UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2752
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALEXIS IYK CHUKWURAH and ELIJAH UMA KALU,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CR H 92 0119 01)

(September 27, 1993)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellants Kalu and Chukwurah were each convicted of conspiracy to possess heroin with intent to distribute, and aiding and abetting each other to possess heroin with intent to distribute. Kalu appeals his conviction and sentence and Chukwurah appeals his conviction. We affirm.

We take up first Kalu's numerous challenges, beginning with the sufficiency of the evidence. The Government was required to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

prove the existence of an agreement between two or more persons to violate federal drug laws; that the defendant knew of the agreement; and that he voluntarily participated in it. 21 U.S.C. § 846. The Government also had to prove knowledge, possession and intent to distribute heroin. 21 U.S.C. § 841(a)(1). We have carefully examined the record and find that the Government easily carried its burden. The testimony of original codefendants Egwudobi and Umunna, and of DEA Agent Freeney, was sufficient for the jury to find the requisite elements beyond reasonable doubt. The codefendant's testimony was neither incredible nor insubstantial. United States v. Singer, 970 F.2d 1414, 1419 (5th Cir. 1992); United States v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991).

Kalu's argument that the district court erred in denying his motion to sever is likewise without merit. To prevail he must show specific and compelling prejudice against which the district court was unable to provide protection and then he can prevail only if the possible prejudice outweighs the public interest in the economy of judicial administration. United States v. Lindell, 881 F.2d 1313, 1318-19 (5th Cir. 1989), cert. denied, 493 U.S. 1087 (1990). Factors relevant to determining compelling prejudice include whether evidence directed toward the guilt of one defendant will "spillover" to another. See United States v. Rocha, 916 F.2d 219, 228 (5th Cir. 1990), cert. denied, 111 S.Ct. 2057 (1991). More is required than a mere showing of "antagonistic" defenses. United States v. Berkowitz, 662 F.2d 1127, 1133 (5th Cir. 1981). They

must also be mutually exclusive and irreconcilable. United States v. Romanello, 726 F.2d 173, 177 (5th Cir. 1984). Appellant is unable to show any of these things. His argument totally disregards the fact that he and his codefendant were simply involved in different aspects of the conspiracy.

Next, Appellant complains of the admission of evidence that codefendant Chukwurah was involved in a potential drug transaction with an undercover officer in 1989. We review under a heightened abuse of discretion standard. United States v. Carrillo, 981 F.2d 772, 774 (5th Cir. 1993). The admission of evidence under Rule 404(b) is governed by the two part test of United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc) cert. denied, 440 U.S. 920 (1979). We find that the evidence complained of was indeed relevant to show Chukwurah's predisposition to commit the charged offense and its probative value was not outweighed by its prejudice.

Appellant next contends that the district court erred in failing to grant his motion to suppress evidence seized at the time of his arrest on the basis that his arrest was warrantless and illegal. We note that a magistrate judge had previously ruled that Kalu's warrantless arrest was based upon probable cause. Under these circumstances, the district court's denial of the last minute motion to suppress as untimely was not an abuse of discretion. See United States v. Hirschhorn, 649 F.2d 360, 364 (5th Cir. 1981). The sole basis for the motion was the alleged warrantless arrest which had already been ruled proper. The record does not reflect

that Appellant challenged this finding until the motion made immediately prior to voir dire. We find no abuse of discretion.

Kalu next argues that the court erred in admitting testimony of Umanna that Egwudobi told him that Kalu was the source of the heroin. The district court determined, after the Government rested, that the Government demonstrated a conspiracy and that coconspirator's statements were admissible. It was correct in so doing under Federal Rules of Evidence 801(d)(2)(E). Additionally, the finding that Kalu was a participant in the conspiracy is supported by his possession of the bag containing the heroin and his own statements made to Egwudobi. District courts are free to consider controverted hearsay statements of coconspirators in determining whether there was a conspiracy involving the defendant. Fed. R. Evid. 104; Bourjaily v. United States, 483 U.S. 171, 178-79 (1987).

Turning now to his sentence, Appellant Kalu complains of the district court's factual finding regarding the quantity of drug used in calculating his sentence, and its failure to grant him a two-level adjustment for his allegedly minor role in the offense. Neither argument has merit. We examine the factual findings on the quantity of drug for clear error. United States v. Mitchell, 964 F.2d 454, 457 (5th Cir. 1992). A conspirator may be sentenced based upon the total amount of drugs distributed by the conspiracy as long as that amount is foreseeable by the conspirator. The probation department calculated Appellant's base offense level using this amount and he has not objected to it. We therefore

examine for plain error, United States v. Lopez, 923 F.2d 47, 49 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991), and we find none. The parties negotiated the transaction involving 400 grams of heroin. The gross weight of the heroin and the package seized was 528 grams. Given the record in this case, we find no plain error. The evidence shows that Appellant Kalu was the source of the heroin. This is supported by coconspirator Egwudobi's testimony. Under these circumstances the district court did not err in failing to grant a downward adjustment for a minor roll in the crime.

Appellant Chukwurah argues that he was entrapped. This defense is established only if a reasonable jury could not find that the Government discharged its burden of proving that he was predisposed to commit the crime charged. United States v. Arditti, 955 F.2d 331, 342 (5th Cir.), cert. denied, 113 S.Ct. 597 (1992). We view the evidence and the inferences and credibility choices in the light most favorable to the Government. Id. at 342-43. To establish his defense he argues strenuously that Lewis enticed him into the scheme. However, the Government produced Lewis and her testimony is quite to the contrary. Her version of the facts is that Chukwurah informed her that he had drugs he wished to dispose of and sought the help of her and her husband. Subsequent contacts came from him as well. The Government also produced the testimony of an undercover officer concerning other potential drug transactions by Chukwurah. Viewing the evidence in the light most favorable to the Government it supports the finding that Appellant Chukwurah was predisposed to commit the charged offenses.

AFFIRMED.