UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2297
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTONIO RAZO, a/k/a
ANTONIO RAZO-ALVARADO and
MARIA ISABEL RAZO, a/k/a
MARIA ADELA JASSO DEPINA

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-90-371-01)

April 30, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Maria and Antonio Razo appeal their convictions on several drug-related offenses. We **AFFIRM**.

I.

In 1988, pursuant to a confidential informant's tip, Pasadena, Texas, police officers began to investigate the Razos. After the

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

informant reported that the Razos were in possession of large amounts of cocaine, the police devised an undercover operation, with the informant approaching the Razos as a potential cocaine purchaser. The informant had identified the Razos' home; and on October 18, the day the transaction was to take place, police began to conduct surveillance at that address.

A search warrant for the Razos' home was obtained that morning. Police officers drove by numerous times throughout the day,[2] and observed the Razos in their front yard on at least one occasion. According to the pre-arranged plan, the informant was to enter the house and inspect the cocaine. Officers would be watching, and the informant would confirm that the cocaine was in the house by wearing a particular hat when he left. Late in the afternoon, constant surveillance began. The officers saw the informant enter the house, then leave 10 minutes later wearing the designated hat. The plan was to wait an hour or two before executing the search warrant, but when Antonio Razo left the house, the officers[3] stopped him, took him home, and conducted the search.

In the converted garage\game room area, officers discovered two one-kilogram bricks of cocaine, worth $150,000-$200,000;

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[2] An officer with the Pasadena, Texas, police department testified that officers could not simply sit and watch the house "because of the way [the house] was situated". This drive-by surveillance was conducted instead.

[3] The Pasadena police department was assisted by state narcotics, Drug Enforcement Administration, and county organized crime unit officers in execution of the warrant.

approximately 35 pounds of marijuana, worth $35,000-$40,000; a scale, several boxes of ziplock bags, and two books with records of drug transactions (dealing papers). In an upstairs bedroom, another kilogram brick of cocaine (worth $75,000-$100,000) was discovered, along with three more notebooks recording drug transactions, two loaded and two unloaded firearms, and over $5,000 in cash. Another scale, more ziplock bags, and dealing papers were found throughout the house.

Approximately two years later, the Razos were charged in a four-count indictment. Both were charged with conspiracy to possess with intent to distribute more than 500 grams of cocaine and less than 50 kilograms of marijuana (count one), and commission of the underlying substantive offenses, aided and abetted by each other (possession with intent to distribute cocaine (count two) and marijuana (count three)). Antonio Razo was charged in count four with using a firearm during and in relation to a drug trafficking crime.

During voir dire, a member of the venire, Mr. Fitzgerald (number 12), stated that he was "100 percent against drugs" and made conflicting statements about whether he could be fair. The defendants' challenge for cause was overruled, but they used a peremptory challenge for number 12. In exercising its peremptory challenges, the government removed three Hispanics; and the Razos' ***Batson*** challenge[4] was overruled. After a four-day trial, the Razos were convicted on all counts.

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[4] ***Batson v. Kentucky***, 476 U.S. 79 (1986).

II.

The Razos challenge the sufficiency of the evidence to support the convictions, and contend that the district court erred in overruling their ***Batson*** challenge, refusing to strike number 12 for cause, and admitting testimony regarding information received from the confidential informant.

A.

It goes without saying that in evaluating the sufficiency of the evidence, we consider the evidence, and any inferences which might be drawn from it, in the light most favorable to the verdict. ***United States v. Munoz***, 957 F.2d 171, 174 (5th Cir.), *cert. denied*, __ U.S.__, 113 S.Ct. 332 (1992). And, we must affirm the conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". ***Id***. (quoting ***Jackson v. Virginia***, 443 U.S. 307, 319 (1979)). We consider each challenged conviction.

1.

Proof of the substantive offenses of possession with intent to distribute require showing (1) knowing (2) possession of cocaine and marijuana, (3) with the intent to distribute. ***Munoz***, 957 F.2d at 174. Possession may be actual or constructive; it may be proven by direct or circumstantial evidence. ***United States v. Onick***, 889 F.2d 1425, 1429 (5th Cir. 1990).

a.

Maria Razo attempted to explain the presence of the drugs when she testified that her cousin (one of three men present in the game

room at the time of the search) was living in the house and occupying the upstairs bedroom. She stated that she and Antonio Razo were separated in October 1988, and she was sleeping in a bedroom in the adjoining trailer, where the children's bedrooms were located. Therefore, she contends that she did not knowingly possess the drugs because they were not found in the area of the house where she lived, or where she was at the time of the search.

Antonio Razo contends that he was not in knowing possession of the drugs because he was not even living in the house in October 1988. He, too, testified that the drugs belonged to his wife's cousin.

We do not find these facts dispositive, even if true. One can be in "possession" if he exercises "ownership, dominion, or control over illegal drugs *or* dominion over the premises where drugs are found". ***Onick***, 889 F.2d at 1429. Maria Razo admitted that she lived at the address in question at the time of the search. Antonio Razo called the residence "my house" and admitted that he visited there several times a week. Indeed, he was there only minutes before the search in which the drugs were discovered. These facts are more than sufficient to establish constructive possession.

b.

