no possibility that the jury instructions allowed the jury to convict for an offense different from that charged in Count 3 of the indictment – *i.e.*, the unlawful transfer of a specific City of Laredo Birth Registration Card – any error in the jury instruction was harmless.

1. Section 1028(a)(2) of Title 18 makes unlawful the transfer in certain circumstances of an “identification document.” An “identification document” is defined to mean a document issued by some governmental agency that is “intended or commonly accepted for the purpose of identification of individuals.” 18 U.S.C. 1028(d)(2). Under the statute, the penalties for a violation of Subsection (a)(2) depend in part on the type of “identification document” involved. If the “identification document” is “a birth certificate, or a driver’s license or personal identification card” the maximum penalty is 15 years. 18 U.S.C. 1028(b)(1)(A)(ii). For other types of “identification documents” not specifically noted, the maximum penalty is three years. 18 U.S.C. 1028(b)(2)(A). See generally H.R. Rep. 802, 97th Cong., 2d Sess. 12-13 (1982) (discussing levels of penalties). Although the terms “birth certificate” and “driver’s license” are not defined, the term “personal

identification card” is defined to mean “an identification document issued by a State or local government solely for the purpose of identification.” 18 U.S.C. 1028(d)(4). The legislative history indicates that a “personal identification card” referred to a document akin to a driver’s license, but issued to non-drivers for the sole purpose of identifying the bearer. H.R. Rep. 802, 97th Cong., 2d Sess. 12 (1982).

Count 3 of the indictment charged defendant with the unlawful transfer of “a personal identification card, that is a City of Laredo Birth Registration Card” (R.E. 2). We acknowledge that this characterization of the City of Laredo Birth Registration Card as a “personal identification card” is inaccurate, at least as that term is defined in the statute and characterized in the legislative history. Under the statute, these are two different types of documents (although both subject a defendant to the same 15-year maximum penalty).

Nevertheless, the indictment more specifically charged defendant with the unlawful transfer of a “City of Laredo Birth Registration Card,” and the transfer of that specific document in an undercover sale to INS Agent Amar was the crux of Count 3, as was repeatedly made clear at trial. The City of Laredo Birth Registration Card was introduced at trial as Government Exhibit 7, and Agent Amar testified at trial that this was the document he purchased from defendant (Rec. 9-26 to 27, 42). Indeed, defendant acknowledges (Br. 21) that the evidence showed that he “transferred the City of Laredo birth registration card in Government Exhibit 7 to [Agent] Amar.”

The Birth Registration Card says on its face that it is a “true certification of birth facts as recorded in this office” (Gov. Ex. 7). Throughout Agent Amar’s testimony, this document is variously referred by counsel and Amar as a “birth certificate,” “resident birth certificate card,” “birth card,” “birth registration card,” and “birth certificate card” (Rec. 9-26 to 40). When defendant testified, he also referred to the card as a “birth certificate” (Rec. 11-90, 107).⁷ There is no question, then, that counsel and the defendant understood that the Count 3 was directed to defendant’s sale of this City of Laredo Birth Registration Card, as stated in the indictment, and to which, as a birth certificate, the maximum penalty of 15 years applied. Indeed, in its opening statement the government stated that this count related to the “selling of a false identification document, * * * [a]nd by an ‘identification document’ we mean a document that you would use to identify yourself, such as a driver’s license or birth certificate or, in this case, a birth registration card” (Rec. 8-44). Thus, although the government may not have consistently used the same description to characterize the document, or always used entirely accurate language, the government made clear – and defendant

⁷See also Rec. 11-41 (defendant acknowledges that Government Exhibit 7 was the “birth registration card” that was discussed in the videotape of his discussions with Agent Amar); Rec. 11-78 (defendant acknowledges that the videotape reflects that he sold a “Laredo birth registration card” for \$625).

clearly recognized⁸ – that this count related to the sale of the City of Laredo Birth Registration Card introduced as Government Exhibit 7.

