UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2118

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE MARIA GONZALES, MIGUEL RAMIREZ-LOPEZ, and JOSE RAMIREZ DELOSANTOS,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas
(CR H 91 75-4;07;08)

(May 18, 1993)

Before POLITZ, Chief Judge, GOLDBERG, and JONES, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

I

Defendants appeal their convictions on drug-related charges. A jury found the three defendants guilty of conspiracy to possess with intent to distribute more than five kilograms of cocaine in violation of 21 USC §§ 846, 841(a)(1), and (b)(1)(A), and possession of more than five kilograms of cocaine with intent

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to distribute it in violation of 21 USC § 841(a)(1) and (b)(1) and 18 USC § 2. The jury additionally found defendant Jose Maria Gonzales guilty of carrying a firearm during and in relation to a drug trafficking crime in violation of 18 USC § 924(c)(1). Each received a minimum ten-year term of imprisonment. We affirm the convictions of Gonzales and Jose Ramirez Delosantos and reverse the conviction of Miquel Ramirez-Lopez.

On April 17, 1991, Rolando Graz, a confidential informant working with the DEA, and undercover special agent Boudreau met with Felipe Hernandez, Cuauhtemoc Munoz, and Jose Vasquez to discuss the purchase of thirty kilograms of cocaine. Vasquez contacted Marciano Parrett to see if that much cocaine could be obtained. Parrett in turn contacted defendant Gonzales to see if Gonzales could get it. On April 23 Gonzales said he could supply the requested cocaine.

That day, Graz, Vasquez, and Hernandez went to Gonzales' house and car repair shop at 14440 Renault in Houston. Gonzales told Graz that six kilograms would arrive shortly. Subsequently, defendant Jose Ramirez Delosantos arrived in his pickup with defendant Miguel Ramirez-Lopez as his passenger. Gonzales told Parrett that the cocaine had arrived and went out to speak with Delosantos. With Delosantos and Ramirez close by, Gonzales told Parett to get the "material." Parrett removed a white box from the passenger side of the truck bed and took a half kilogram bag of cocaine from it, concealing it. From the house, Graz observed the white box being passed among Ramirez, Delosantos, and Gonzales.

Parrett then took the half-kilogram bag into the house for Graz to inspect it. When Graz indicated dissatisfaction with the cocaine, Parrett went outside and returned with the white box that contained the remainder of the six kilograms. The defendants all remained outside the entire time.

After Parrett returned to the house with the remainder of the cocaine, DEA agents arrested the defendants. DEA Agent McCormick, wearing a clearly identified police raid jacket, found Ramirez and Delosantos crouching by the pickup. Another agent found a loaded semi-automatic handgun in Gonzales' boot.

Although Gonzales claimed he carried the gun because he had been "ripped off" in the past, a character witness at trial indicated that she had never seen Gonzales carry a gun. Delosantos, alone among the defendants, took the stand in his own behalf. He claimed that he had met Ramirez only six days before and that he had never met Gonzales. He said that he met Ramirez through a friend that was trying to get amnesty for Ramirez through the INS. He said he was letting Ramirez stay at his house because Ramirez did not have a place to live. Delosantos said that he had gone to Gonzales' repair shop to see about buying a truck and that Ramirez had come along for the ride.

Following trial, the jury returned verdicts of guilty against each of the defendants for each count charged. They now appeal, claiming the evidence was insufficient to convict and alleging various defects in the trial. The facts surrounding the

claimed defects in the trial will be discussed as they are addressed below.

II

Appellants each challenge the sufficiency of the evidence upholding their convictions. We may reverse for insufficiency only where no rational jury could find the appellants guilty beyond a reasonable doubt based on the evidence presented. United States v Fox, 613 F2d 99, 101 (5th Cir 1980). The court views the evidence and the inferences reasonably to be drawn form it in the light most favorable to the government. Id.

To support the conspiracy conviction, the government must show: (1) the existence of an agreement between two or more people; (2) appellant's knowledge of the agreement; and (3) appellant's voluntary participation in the conspiracy. United States v Sacerio, 952 F2d 860, 863 (5th Cir 1992). To support the possession conviction, the government must prove that the appellants knowingly possessed the cocaine with intent to distribute it. Id. Constructive possession exists when the defendant has ownership, dominion, and control over the contraband itself, or the vehicle in which it was concealed. Id.

