

AUG 29 2008

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NOT FOR PUBLICATION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.

GUILLERMO LOPEZ-MORALES,

Defendant - Appellant.

No. 07-30188

D.C. No. CR-05-00126-10-RHW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Submitted August 26, 2008**
Seattle, Washington

Before: T.G. NELSON, HAWKINS, and BYBEE, Circuit Judges.

Guillermo Lopez-Morales (“Lopez”) appeals his convictions for conspiracy to distribute controlled substances, *see* 21 U.S.C. §§ 841, 846, and use of a

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

communication facility in furtherance of a controlled-substance offense. *See* 21 U.S.C. § 843(b). We affirm the conviction.

Although the indictment conjunctively charged Lopez with conspiring to distribute cocaine *and* methamphetamine, the district court did not constructively amend or prejudicially vary the indictment by instructing the jury that Lopez could be found guilty if he conspired to distribute *either* cocaine *or* methamphetamine. *See United States v. Miller*, 471 U.S. 130, 136 (1985); *United States v. Toliver*, 351 F.3d 423, 430 (9th Cir. 2003); *United States v. Booth*, 309 F.3d 566, 572 (9th Cir. 2002).

Similarly, the district court did not err by not including a specific reference to Washington in the jury instructions. Lopez contends that this omission allowed the jury to convict him based on a different conspiracy than that charged in the indictment. But even assuming the government proved multiple conspiracies, rather than the single conspiracy charged in the indictment, Lopez failed to demonstrate prejudice. *See United States v. Morse*, 785 F.2d 771, 774-75 (9th Cir. 1986).

We decline to reach Lopez' ineffective assistance claim because the record is not sufficiently developed for review of this issue. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000).

We have considered Lopez' remaining contentions and find them without merit.

AFFIRMED.