IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1856
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BILLY JACK HAGGARD and
MICHAEL WAYNE MCCOY,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
(3:92-CR-092-R)

(September 21, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Billy Jack Haggard and Michael Wayne McCoy were convicted by a jury of various drug offenses. Both appellants were convicted of conspiracy to distribute and to possess with intent to distribute methamphetamine in violation of 21 U.S.C. § 846 (count one), possession, aided and abetted by each other, with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1)

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[*]Local Rule 47.5 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

and 18 U.S.C. § 2 (count three), and carrying a firearm, aided and abetted by each other, during the commission of a drug trafficking crime in violation of 18 U.S.C. § 924(c) & 2 (count four). In addition, Michael Wayne McCoy was charged with and convicted of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g) (count two). Billy Jack Haggard was sentenced to 262 months imprisonment on counts one and three, plus sixty months on count four to run consecutive with counts one and three, and five years supervised release. The court also imposed a $2000 fine and a $150 special assessment. Michael Wayne McCoy was sentenced to 262 months imprisonment on counts one, two, and three, plus sixty months on count four to run consecutive with counts one, two, and three, and five years supervised release. The court also imposed a $2000 fine and a $200 special assessment. Haggard and McCoy now appeal their convictions. After a careful review of the record, we affirm the district court's judgments of conviction and sentences.

I.

On November 1, 1991, the Dallas police department received information that amphetamines were being sold out of room 131 of the Traveler's Inn in Mesquite, Texas. Dallas police officers and federal agents maintained surveillance of the room from approximately 9:30 a.m. to 2:30 p.m. During officer Murphy's surveillance of the room, he observed Billy Haggard exit the room and retrieve a green and pink container from the trunk of a Cadillac that was parked outside the room. Law enforcement

officers executed the search warrant at approximately 2:30 p.m. When the officers entered the room, Margie Wright was standing directly in front of the door. McCoy was seated on one of two beds in the room to the right of the officers; Haggard was seated on the other bed. Wright immediately pulled a pouch out of her blouse and threw it across the room. The pouch contained approximately $625. Officer Jones then secured her to keep her from drawing a weapon. Another officer secured McCoy. A gun was visibly sticking out from underneath the pillow on the bed where McCoy was sitting. The officers searched McCoy and found three bags containing a liquid residue, numerous clear plastic bags, and $936 in cash. Agent Crowley secured Haggard, and the officers searched him and found a silver tube containing two bags of methamphetamine and $500 in cash. In a search of the room, officers found a green and pink drink cup with three bags of methamphetamine inside the drinking cup, marijuana, used and unused needles, and clear plastic bags. Also, the officers found a scale in the Cadillac that was parked outside of the room.

II.

Both appellants raise claims that there was insufficient evidence to support their convictions. Haggard claims that there was insufficient evidence to support his convictions on all three counts. McCoy claims that there was insufficient evidence to support his convictions for conspiracy to distribute methamphetamine and felon in possession of a firearm.

We review the district court's denial of a motion for judgment for acquittal *de novo*. United States v. Restrepo, 994 F.2d 173, 182 (5th Cir. 1993). "`The well established standard in this circuit for reviewing a conviction allegedly based on insufficient evidence is whether a reasonable jury could find that the evidence establishes the guilt of the defendant beyond a reasonable doubt.'" Id. We view the evidence in the light most favorable to the government to determine whether the government proved all elements of the crimes alleged beyond a reasonable doubt. United States v. Skillern, 947 F.2d 1268, 1273 (5th Cir. 1991), cert. denied, 112 S. Ct. 1509 (1992). Furthermore, the evidence does not have to exclude every reasonable hypothesis of innocence. United States v. Leed, 981 F.2d 202, 205 (5th Cir. 1992), cert. denied, 113 S. Ct. 2971 (1993).