2. It is plain that the jury must find the defendant guilty of every element of the crime charged, including those that allow extra punishment. See, e.g., *United States v. Nunez*, 180 F.3d 227, 233-234 (5th Cir. 1999). This Court has also made clear that a defendant cannot be tried on charges not made in the indictment against him, and that reversal is required if there is a modification at trial of the elements of the crime charged. *Nunez*, 180 F.3d at 230-231; *United States v. Holley*, 23 F.3d 902, 912 (5th Cir.), cert. denied, 513 U.S. 1043 (1994). That does not mean, however, that all differences between the indictment and the jury charge require reversal. The Court has made clear that it will reverse “only if that difference allows the defendant to be convicted of a separate crime from the one for which he was indicted.” *Nunez*, 180 F.3d at 231; see also *United States v. Trice*, 823 F.2d 80, 91 (5th Cir. 1987). Otherwise, the Court explained, defendant “will have to show how the variance in the language between the jury charge and the indictment so severely prejudiced his defense that it requires reversal under harmless error review.” *Nunez*, 180 F.3d at 231. Thus, the ultimate question is whether the conviction “rest[s] upon a set of facts distinctly different from that set forth in the indictment,” *United States v. Young*, 730 F.2d 221, 223 (5th Cir. 1984), or, put

⁸As we have noted (note 5, *supra*), defendant has not asserted in this case that he did not do the acts charged in the indictment. Rather, he claims he did the acts with lawful intent.

another way, whether defendant is “apprised by the indictment of the particular theory he will have to counter at trial and [whether] the jury is permitted to convict on a basis broader than that charged in the grand jury’s indictment,” *United States v. Doucet*, 994 F.2d 169, 172 (5th Cir. 1993).

In the instant case, in view of record as a whole, the fact that the jury instructions refer to only an “identification document” – and not specifically to the “City of Laredo Birth Registration Card” – does not mean that the jury could have convicted the defendant of a crime separate from the one for which he was indicted (or a crime with a lesser penalty under the statute). As noted above, defendant, his counsel, and the government all understood at trial that under Count 3 defendant was being prosecuted for selling the City of Laredo Birth Registration Card – the card that is expressly cited in the indictment and that was presented to the jury as Government Exhibit 7.⁹ That document, repeatedly referred to as a birth certificate, is one of the documents to which the 15-year penalty applies. Indeed, no one appears to have disputed this at trial or at sentencing. Of course, had defendant objected to the jury instructions at trial on the basis that they did not accurately describe the City of Laredo Birth Registration Card, the instructions could have easily been corrected. In any event, the jury was well-aware that it was

⁹The record reflects that the jury had the exhibits with them during their deliberations (Rec. 11-182 to 183). In addition, we note that in his closing argument defendant’s attorney referred to the document as a “birth certificate” (Rec. 11-145). The government’s closing argument referred to the document as an “identification document” (Rec. 11-134).

to determine with respect to Count 3 whether defendant unlawfully transferred the City of Laredo Birth Registration Card introduced as Government Exhibit 7.¹⁰

This Court's decision in *United States v. Robles-Vertiz*, 155 F.3d 725, 727-729 (5th Cir. 1998), is analogous. In that case, the Court held that the government did not impermissibly constructively amend the indictment where the indictment charged the defendant with illegally transporting an alien of a specific name, but the evidence at trial showed he had transported a woman with a different (but similar) name. The Court explained that if "the indictment contained an accurate description of the crime, and that crime was prosecuted at trial, there is no constructive amendment." *Id.* at 728 (internal quotation marks omitted). The Court distinguished other cases that "illustrate[d] that the government may not obtain an indictment alleging certain material elements or facts of the crime, then seek a conviction on the basis of a different set of elements or facts." *Ibid.* Thus, the "key inquiry is whether the defendant was convicted of the same conduct for which he was indicted." *Id.* at 729. The Court concluded that the error in the

¹⁰The trial judge emphasized in the jury instructions that the indictment was the formal charge against the defendant (Rec. 11- 170), and that the "defendant is not on trial for any act, conduct or offense not alleged in the indictment" (Rec. 11-175). The jurors had a copy of the indictment with them during their deliberations (Rec. 11-186). In *Holley*, this Court, in rejecting the argument that the jury instructions resulted in a constructive amendment of the indictment, emphasized that the court instructed the jury that it was to consider only the crime that was charged in the indictment, and that the jury was given a copy of the indictment for use during its deliberations. 23 F.3d at 912.

