249 F.3d 529, RICO Bus.Disp.Guide 10,070, 2001 Fed.App. 0146P
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United States Court of Appeals,
Sixth Circuit.
UNITED STATES of America, Plaintiff–Appellee,
v.
Jeffrey RIDDLE (99–3405); Lavance Turnage (99–3406); Bernard Altshuler (99–3439), Defendants–Appellants.

Nos. 99–3405, 99–3406 and 99–3439.
Argued Feb. 1, 2001.
Decided and Filed May 4, 2001.

OPINION

ALAN E. NORRIS, Circuit Judge.

Defendants Bernard Altshuler, Jeffrey Riddle, and Lavance Turnage were convicted by a jury of RICO, RICO conspiracy (18 U.S.C. § 1962(c) & (d)), and conducting an illegal gambling business (18 U.S.C. § 1955), and Riddle and Turnage of committing a violent crime in furtherance of racketeering (18 U.S.C. § 1959). They appeal on several grounds. They argue that the district court erred when it permitted them to be absent during voir dire, and they attack their RICO and violent crime convictions on the grounds that there was an insufficient connection with interstate commerce. They also claim that the evidence was insufficient to support certain counts against them and that the district court erred when it allowed the testimony of a witness after the government had concluded a plea bargain with him, when it did not give a conspiracy withdrawal jury instruction, and when it sentenced them without presentence reports. We affirm the district court.

Because resolution of defendants' issues concerning their voir dire absence and the interstate commerce requirements may have precedential value, those issues will be addressed below. The remaining issues raised by defendants are addressed in an unpublished appendix to this opinion.

***532 I.**

This is a case about three actors in the Lenine Strollo branch of La Cosa Nostra (LCN) in Youngstown, Ohio. Strollo ran several types of gambling in the enterprise, including a numbers lottery and dice games, some of which were played after-hours at several establishments, mainly Sharkey's; Jeff, Butch, and Jeff's; and the Greek Coffee House. These games had operated in Campbell, Ohio, since at least the 1950s, and Strollo became more involved as his political influence in the community grew, until he gained sole control after his release from prison in 1991.

Strollo came to rely on defendant Altshuler and another associate named Lawrence Garono in the gambling enterprise. Altshuler ran or supervised most dice games and "stag" parties (games to raise money for a particular cause or event) when he was not in prison, and in the mid 1990s when he was released from prison, Altshuler took control of the ailing gambling business, in part because he suggested he would be able to attract African American drug dealers to the tables. To assist him, Altshuler recruited Riddle and Turnage, who were accepted in the drug dealing community. Together they converted Sharkey's into a nightclub with a craps game, but the undertaking failed. They had more success with gambling at the restaurant called Jeff, Butch, and Jeff's.

While Strollo built his business, Ernie Biondillo, as a self-designated successor to Strollo's murdered rival, began to conduct gaming events. Strollo felt that he was not getting his fair share, and he decided to kill Biondillo, delegating the task to Garono and then to Altshuler, who gave the job to Riddle. Riddle in turn involved Turnage. Riddle, Turnage, and another associate, George Wilkins, surveilled Biondillo and set out one day with guns to kill him; their efforts came to naught when they could not find Biondillo. Riddle subsequently decided he should not be present at the shooting and found a substitute; Turnage, Wilkins, and the substitute met on June 3, 1996, blocked off Biondillo's car, and shot and killed him.

Members of the enterprise had been enjoying a certain amount of protection from the Mahoning County prosecutor, who unexpectedly lost the election in 1996 to a former police officer named Paul Gains. In light of several pending cases against enterprise members, including a case against Turnage, Strollo's contact with the prosecutor's office stated that the only solution was to kill Gains before he assumed office.

Strollo passed the word on to Altshuler, who replied, "We'll take care of it." Riddle enlisted Turnage and Wilkins, and in October 1996, the trio went to find Gains at a restaurant in Youngstown to kill him; they had to abandon their plan, however, when they found the area full of police. Turnage gave up on having his case fixed, pleaded guilty to robbery, and went to jail. Riddle then recruited two other men to kill Gains, but they bungled the attempt, leaving Gains wounded but alive.

On December 10, 1997, the government filed an indictment against Strollo and nineteen of his associates, later replaced by a superseding indictment against thirteen defendants. The indictment charged Altshuler, Riddle, and Turnage with violations of 18 U.S.C. § 1962(c) and (d) (RICO) and § 1955 (illegal gambling business), and Riddle and Turnage with violation of 18 U.S.C. § 1959 (violent crime in aid of racketeering).

