

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 21 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 18-10174

Plaintiff-Appellee,

D.C. No.

3:16-cr-00006-MMD-VPC-1

v.

DEL HARDY, Esquire, AKA Delmar L.
Hardy,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

Argued and Submitted March 13, 2019
San Francisco, California

Before: M. SMITH, WATFORD, and HURWITZ, Circuit Judges.

Delmar Hardy was convicted under 26 U.S.C. § 7206(1) of three counts of willfully filing false tax returns. We have jurisdiction of this appeal under 28 U.S.C. § 1291 and affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. “Good faith reliance on a qualified accountant has long been a defense to willfulness in cases of tax fraud and evasion.” *United States v. Bishop*, 291 F.3d 1100, 1106 (9th Cir. 2002). We have made clear, however, that if “the trial court adequately instructs on specific intent, the failure to give an additional instruction on good faith reliance upon expert advice is not reversible error.” *United States v. Dorotich*, 900 F.2d 192, 194 (9th Cir. 1990) (internal quotation marks and citation omitted). The district court adequately instructed the jury on specific intent, telling it that the government was required to prove both specific intent and that Hardy did not have a good faith belief that he was complying with the law. The district court therefore did not abuse its discretion by declining to give Hardy’s requested instruction about reliance on the advice of an accountant.

2. The district court did not abuse its discretion in giving a deliberate ignorance instruction. *See United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc). The instruction was appropriate in light of evidence that Hardy instructed his office manager to account for cash receipts in a different manner than other payments and did not direct her to send cash receipt records to his accountant. Moreover, although Hardy claimed not to pay attention to his tax returns, his accountant testified that he closely monitored his return’s description of a closely held corporation.

3. The court did not abuse its discretion in admitting evidence of Hardy's expenditures and claimed income during the tax years at issue as evidence of his awareness of underreporting of income. *See United States v. Marabelles*, 724 F.2d 1374, 1379 (9th Cir. 1984) (“Although direct proof of a taxpayer’s intent to evade taxes is rarely available, willfulness may be inferred by the trier of fact from all the facts and circumstances of the attempted understatement of tax.”).

4. The district court also did not abuse its discretion in excluding expert evidence that accurate tax returns would still have resulted in relatively low liability for Hardy. An absence of tax liability is not a defense to false reporting. *See United States v. Marashi*, 913 F.2d 724, 736 (9th Cir. 1990) (“A violation of 26 U.S.C. § 7206(1) is complete when a taxpayer files a return which he does not believe to be true and correct as to every material matter.”) (internal quotation marks omitted).

5. The district court did not abuse its discretion in denying a new trial after its post-verdict dismissal, at the government’s request, of Hardy’s conviction for one count of corruptly endeavoring to obstruct the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a). The court appropriately rejected Hardy’s argument that “spillover” evidence from the dismissed count tainted the convictions on the false tax return counts. *See United States v. Lazarenko*, 564 F.3d 1026, 1043–44 (9th Cir. 2009) (listing relevant factors). The court’s instructions—a “critical factor,” *id.* at 1043—delineated the different elements of each charged

offense. And, the jury, although returning guilty verdicts on four of the counts in the indictment, acquitted on the remaining count. “The fact that the jury rendered selective verdicts is highly indicative of its ability to compartmentalize the evidence.” *United States v. Cuzzo*, 962 F.2d 945, 950 (9th Cir. 1992).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

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95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Form 10. Bill of Costs**

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

9th Cir. Case Number(s)

Case Name

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

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