indictment was analogous to a spelling error that constituted a “harmless * * * variance.” *Ibid.* In language equally applicable here with respect to the City of Laredo Birth Registration Card, the Court emphasized that the defendant “could not have been confused as to the events that formed the basis for the indictment, nor has he shown how the error hampered him in preparing a defense. He was aware of which person the government intended to identify in the indictment, and of the precise set of facts that formed the basis of the charge.” *Ibid.*

Thus, in light of the record as a whole, any error in the jury instructions was harmless. In view of the evidence presented, the jury necessarily found beyond a reasonable doubt the element of the offense set forth in the indictment that mandated the longer maximum sentence – *viz.*, that the document transferred was the City of Laredo Birth Registration Card. For this reason as well, and since the indictment specifically referred to the City of Laredo Birth Registration Card, the jury instructions did not “constructively amend” the indictment. In sum, the record is clear that even though the jury instructions may not have accurately described the City of Laredo Birth Registration Card,¹¹ the instructions did not permit the jury to convict for an offense different from that charged in the indictment or prosecuted at trial, and thus there is no “grave miscarriage of justice.”

¹¹Of course, the City of Laredo Birth Registration Card is one type of “identification document,” so the jury instructions did not entirely mis-describe the document at issue.

III

THE EVIDENCE IS SUFFICIENT TO ESTABLISH THAT DEFENDANT'S
TRANSFER OF THE CITY OF LAREDO BIRTH REGISTRATION CARD
WAS IN "OR AFFECT[ED] INTERSTATE OR FOREIGN COMMERCE"

Defendant argues (Br. 27-32) that the evidence was insufficient to establish that the sale of the City of Laredo Birth Registration Card to the undercover INS agent constituted a transfer of the card that was "in or affect[ed] interstate or foreign commerce." 18 U.S.C. 1028(c)(3)(A). Defendant asserts that the "transfer of the document * * * was merely intrastate" (Br. 29), there was no evidence the card ever traveled in interstate commerce (Br. 30), and the government did not prove that the transfer of the card to the agent "had a potential impact on interstate commerce" (Br. 31). Since the record reflects that defendant sold the City of Laredo Birth Registration Card for the purpose of permitting the buyer to travel between Mexico and the United States, and well as to other states in the United States, this argument is meritless.

Sections 1028(a)(2) & (c)(3)(A) of Title 18, as relevant in this case, make it unlawful to "transfer[]" an identification document "knowing that such document was stolen or produced without lawful authority," where the transfer of the document "is in or *affects* interstate or foreign commerce" (emphasis added). As defendant acknowledges (Br. 29), the legislative history of the statute makes clear that this provision was intended to provide "broad Federal jurisdiction" and requires only "a minimal nexus with interstate or foreign commerce." H.R. Rep. 802, 97th Cong. , 2d Sess. 14 (1982); *United States v. Pearce*, 65 F.3d 22, 25 (4th

Cir. 1995). Transfer of a document that is intended to be used in interstate or foreign commerce meets this minimal nexus requirement. *Pearce*, 65 F.3d at 25; *United States v. Gros*, 824 F.2d 1487, 1494-1496 (6th Cir. 1987). This nexus is also met if the evidence shows that the defendant had the intent to do acts which, if complete, would have affected interstate commerce. *Pearce*, 65 F.3d at 25; *Gros*, 824 F.2d at 1494-1496.

In evaluating the sufficiency of the evidence the issue is whether, viewing the evidence in the light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Dean*, 59 F.3d 1479, 1484 (5th Cir. 1995), cert. denied, 516 U.S. 1064 (1996); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In this case, there was sufficient evidence for the jury to conclude that the transfer of the document by defendant to the undercover INS agent was intended to affect interstate or foreign commerce.¹² The transcripts of the undercover purchase of the City of Laredo Birth Registration Card show, for example, that there was an

¹²At the close of the government's evidence, defendant moved for acquittal, arguing with respect to Count 3 that there was insufficient evidence that the transfer of the document affected interstate or foreign commerce (Rec. 10-91 to 92). The government responded that the testimony showed that the "birth registration card is used by persons who are coming across the border to identify themselves as United States citizens, and that they then use that to travel within the United States, to identify themselves as citizens" (Rec. 10-94). The court denied the motion, noting that it agreed with the government's view of the record (Rec. 10-95).

extensive discussion of how the card should be used, and how the agent should behave at the border with the card, to facilitate his movement across the border. See, *e.g.*, Gov. Ex. 6aT.1 at 39-41; Gov. Ex. 6aT.2 at 44-46, 49, 60-66, 77-78. Indeed, defendant admits (Br. 32) that the evidence shows that he transferred the document to the INS agent for the purpose “of crossing the border between the United States and Mexico” (although defendant, consistent with his defense of this count, see note 5, *supra*, calls it the “feigned purpose”). The transcripts also indicate that they discussed the agent’s traveling to other states within the United States. See Gov. Ex. 6aT.2 at 69.