A

The evidence against Gonzales was the strongest of the three. Gonzales said that he could obtain the cocaine. The entire transaction was conducted at his house. Gonzales indicated the time it would arrive. When it arrived, he instructed Parrett to get it from the truck. Gonzales had a loaded semi-automatic pistol

in his boot when the agents arrested him. All of these facts belie Gonzales' claim that he was simply present at the scene of a drug transaction. The jury was free to conclude that Gonzales was up to his neck in this drug deal and that he carried the gun to protect the transaction.

B

The evidence against Delosantos is weaker, based as it is more on inference, but is still sufficient to convict him. Delosantos was the owner and driver of the truck that arrived at the time and place that Gonzales said the drugs would arrive. When Delosantos drove up to the house, Gonzales said that the cocaine had arrived. The cocaine was then taken from his truck after Gonzales told Parrett to get the "material." When the agents swept down on the scene, Delosantos crouched by his truck as if to avoid detection and arrest. This was evidence sufficient to establish his involvement in the conspiracy and his possession of the contraband. We cannot say that a rational jury could not find him guilty beyond a reasonable doubt.

C

As the government acknowledges, the evidence against Ramirez was the weakest of the three. Presence at the scene of the crime is one factor that the jury may consider to support a conviction, since it is unlikely that a drug dealer would allow someone not associated with the deal to be present. United States v Chavez, 947 F2d 742, 745 (5th Cir 1991). However, it is settled that mere presence at the scene of the crime and close association

with the conspirators will not support a conviction. United States v Gallo, 927 F2d 815, 820 (5th Cir 1991).

It is hard to tease a general principle from the drug conspiracy cases involving sufficiency of the evidence claims since the cases are inevitably fact-specific. Nevertheless, this court has refused to uphold conspiracy convictions where the quantum of evidence against the defendant was arguably greater than that against Ramirez. United States v Sacerio, 952 F2d 860 (5th Cir 1992) (defendant rode in car containing cocaine; rented hotel room in which cocaine was found; and phone calls to drug dealers were made from his room); United States v Gardea Carrasco, 830 F2d 41 (5th Cir 1987) (defendant rode with conspirator to airport and helped unload suitcases containing cocaine; conspirator visited defendant's house on two occasions; and conspirator took three suitcases that resembled confiscated suitcases into defendant's house); United States v Jackson, 700 F2d 181 (5th Cir 1983) (defendant joined conspirators at restaurant; and seemed "very watchful" of the comings and goings at the restaurant); but see United States v Chavez, 947 F2d 742 (5th Cir 1991) (upholding conviction of defendant who was discovered in repair shop after business hours; met not with employees but with drug dealers; and was present where 336 kilograms of cocaine were being unloaded).

The conspiracy evidence against Ramirez was thin. He was a passenger in Delosantos' truck. He may have handled a box similar to one containing cocaine. The jury may also have disbelieved Delosantos' story that he had only met Ramirez a few

days before and yet had permitted him to ride along to a drug deal. Also, Ramirez crouched beside the truck with Delosantos as agents swept in to arrest them, which may have indicated a consciousness of guilt.

On the other hand, Ramirez never engaged in any discussion about the cocaine with the informant or the conspirators. Jackson, 700 F2d at 185. His name was never mentioned in the pre-transaction discussions. The cocaine was concealed the entire time. Although there was some suggestion that Ramirez may have briefly held the box containing the cocaine, he did not open it or observe its contents. Gardea Carrasco, 830 F2d at 45. The drug transaction itself and all discussions about the drug transaction took place inside the house, away from Ramirez. There was no evidence that he knew anything about those conversations. Id. And unlike Delosantos, he did not own or operate the vehicle that brought the drugs.

In fact, so weak was the evidence against Ramirez that Judge Hoyt indicated at the end of the presentation of the evidence that if the jury returned a guilty verdict against Ramirez, he would enter a judgment of acquittal. Nevertheless, when Ramirez asked for a judgment of acquittal upon presentation of the evidence Judge Hoyt denied the motion because the presentence report indicated that Ramirez was not the defendant's real name and because there was some evidence that Ramirez had held the box containing the cocaine. We believe Judge Hoyt's initial impression

was right; there was insufficient evidence of Ramirez' knowing participation in a conspiracy.

The conviction of Ramirez for possession with intent to distribute the cocaine is defective. The government had to show beyond a reasonable doubt that Ramirez had at least constructive possession of the cocaine. Ramirez did not own the truck in which the cocaine was transported. Ramirez was a passenger who did not exercise dominion or control over the vehicle. Sacerio, 952 F2d at 863. Although he may have briefly handled a box similar to one containing the cocaine, there was no evidence that he knew of its contents. A reasonable jury must have had a reasonable doubt about his guilt. United States v Moreno-Hinojosa, 804 F2d 845, 847 (5th Cir 1986) (evidence that defendant rode along on trip he may have known was improper; had $200 cash; was twice before convicted; and misrepresented his friendship to drug dealer after his arrest; was insufficient to establish possession). The evidence was insufficient to convict him for possession with intent to distribute.