Intent to distribute may be inferred from the presence of distribution paraphernalia and large quantities of cash and drugs. The amount of drugs recovered was far more than might be kept for personal use. The scales, ziplock bags and dealing papers are all

distribution paraphernalia. In sum, a reasonable jury could have found Antonio and Maria Razo guilty beyond a reasonable doubt of possession with intent to distribute both marijuana and cocaine.

2.

A drug conspiracy must be proven by showing that (1) the defendant conspired with one or more others to violate the narcotics laws, (2) the defendant knew of the conspiracy, and (3) knowingly and voluntarily participated in it. No proof of an overt act is required, ***Onick***, 889 F.2d at 1432, and any element may be proven by circumstantial evidence. ***Munoz***, 957 F.2d at 174.

A drug dealer named Norberto Castillo testified that he had known the Razos since 1986; that, in the year prior to their arrest, the Razos had picked up cocaine from him "too many [times] to remember"; and that, on at least one occasion, he had seen Maria Razo carrying on a drug transaction at her home. He also recounted a conversation with the Razos wherein they attributed their financial success -- the purchase of their home and all its contents -- to the "good business they had done" in selling cocaine. This testimony alone, weighed, as it must be, in favor of the verdict, is more than enough to allow a reasonable jury to find the Razos guilty of conspiracy beyond a reasonable doubt.

3.

It need not be shown that Antonio Razo actually used the firearms found at his home in order to find him guilty of carrying them in relation to a drug trafficking crime. It is sufficient that the guns could have been used to protect the drugs or drug

paraphernalia. ***Onick***, 889 F.2d at 1432. Indeed, we have held that "[t]he presence of loaded firearms at the home of a defendant where drugs, money, and ammunition are also found is sufficient to establish the use of a firearm as an integral part of a drug trafficking crime." ***United States v. Capote-Capote***, 946 F.2d 1100, 1104 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2278 (1992). There was sufficient evidence on which a reasonable jury could base its verdict of guilty beyond a reasonable doubt on count four.

B.

Though the Razos raised three ***Batson*** challenges, they appeal only the prosecutor's elimination of number 13, Ms. Ontiveros. ***Batson***, of course, precludes the use of peremptory challenges to strike a potential juror solely on the basis of race. When there is a prima facie showing that a strike was exercised in violation of that rule, "the burden then shifts to the prosecutor to articulate a race-neutral explanation" for the strike. ***United States v. Clemons***, 941 F.2d 321, 323 (5th Cir. 1991). If the prosecutor articulates legitimate reasons for the challenge, they will be deemed race-neutral "[u]nless a discriminatory intent is inherent" in the explanation. ***Id***. at 325. By its very nature, this analysis turns on credibility determinations; and we therefore review the district court's finding under the clearly erroneous standard. ***Id***.

The prosecutor explained that Ms. Ontiveros was stricken because she did not seem responsive to the prosecutor, continuously

looked at the defendants, and "seemed to be empathetic with the defendants, with defense counsel". The ***Batson*** challenge was raised at the end of the day. The district court allowed defense counsel to question the prosecutor under oath and gave them until the following morning to submit any legal support for their position. The next day, the district judge concluded that the prosecutor's "reasons were sufficient under the law, that they were accurate ... [,] justifiable [and] fully articulated". The district judge was in a position to view both the prosecutor and Ms. Ontiveros and determine their credibility. We do not find his determination clearly erroneous.

C.

Next, the Razos challenge the district court's refusal to strike venireperson number 12, Mr. Fitzgerald, for cause. Obviously, the district court has broad discretion in deciding whether to dismiss a potential juror, and we review only for clear abuse of discretion. ***United States v. Greer***, 968 F.2d 443, 445 (5th Cir. 1992) (equally divided en banc court).[5]

Mr. Fitzgerald made several statements indicating that he might not be fair in judging defendants charged with drug offenses.

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[5] Of course, even if the district court abused its discretion in refusing to strike Mr. Fitzgerald, the Razos were not deprived of their Sixth Amendment right to a fair and impartial jury. They used a peremptory challenge to remove Mr. Fitzgerald from the jury, and as the Supreme Court has held, "[s]o long as the jury that sits is impartial, the fact that the defendant[s] had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." ***Ross v. Oklahoma***, 487 U.S. 81, 88 (1988). In any event, the Razos do not challenge that use of a peremptory challenge on appeal.

However, when asked directly, he told the district court: "I can follow the law, yes, sir, which I intend to. I am sworn in." This may have been a close call, but it was, as stated, a matter for the trial judge's discretion. On these facts, we cannot say that there was a clear abuse of discretion.

D.

Finally, the Razos challenge the admission, through an officer, of the confidential informant's statements that they were "in possession of a large amount of cocaine". They contend that this is inadmissible hearsay.

Hearsay is "a statement [made out of court] offered in evidence to prove the truth of the matter asserted". Fed. R. Evid. 801(c). The statement was offered not to prove that the Razos were, in fact, in possession of cocaine but for the sole purpose of setting the stage for the surveillance and search of their home.[6] The district court did not abuse its in admitting that testimony. Fed. R. Evid. 103.

III.

Accordingly, the judgments are

AFFIRMED.

[6] The challenged testimony includes the officer's statements that he "had received information from an informant that the defendants ... were in possession of a large amount of cocaine", that the informant had indicated the defendants' address, and that, on the day of the search, the informant wore the designated hat when he left the Razos' home.