On December 2, 1998, in a pretrial conference, the parties requested the use of a juror questionnaire. The government asked for an anonymous jury, and Strollo's counsel asked that all potential jurors be ***533** questioned individually in the court's chambers. The court noted that United States Marshals would have to accompany defendants wherever they went, and the Marshals' presence in the court's chambers might prejudice defendants by suggesting to potential jurors that defendants were dangerous. Counsel responded that it would be in defendants' interest to waive their right to be present in order to preserve the benefit of individual questioning without the potential prejudice of the Marshals' security. The court agreed and instructed the lawyers to tell the court in writing by January 7, 1999, if the defendants objected to this procedure. There were no objections, and at a February 11, 1999, meeting, defense counsel discussed the proposed voir dire procedure with their clients, at the court's request, in a holding cell and reported to the court that defendants wished to proceed as agreed. The court issued a written order confirming the waiver.

The prospective jurors then completed under oath a questionnaire of forty-six pages, developed with the input of defense counsel. Counsel agreed to strike a total of sixty-six jurors for cause on the basis of the questionnaires, which were available to defendants during the screening process.

On February 23, 1999, the court began individually questioning the remaining jurors in chambers, one by one, with defense counsel present; the individual voir dire process lasted for three days. Defendants were present in the courthouse on the morning of February 23, but at the start of the afternoon session on that day, defense counsel indicated to the court that defendants requested permission to return to jail until the final stages of the jury selection process. The court, after confirming with counsel defendants' waiver of their right to be in the courthouse, granted defendants' request. On March 1, defendants returned to the courtroom for the exercise of peremptory challenges. These challenges were exercised in side-bar conferences in the open courtroom, where defendants were present.

During the screening of the jurors, the government had concluded a plea agreement with Strollo that gave him twelve to fifteen years in prison in exchange for his testimony against the others, and dropped a forfeiture charge in the amount of ten million dollars, plus various properties. The trial began on March 1, 1999, and Strollo fulfilled his bargain by testifying. On March 12, 1999, Altshuler, Riddle, and Turnage were convicted on all counts and sentenced to life imprisonment. After the jury verdict, the court did not order a presentence report, stating that it had adequate information already from previous proceedings. The court offered to sentence the defendants the following week, but defense counsel agreed to do the sentencing that day. The court gave the counsel time to get the defendants' consent to the sentencing procedure, and counsel made no objections. Defendants were sentenced to life imprisonment without release, with a five-year sentence for illegal gambling to run concurrently. Defendants appeal their convictions and sentences.

* * * *

B. Interstate Commerce

Altshuler and Riddle claim that several counts of their conviction should be reversed because the government did not sufficiently establish a link with interstate commerce. Specifically, they argue that the court lacked subject matter jurisdiction to convict them under 18 U.S.C. § 1962 (RICO) and 18 U.S.C. § 1955 (gambling), and Riddle under 18 U.S.C. § 1959 (violence in furtherance of racketeering) [FN1] because the government did not show a substantial effect on interstate commerce. Defendants raise their interstate

commerce argument for the first time on appeal. The claim may only be reviewed for plain error. *See United States v. Gaydos*, 108 F.3d 505, 509 (3d Cir.1997) (reviewing for plain error the claim that the evidence was insufficient to establish a connection to interstate commerce in an explosives case).

> FN1. Altshuler was not convicted under 18 U.S.C. § 1959.

Defendants err in asserting that the interstate commerce argument goes to the court's subject matter jurisdiction. ***536** This court has explained that the interstate commerce requirement, while referred to as a "jurisdictional" element, does not affect subject matter jurisdiction, that is, the court's power to hear a case. Rather, a claim of an insufficient connection to interstate commerce is a challenge to one of the elements of the government's case and is therefore considered a claim about the sufficiency of the evidence. *See United States v. Degan*, 229 F.3d 553, 556 (6th Cir.2000) (explaining that defendant's challenge to an interstate commerce nexus in a conviction under 18 U.S.C. § 1958(a) (murder for hire) had no effect on subject matter jurisdiction but was a claim about the sufficiency of the evidence); *United States v. Martin*, 147 F.3d 529, 531–32 (7th Cir.1998) (stating that a challenge to 18 U.S.C. § 844(i)'s interstate commerce element did not affect subject matter jurisdiction). Defendants' claim is therefore best understood as a facial challenge to the constitutionality of §§ 1959 and 1955 and an as-applied challenge to the sufficiency of the government's evidence in the §§ 1959 and 1962 convictions.