A. Conspiracy Charge

In order to find the appellants guilty of a conspiracy under 21 U.S.C. § 846, the government must prove (1) the existence of an agreement to import or possess controlled substances with intent to distribute them; (2) the defendants' knowledge of the agreement; and (3) the defendants' voluntary participation in the agreement. Id. The government is not required to prove the existence of the agreement between the co-conspirators by direct evidence; the agreement may be inferred from circumstantial evidence. United States v. Natel, 812 F.2d 937, 940 (5th Cir. 1987). The government does not have to show an overt act in furtherance of the conspiracy. Id. While presence at the scene

of the crime or close association with another involved in a conspiracy will not by itself support an inference of participation in a conspiracy, presence or association is a factor that a jury may rely upon, along with other evidence, in finding conspiratorial activity by the defendant. Id.

The government presented evidence that the methamphetamine found in the motel room amounted to about 200 individual dosage units, an amount inconsistent with individual drug use. The government also presented evidence that McCoy was not seen leaving the room from approximately 9:30 a.m. to 2:30 p.m. Haggard was only seen leaving the room to retrieve a cup from the Cadillac parked outside the room. The cup was later found to contain methamphetamine. In addition, the government found several used syringes, twenty-one unused syringes, a loaded gun, drug packing material (little bags), and large amounts of cash in the room or on the person of the appellants. The government also presented testimony which linked these items to drug distribution operations. The officers also found scales in the car parked outside the room which an officer testified would be used in a drug selling operation. Furthermore, a few days prior to their arrest McCoy and Haggard had been seen driving together in the Cadillac that was parked outside the room. We conclude that there was sufficient evidence for a rational jury to conclude beyond a reasonable doubt that the defendants were guilty of the conspiracy charge. See United States v. Pineda-Ortuno, 952 F.2d 98, 102 (5th Cir.) (stating that the defendant's possession of a

larger quantity of cocaine then an ordinary user would possess for personal consumption supported an inference that the defendants intended to distribute the drug), cert. denied, 112 S. Ct. 1990 (1992); United States v. Simmons, 918 F.2d 476, 484 (5th Cir. 1990) (holding that there was sufficient evidence to convict the defendants of conspiracy when the defendants had exited a plane together with virtually identical packages of cocaine and in quantities that were inconsistent with personal use).

B. Possession with Intent to Distribute

Haggard also contends that there was insufficient evidence to support his conviction for possession with intent to distribute methamphetamine. To convict Haggard of this charge, the government must prove that Haggard knowingly possessed methamphetamine with intent to distribute. United States v. Munoz, 957 F.2d 171, 174 (5th Cir.), cert. denied, 113 S. Ct. 332 (1992). "Proof of intent to distribute may be inferred from the presence of distribution paraphernalia, large quantities of cash, or the value and quality of the substance." Id. The officers found drugs and $500 on Haggard. Furthermore, an officer testified that the total amount of methamphetamine found in the room was a distributable amount. Also, officer Murphy testified that he saw Haggard retrieve a cup from the car parked outside the room which was later found to have methamphetamine in it. In addition, the jury was presented with evidence that there were twenty-one unused syringes in the room and testimony which linked the syringes to distribution paraphernalia. Thus, we conclude

that there was sufficient evidence for a rational jury to conclude that Haggard was guilty of count three.

C. Felon in possession of a firearm

McCoy further claims that there was insufficient evidence to support his conviction as a felon in possession of a firearm. Possession of a firearm may be either actual or constructive. United States v. Mergerson, 995 F.2d 1285, 1297 (5th Cir. 1993). "`Constructive possession' has been defined as ownership, dominion, or control over the contraband itself, or dominion or control over the premises in which the contraband is concealed." Furthermore, constructive possession need not be exclusive; it may be joint with others, and it may be proven with circumstantial evidence. United States v. McKnight, 953 F.2d 898 901 (5th Cir.), cert. denied, 112 S. Ct. 2975 (1992). We have held that when there is joint occupancy or presence at a location in which contraband is found the court will apply a "`commonsense, fact-specific approach'" to determine if an individual is in possession of the contraband. Id. at 902. Also, when there is joint occupancy or joint presence of the location where contraband is found, we have held that some circumstantial evidence must link the defendant to the contraband besides the joint occupancy or presence. Id.