Because we reverse Ramirez' convictions on insufficiency of the evidence, it is unnecessary to consider his other claims of defects in the trial.

III

The remaining two appellants assert that the trial court improperly limited cross-examination of key government witnesses in violation of their Sixth Amendment right to confront the witnesses against them. The contention is meritless.

The trial court limited cross-examination in three areas: 1) DEA intervention on behalf of informant Graz in prior arrests not resulting in convictions; 2) the maximum sentence facing the testifying co-appellants; and 3) the co-appellants' understanding of the government's intent to request a downward departure in their sentences. The limitation, contends the appellants, prevented them from adequately exploring possible bias the witnesses might have in testifying against them.

However, in each area noted by the appellants, the trial court permitted cross-examination sufficient to allow the jury to evaluate their reasons for testifying. United States v Andrew, 666 F2d 915, 925 (5th Cir 1982). Graz, for example, was extensively cross-examined on how much money he had been paid by the DEA. Similarly, defense counsel cross-examined the testifying co-conspirators about prior convictions and about the terms of their plea agreement. The court did not abuse its discretion in limiting the cross-examination as it did. Id.

Finally, Delosantos complains that one of Gonzales' character witnesses inculpated him by saying that she had known Delosantos for awhile. The trial court did not allow Delosantos to cross-examine the witness, Cruz Perez. Perez merely said that she had known Delosantos, but that she had no knowledge of any business relationship between Gonzales and Delosantos. Since the testimony did not inculpate Delosantos, he had no Sixth Amendment right to cross-examine the witness.

IV

The trial court instructed the jury that it could infer knowledge in the case by evidence that the "defendant deliberately closed his eyes to what would otherwise have been obvious to him." Gonzales and Delosantos argue that the evidence was insufficient to justify this instruction.[1] Since neither of these appellants objected to this deliberate ignorance instruction, the court reviews it for plain error. United States v Maceo, 947 F2d 1191, 1198 (5th Cir 1991). That is, the court corrects only particularly egregious errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings and result in a miscarriage of justice. Id.

A deliberate ignorance instruction is appropriate where (1) the defendant was subjectively aware of a high probability of illegal conduct; and (2) the defendant purposely avoided learning of the conduct. United States v Ojebode, 957 F2d 1218, 1229 (5th Cir 1992). We have repeatedly cautioned, and we do so again, that because of the potential for abuse, a deliberate ignorance instruction should be given only where the evidence clearly warrants it.

The government concedes that the evidence supporting the instruction was "sparse." However, there was some evidence supporting each element as to Delosantos, including the facts that he claimed to know nothing about a box he transported, never

1. Technically, this point of error could be held waived by Gonzales because, although he identified it as a separate argument, the text portion of his brief contained no discussion or authorities on it.

entered the house where the transaction occurred, and demonstrated some consciousness of guilt by crouching to avoid detection. With regard to Gonzales, of course, the evidence showed direct involvement and knowledge, and the instruction was not pointed at him. In the absence of an objection from the appellants, these facts were sufficient to avoid a miscarriage of justice in the delivery of the deliberate ignorance instruction. There was no plain error in the instruction.

V

Gonzales and Delosantos next assert that the prosecutor made improper closing remarks. Under the Due Process Clause, prosecutors must refrain from using improper methods to obtain a conviction. This responsibility extends to closing arguments at trial. In instances where the appellants have made a contemporaneous objection to a closing argument, the standard of review is whether the remarks were improper and whether they prejudicially affected substantial rights of the defendant. United States v Castro, 874 F2d 230, 232 (5th Cir 1989). Where no objection was made, the court reviews for plain error. United States v Carter, 953 F2d 1449, 1460 (5th Cir 1992).

The appellants assert first that the prosecutor misled the jury about the burden of proof. In his opening argument, the prosecutor argued that, as a matter of "common sense," to acquit the appellants the jurors would have to believe that the government's witnesses all lied. As a comment on the burden of proof, this was wrong.

The incident is reviewed for plain error since the appellants did not object to it. This court recently found no plain error in a similar line of argument by a prosecutor. United States v Diaz-Carreon, 915 F2d 951, 957 (5th Cir 1990). The prosecutor's remarks here were also salvaged to some extent by his prefatory comment that he was speaking "about common sense things," not about the formal burden of proof. The chances that his remark misled the jury as to the real burden of proof are slim.