In attacking the statutes, defendants rely on the Supreme Court's opinion in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), which invalidated the Gun Free School Zones Act (18 U.S.C. § 922(q) (1994)) because Congress had insufficiently established a connection with interstate commerce. There, the Supreme Court identified three categories of activities that Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce." *Id.* at 558–59, 115 S.Ct. 1624 (citation omitted). The statute in *Lopez* fell into the third category, and the Court determined that activities regulated within this category had to "substantially affect" interstate commerce. *Id.* at 559, 115 S.Ct. 1624. The statute at issue did not survive constitutional scrutiny for two reasons: it was a criminal statute that had nothing to do with commerce, and it lacked a "jurisdictional element which would ensure, through case-by-case inquiry, that the [activity] in question affects interstate commerce." *Id.* at 561, 115 S.Ct. 1624.

1. 18 U.S.C. § 1962 (RICO) (Altshuler and Riddle)

Altshuler and Riddle argue that their RICO convictions under 18 U.S.C. § 1962(c) and (d) were invalid because the government was obliged under *Lopez* to show a substantial effect on interstate commerce, and it failed to do so, alleging only an intrastate enterprise. Section 1962(c) states that

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). Subsection (d) makes it a crime to conspire to violate (c). Because the statute contains a jurisdictional requirement (the enterprise must be engaged in or affect commerce), it is not controlled by *Lopez*, and, according to the Supreme Court, when a RICO enterprise is "engaged in" interstate commerce, the government does not need to show that the enterprise's effect on commerce is "substantial." *United States v. Robertson*, 514 U.S. 669, 671–72, 115 S.Ct. 1732, 131 L.Ed.2d 714 (1995). *Robertson* affirmed a RICO conviction based on the operations ***537** of an Alaska gold mine, which used out-of-state workers and sent gold out of Alaska, and thus engaged in interstate commerce. *Id.* The Court in *Robertson* reserved the question of whether a RICO prosecution based on an enterprise that "affects" interstate commerce must show a "substantial" effect. *Id.*

Since the Youngstown enterprise here is not "directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce," *id.* at 672, 115 S.Ct. 1732, we consider the requirements for an enterprise that affects interstate com-

merce, rather than one that is engaged in interstate commerce. The question of a RICO enterprise's necessary relationship to interstate commerce has not been expressly addressed by this court after *Robertson* and *Lopez*, but other courts have confirmed that a de minimis connection is still sufficient. *See, e.g.*, *United States v. Juvenile Male*, 118 F.3d 1344, 1348 (9th Cir.1997) ("we conclude that all that is required to establish federal jurisdiction in a RICO prosecution is a showing that the individual predicate racketeering acts have a de minimis impact on interstate commerce"); *United States v. Miller*, 116 F.3d 641, 674 (2d Cir.1997) (holding that because drug trafficking affects interstate commerce, a RICO claim based on drug trafficking need establish only a de minimis connection between the individual transaction and interstate commerce).

We have found a de minimis connection to interstate commerce to be sufficient under similar statutes after *Lopez*. *See* *United States v. Ables*, 167 F.3d 1021, 1030 (6th Cir.1999) (applying a de minimis standard to 18 U.S.C. § 1956 (money laundering), which involves financial transactions that "in any way or degree affect[ ] interstate or foreign commerce" or involve "the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree"); *United States v. Wall*, 92 F.3d 1444, 1450 n. 13 (noting in dicta that statutes like the carjacking statute, which "require[s] that the government prove that the activities at hand substantially relate to interstate commerce," call for a "low threshold of proof of interstate relation"); *United States v. Smith*, 182 F.3d 452, 456 (6th Cir.1999) (stating a de minimis standard for violations of the Hobbs Act, 18 U.S.C. § 1951, which requires robberies to "affect [ ] commerce"); *but see* *United States v. Wang*, 222 F.3d 234, 239 (6th Cir.2000) (requiring a "substantial" connection in Hobbs Act cases when an individual, rather than a business, is the victim).

We hold that a de minimis connection suffices for a RICO enterprise that "affects" interstate commerce. The question then is whether the government has met that burden in this case. The Ohio-based enterprise here purchased Pennsylvania lottery tickets to protect against losses in the illegal gambling business; the members sold in Pennsylvania a ring taken from the Youngstown murder victim Biondillo; the enterprise extorted money from a victim who sold fireworks in New York; and the government alleged that the Pittsburgh mafia family was involved in the enterprise (although all of those charged were Ohio residents). Given the low threshold for a de minimis interstate commerce connection, the requirement has been met in this case. *Cf.* *United States v. Mills*, 204 F.3d 669, 672–73 (6th Cir.2000) (finding the de minimis nexus sufficient under the Hobbs Act when there was a "realistic probability" that sheriff's deputies from whom bribes were extorted would turn to an interstate lender recommended by the defendant sheriff in order to pay the bribes).

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III.

For the foregoing reasons, the rulings of the district court with respect to defendants' voir dire absence and the interstate commerce elements of 18 U.S.C. §§ 1962, 1955, and 1959 are **affirmed.**

[APPENDIX OMITTED]