Further, Agent Amar testified at trial that most of the money he was paying for the card was for “training” on how to get across the border (Rec. 9-28). The defendant also testified that at the time he gave the agent the birth certificate he told the agent how to get through the border crossing (Rec. 11-89 to 90). Defendant also acknowledged that they spent a lot of time talking about how to get through the border, and that the birth certificate was something that could be used to get back and forth from Mexico because it proved the person was a United States citizen (Rec. 11-90). Finally, the government presented evidence from an INS agent that the kind of birth registration card sold in this case was the kind of document seen with regularity at the port of entry, and that because it indicates the person is a United States citizen it permits the person to pass freely across the border between the United States and Mexico (Rec. 8-84 to 85).

This evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that the transfer of the City of Laredo Birth Registration Card was intended to affect interstate or foreign commerce.¹³ Indeed, the very purpose of the transaction was for the “buyer” (Agent Amar) to obtain an identification document that would show he was a United States citizen and therefore permit and facilitate his travel across the border with Mexico and within the United States. Accordingly, the government satisfied the jurisdictional element set forth in 18

¹³The trio of recent Supreme Court decisions cited by defendant (Br. 30) are not relevant to the application of 18 U.S.C. 1028's jurisdictional nexus to the facts of this case, or to the conclusion that this jurisdictional nexus was met because the intended use of the birth registration card would have affected interstate and foreign commerce. *Jones v. United States*, 120 S. Ct. 1904 (2000), addressed whether a private residence not used for a commercial purpose is a property “used in” a commerce-affecting activity within the meaning of the 18 U.S.C. 844(i). The two other cases addressed whether the statute itself was a valid exercise of Congress’s Commerce Clause power, and, unlike in the instant case, in both cases the statute did not contain a jurisdictional element. See *United States v. Morrison*, 120 S. Ct. 1740 (2000) (addressing whether civil remedy provision of the Violence Against Women Act, 42 U.S.C. 13981, was a valid exercise of Congress’s Commerce Clause power to regulate activities that “substantially affect” interstate commerce); *United States v. Lopez*, 514 U.S. 549 (1995) (addressing whether Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q), was a valid exercise of Congress’s Commerce Clause power to regulate activities that “substantially affect” interstate commerce). As the Court recognized in *Morrison* and *Lopez*, a jurisdictional element acts to limit the statute to a discrete set of cases where the conduct at issue – here, the transfer of an identification document (the City of Laredo Birth Registration Card) – has an “explicit connection” to interstate or foreign commerce. *Morrison*, 120 S. Ct. at 1750-1751; *Lopez*, 514 U.S. at 562. As we have noted, the facts in this case plainly establish that requisite connection.

U.S.C. 1028(c)(3)(A).¹⁴

CONCLUSION

The judgment of the district court with respect to the sentences imposed on Counts 2 and 3 should be vacated and the case remanded for re-sentencing. The judgment of the district court with respect to the conviction on Count 3 should be affirmed. As we have noted, defendant does not challenge his conviction on Count 2 of the indictment, or his conviction and sentence on Count 5 of the indictment.

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¹⁴Since the record makes clear that the sale of the City of Laredo Birth Registration Card had a potential affect on foreign or interstate commerce, defendant's assertions that the transfer of the document was intrastate, and that there was no evidence that the card itself ever traveled in interstate commerce, are irrelevant. In any event, see generally *United States v. Jackson*, 155 F.3d 942, 946-947 (8th Cir.) (rejecting argument that documents themselves must have traveled in interstate commerce), cert. denied, 525 U.S. 1059 (1998); and *United States v. Gros*, 824 F.2d at 1494-1496 (jury instruction that the prohibited act need not be contemporaneous with the movement in or effect upon interstate commerce not improper).

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2000, two copies of the Brief for the United States as Appellee were served by first-class mail, postage prepaid, on the following counsel of record:

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