The testimony at trial established that the gun was under a pillow on the bed that McCoy was sitting on when police officers arrived. After officers came into the room, McCoy fell back onto the bed and the gun partially slipped out from underneath the

pillow. The testimony also showed that after the gun slipped out from underneath the pillow, McCoy's hand was almost touching it and he may have been reaching for the weapon. Furthermore, there was testimony from Wright that McCoy had told her earlier that someone had come by and left a gun for him. Therefore, we conclude that there was sufficient evidence for a rational jury to conclude that McCoy had knowledge of and control of the weapon.

D. Aiding and abetting the use of a firearm during a drug trafficking offense

Haggard argues that there was insufficient evidence to support his conviction for using a firearm during the commission of a drug trafficking offense. A party to a conspiracy can be convicted of a substantive offense committed by a co-conspirator if the offense was committed in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 647-48 (1946). Haggard contends, however, that the jury was not instructed as to co-conspirator liability for count four and that, therefore, the government had to prove that he actually possessed or used the weapon during the commission of the offense. This contention is totally without merit because the jury was instructed as to co-conspirator liability for count four. Therefore, for Haggard to be convicted under count four, the government only had to prove that McCoy possessed or used the weapon in furtherance of a drug trafficking offense.

To prove that McCoy "used" the weapon to further a drug trafficking offense the government need not prove that he discharged or brandished the weapon. United States v. Blakenship, 923 F.2d 1110, 1114 (5th Cir.), cert. denied, 111 S. Ct. 2262 (1991). All that the government has to prove is that the weapon "could have been used to protect or have the potential of facilitating the operation, and that the presence of the weapon was connected with the drug trafficking." United States v. Featherson, 949 F.2d 770, 776 (5th Cir. 1991), cert. denied, 112 S. Ct. 1698 (1992); see also United States v. Beverly, 921 F.2d 559, 563 (5th Cir.) (noting that the government need only present sufficient evidence so that a jury could infer that a weapon was "used as protection `in relation to' both the ill-gained cash and drugs found in the room" to convict the defendant of carrying or using a firearm during the commission of a drug trafficking offense), cert. denied, 111 S. Ct. 2869 (1991).

The evidence at trial established that the weapon was loaded and located in the same room as a drug distribution operation. Testimony established that this weapon was of a type typically used in narcotics crimes and that the weapon was easily accessible. Furthermore, there was sufficient evidence that McCoy was in possession of the firearm. Therefore, because we conclude that a rational jury could have found beyond a reasonable doubt that McCoy "used" the weapon in connection with drug trafficking, we also conclude that there was sufficient evidence to convict Haggard of count four.

III.

Appellants McCoy and Haggard both contend that the trial court erred in overruling their motions for mistrial or dismissal because of the government's failure to provide the appellants with exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). A Brady claim involves three elements: (1) that the prosecution suppressed or withheld evidence, (2) that the evidence is favorable to the defense, and (3) that the evidence is material to the defense. United States v. Stephens, 964 F.2d 424, 435 (5th Cir. 1992). The Supreme Court has held that evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985).

On cross-examination, agent Crowley testified that a comparable latent fingerprint had been found on the holster for the pistol found in room 131. Agent Crowley furthered testified that fingerprint analysis had determined that the fingerprint was not McCoy's or Haggard's. However, the fingerprint was not compared to anyone else including Wright who had also been in the room at the time the gun was found. The government failed to inform the appellants that this fingerprint had been found on the holster.

Appellants argue that failure to disclose this evidence to the appellants before trial precluded them from receiving a fair trial. The appellants argue that had they been aware of the information prior to trial they could have requested that the fingerprint be compared to Wright's. The appellants further argue that if the fingerprint had been Wright's it would have cast doubt as to the appellants guilt concerning counts two and four. Furthermore, the appellants argue that the nondisclosure of this evidence kept them from effectively discrediting the police investigation by showing that direct evidence found at the scene of the crime was overlooked.

