

FILED

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN EMMETT BROWN, Jr.,

Defendant-Appellant.

No. 16-30297

D.C. No.

2:15-cr-00211-MJP-1

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DERRICK LOUIS CARTER,

Defendant-Appellant.

No. 16-30298

D.C. No.

2:15-cr-00211-MJP-2

Appeal from the United States District Court
for the Western District of Washington
Marsha J. Pechman, District Judge, Presiding

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

Submitted February 5, 2019**
Seattle, Washington

Before: IKUTA and CHRISTEN, Circuit Judges, and CHOE-GROVES,*** Judge.

John Brown and Derek Carter appeal their convictions for possession of cocaine with intent to distribute and conspiracy to distribute more than five kilograms of cocaine pursuant to 21 U.S.C. §§ 841(a), (b)(1), and 846. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.¹

1. Brown and Carter argue that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by providing a recording of a telephone call from Curtis Coleman only a few weeks before trial and by failing to produce a copy of an email (showing that the Coleman telephone call had been forwarded) until after trial. *Brady* claims require proof of prejudice—i.e., that there is a “reasonable probability that the suppressed evidence would have produced a different verdict.” *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

¹ Because the parties are familiar with the background of this case, we do not describe the facts in detail here.

Here, Brown and Carter fail to show prejudice because they have not demonstrated that the recorded telephone call and the email are relevant to their duress defense. Brown and Carter argued that they only agreed to smuggle cocaine into Canada because the U.N. Gang was threatening Brown's family. But the Coleman telephone call and forwarded email showed Coleman was upset with Brown for unrelated reasons. The record does not show that Coleman was part of the U.N. Gang. And Brown and Carter's decision to smuggle cocaine for the U.N. Gang would have done nothing to allay Coleman's ire toward Brown. Accordingly, Brown and Carter have failed to show that there is any "reasonable probability" that the jury would have acted differently had they learned of the Coleman materials at trial. *Strickler*, 527 U.S. at 281.

2. Brown and Carter also allege that the government violated *Napue v. Illinois*, 360 U.S. 264 (1959), by presenting what amounted to false testimony. Specifically, Brown and Carter argue that the government failed to correct one of Brown's witnesses, Agent Penn from the Department of Homeland Security, when he testified that he had only reviewed a particular report in preparing for his testimony and that he only remembered a non-threatening letter Coleman sent to Brown (without mentioning the recorded Coleman telephone call). *Napue* claims require a showing of materiality, meaning the defendant must show that there is a

“reasonable likelihood that the false testimony could have affected the judgment of the jury.” *Hayes v. Brown*, 399 F.3d 972, 985 (9th Cir. 2005).

Even assuming that Agent Penn’s testimony was actually false and that the government had an obligation to supplement the direct testimony of Brown’s own witness, Brown and Carter’s *Napue* claim, like their *Brady* claim, fails because the relevant testimony is about the Coleman materials, and that evidence is not probative of Brown and Carter’s duress defense. Coleman was not part of the U.N. Gang and his threats against Brown were not related to the reason Brown and Carter offered as a justification for their participation in the cocaine smuggling endeavor. Accordingly, even if the government had supplemented Agent Penn’s testimony with information about Coleman’s recorded call, Brown and Carter have failed to show that information would likely have been material to the jury.

3. Brown and Carter allege that the government’s closing argument misstated the law and improperly vouched for certain witnesses while denigrating the defense. We are not persuaded. The government did not misstate the rule from *United States v. Verduzco*, 373 F.3d 1022, 1030-31 (9th Cir. 2004), about assessing how a reasonable person would act; the prosecutor simply explained that the jury need not accept Brown’s own subjective beliefs. And the prosecutor did not improperly vouch or denigrate when she argued that certain witnesses and theories

were consistent or inconsistent with the evidence at trial. That is well within the scope of permissible closing argument.

AFFIRMED.