After defense counsel attacked the credibility of the government's witnesses, saying that the paid informant had lied "through his teeth," the prosecutor launched a vigorous defense of their credibility in his rebuttal. The prosecutor argued that the defense would have the jury believe that "everybody . . . are scum-bags at best . . . and the DEA, the people that work for the DEA . . . they're liars and perjurers." The defense made no objection to this remark. It is hard to see how it so poisoned the atmosphere of the trial as to amount to plain error.

Next, the appellants complain of the prosecutor's appeal to the jury to act as the conscience of the community. However, this argument too was partly in response to an argument made by the defense. The prosecutor told the jury: "And it's common knowledge--and every one of you--we can't pick up a paper, we can't turn on our television, we can't turn on a radio, we're not safe in our homes, and what is the cause of it? It's because of criminal conduct, and this right here is the source of 90 percent of it (indicating)." He went on to describe how drugs are "cutting out

the underpinning of our whole society, our education system is going to hell, our children." Such arguments are not categorically impermissible. United States v Brown, 887 F2d 537, 542 (5th Cir 1989) (appeals to the jury to be conscience of the community not impermissible unless calculated to inflame). The trial court sustained an objection to this argument but did not give a limiting instruction because only parts of it were objectionable. Although the remarks were in part excessive, it is hard to see how, given the evidence against Gonzales and Delosantos, they affected substantive rights. Moreover, the trial judge was better positioned than this appellate court to determine whether such remarks were inflammatory in the context of the trial.

Finally, the appellants point to a statement by the prosecutor that the ten-year sentence for two of the witnesses was "no great deal." No objection to this remark was made at trial. The appellants had an adequate opportunity to cross-examine the witnesses about the nature of their deal with the government. Moreover, the remark was not deceptive because the sentence was within the Guidelines range. There was no plain error in allowing the remark.

VI

After trial, one of the jurors, Ms. Janet Stenier, told the United States Attorney's Office that another juror had interpreted "inaudible" portions of the tape introduced into evidence. The Spanish-speaking juror had translated the inaudible portion as saying, "the cocaine is coming from Porter." Delosantos

lived in Porter, Texas, and he and Ramirez were coming from Porter on the day of the arrests.

Based on this incident, the appellants moved for a new trial or for the opportunity to interview the jurors because it appeared they had been exposed to extrinsic material. The trial court denied the motions. The denial is reviewed for abuse of discretion. United States v Ortiz, 942 F2d 903, 913 (5th Cir 1991).

The appellants argue that the juror's translation amounts to extrinsic evidence that deprived them of the opportunity to conduct cross-examination, offer evidence in rebuttal, argue the significance of the information to the jury, or request a curative instruction. United States v Navarro-Garcia, 926 F2d 818, 823 (9th Cir 1991). Where the jury has been exposed to such information, the defendant is entitled to a new trial "unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." Ortiz, 942 F2d at 913. The government counters that under Federal Rule of Evidence 606(b) jurors may not testify about internal matters, such as whether another juror was drunk during deliberations. Tanner v United States, 482 US 107, 117 (1987). Thus, Steiner would not be competent to testify if a hearing were held.

Appellants' argument must fail. The tape recording itself was not extrinsic evidence; it was properly admitted. The only question is whether a juror's interpretation of that evidence constituted extrinsic testimony. In considering and interpreting

evidence before them, it is beyond dispute that jurors may bring their own personal experiences and knowledge to bear. Navarro-Garcia, 926 F2d at 821. Surely the juror's knowledge of Spanish is a part of his personal experience, which he inevitably brings to bear on the evidence before him. That personal experience is not extrinsic, but intrinsic, to the jury's deliberations.

That the juror communicated his knowledge to the other jurors may have been improper, but it is not an impropriety rooted in the extrinsic evidence. Ortiz, cited by appellants, is inapposite, because there was no question that there was an allegation that extrinsic evidence had been brought into the jury room, and the testimony was necessary to examine where it came from and what influence, if any, it might have had. Here, by contrast, the tape recording was in evidence and the only additional information was provided by the Spanish-speaking juror. The court needed no further information to determine that the unauthorized translation related solely to the jurors' deliberations and was shielded from inquiry under Rule 606(b). Accordingly, the court did not abuse its discretion in denying the motion for new trial or request to have a hearing on the incident.

VII

The convictions of Gonzales and Delosantos are **AFFIRMED**. The conviction of Ramirez for conspiracy and possession with intent to distribute is **REVERSED**.