We disagree that the government's failure to timely disclose this evidence denied the appellants a fair trial. Assuming arguendo that McCoy has established the first two elements of his Brady claim, we can not find that the evidence was material. The appellants were able to cross-examine agent Crowley concerning the fingerprint. During cross-examination agent Crowley testified that the fingerprint found on the holster was not McCoy's or Haggard's, and that the fingerprint was not compared to Wright's or anyone else's. Furthermore, this evidence does not undermine the conclusion that McCoy was in possession of the weapon. Therefore, we uphold the trial court's decision.

IV.

McCoy also argues that the trial court erred in refusing to submit his proposed jury instruction on reasonable doubt. However, the jury instruction that the trial court submitted is

the same instruction that we held to be sufficient in United States v. Hunt, 794 F.2d 1095, 1100 (5th Cir. 1986). Thus, McCoy's claim is totally without merit.

V.

McCoy argues that the trial court should have excluded certain evidence from the trial because the government violated the trial court's pretrial discovery order. The trial court has broad discretion to remedy a violation of a discovery order. United States v. Martinez, 941 F.2d 295, 302 (5th Cir. 1991), cert. denied, 112 S. Ct. 1295 (1992); United States v. Bentley, 875 F.2d 1114, 1118 (5th Cir. 1989). The factors that the court should consider in exercising this discretion are "why disclosure was not made, the prejudice to the opposing party, the feasibility of rectifying that prejudice by granting a continuance, and other relevant circumstances." Bentley, 875 F.2d at 1118.

McCoy contends that the testimony of a government witness should have been excluded because the witness was not listed on the government's witness list. The trial court's pretrial order required all witnesses to be disclosed. However, the pretrial order also provided that an unlisted rebuttal witness should be permitted to testify if the attorneys could not have reasonably anticipated the need for the witness.

During the trial, Betty Bedner testified that she dropped McCoy off at the motel some time before 2:00 p.m. The government called officer Holcomb to the stand to rebut Bedner's testimony.

Officer Holcomb testified that he began surveillance of the motel some time around 2:00 p.m. and that he had not seen anyone come or go from the motel room.

McCoy argues that officer Holcomb's testimony was not truly rebuttal testimony because it did not refute Bedner's claim and that the need for the testimony should have been reasonably anticipated by the government. The government argues that the testimony is rebuttal testimony and that they could not have known the need for the testimony before trial because Betty Bedner refused to talk to them before the trial. However, McCoy has not shown how he was prejudiced by the admission of this testimony when other officers had also testified that they had maintained surveillance of the motel room and had not seen anyone come or go. Therefore, we conclude that the trial court did not abuse its discretion and uphold the trial court's decision to allow the rebuttal testimony.

McCoy further contends that the trial court erred in not excluding evidence of drugs and drug paraphernalia that were found on him. McCoy contends that the evidence should have been excluded because the government did not disclose the evidence to him by June 29, 1992 as required by the trial court's pretrial order. McCoy was not informed of the evidence until at least July 10, seventeen days before trial. However, McCoy should have been aware that drug and drug paraphernalia were taken from him at his arrest. The trial court could have easily concluded that McCoy was not prejudiced by the delay in presenting this evidence

to him. Thus, we conclude that McCoy has failed to show that the trial court abused its discretion.

VI.

Finally, McCoy argues that the decision to prosecute him in federal court rather than state court violated his due process rights because the decision was made without any guidelines and exposed him to a greater sentence. We have already rejected this argument in United States v. Carter, 953 F.2d 1449, 1462 (5th Cir.), cert. denied, 112 S. Ct. 2980 (1992). Therefore, this claim is also without merit.

VII.

For the foregoing reasons, we AFFIRM the district court's judgments of conviction and sentences.