

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3187

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

DAVID HERNANDEZ and
DANIEL RECIO,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Louisiana
(CR-91-145-K)

February 9, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Defendant appeals his convictions for conspiracy to possess with intent to distribute and possession with intent to distribute cocaine and marijuana. We affirm.

I.

Prosecution of Daniel Recio arose from the execution of a search warrant at the home of David Hernandez. Jefferson Parish

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

authorities received information that a large shipment of cocaine would be delivered to the Hernandez residence on March 20, 1991. A task force consisting of Jefferson Parish sheriff's deputies, New Orleans police, and the FBI conducted surveillance of the residence beginning on that afternoon.

During surveillance, Agent Orgeron saw Hernandez and his live-in companion, Celia Guerra, leave the house in a white station wagon, stop briefly at an apartment complex, and then drive to a McDonald's restaurant. There, they met Miguel Sarmiento, who was waiting in a maroon Chevrolet. Hernandez took command of the Chevrolet and both cars proceeded back to the Hernandez residence. At first, Hernandez left the Chevrolet in his driveway and went into the house. Later, he emerged from the house and backed the Chevrolet behind a solid wooden fence appurtenant to the dwelling, hiding the car from observation. At this point, Agent DeLaughter applied for a search warrant.

Shortly before midnight, Recio's Nissan Maxima pulled up to the residence. According to Recio, he was arriving from a trip to Brownsville, Texas. He testified that he and his wife, Ramona Recio, traveled from Bay St. Louis, Mississippi to Brownsville in response to a call from her family informing her that her father in Mexico was ill. Her brother planned to meet her at the border to escort her to the family home, because Recio, a Cuban national, did not have the proper immigration documents to leave and re-enter the United States. Recio decided that he would stop in New Orleans on the way and leave his pickup truck for repairs, because he had

difficulty communicating with English-speaking mechanics in Mississippi. His New Orleans mechanic was Hernandez, whom Recio had met at the Latin supermarket in New Orleans. Recio drove the pickup, and his wife drove their Nissan Maxima to Hernandez' house. After a brief stop, they continued on their trip. In Brownsville, Mrs. Recio joined her brother; Recio returned to New Orleans.

Recio went into the house, and after about ten minutes inside, Recio, Hernandez and Sarmiento left the house and went to the rear of Recio's car. Recio opened the trunk and removed a white plastic bag. At trial, Recio denied going to his trunk. The three men then returned to the house.

About fifteen minutes after Recio's arrival, the search warrant was executed. Agents gained entry by first removing a barred security gate by attaching a chain to it and pulling with a truck and then breaking the wooden front door. Inside the house, agents saw Recio and Hernandez seated at a table. On the table was a triple beam scale, as well as a brown plastic bag and a clear plastic bag. Together, the bags contained over three kilograms of cocaine. As the officers entered, Recio handed the clear plastic bag to Hernandez. Hernandez grabbed the brown plastic bag from the table and ran down the hallway. Agent Orgeron chased Hernandez down the hall and into the master bedroom. When Orgeron identified himself as the police, Hernandez threw the packages into Orgeron's chest.

After arresting Hernandez, Recio, Sarmiento, and Guerra, the officers searched the house. In the closet of a spare bedroom,

they discovered a U-Haul box containing a total of 18 bags of marijuana; sixteen clear plastic bags were found in a green plastic garbage bag, and two clear plastic bags were found separately in a white plastic garbage bag. Contrary to the officers' account, Hernandez testified that all of the marijuana and the cocaine were in two trash bags in the closet. Officers also discovered a second triple beam scale in a kitchen cabinet and Recio's immigration document.

In a four-count indictment, the grand jury charged Recio, Guerra, Hernandez, and Sarmiento with conspiracy to possess three kilograms of cocaine and 17 pounds of marijuana with intent to distribute (counts one and two) and possession of the same with intent to distribute (counts three and four). With the exception of Hernandez who pleaded guilty to all counts, the defendants pleaded not guilty and proceeded to trial. At the close of the government's case, the district court granted Guerra and Sarmiento's motions for judgment of acquittal. The court denied Recio's motion, and the trial went forward. The jury returned a verdict of guilty on all counts; the district court sentenced Recio to concurrent terms of imprisonment of 96 months, a fine of \$12,500, concurrent five-year terms of supervised release, and a special assessment of \$200. This appeal followed.

II.

A.

Recio first argues that the evidence was insufficient to support the convictions for conspiracy to possess cocaine and

marijuana with intent to distribute. He does not challenge the sufficiency of the evidence to support his convictions for possession. Because Recio moved for judgment of acquittal, the standard for evaluating the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). In viewing the evidence in the light most favorable to the verdict, we afford the government the benefit of all reasonable inferences and credibility choices. United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987).

In order to establish the substantive count of conspiracy, the government has the burden of proving "(1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) that each alleged conspirator knew of the conspiracy and intended to join it, and (3) that each alleged conspirator did participate in the conspiracy." United States v. Guerra-Marez, 928 F.2d 665, 674 (5th Cir. 1991). The elements may be established by circumstantial evidence, and a plan may be inferred from the circumstances. Id.

Recio asserts that the government's witnesses were inherently unbelievable. He contends that the only evidence connecting him to the cocaine "is the testimony, now of questionable veracity, of the police officers." His contention is unavailing. We are "concerned only with the sufficiency, not the weight, of the evidence. Assessing the credibility of the witnesses and weighing the

evidence is the exclusive province of the jury." United States v. Greenwood, 974 F.2d 1449, 1458 (5th Cir. 1992).

Applying the sufficiency of the evidence standard, it was reasonable for the jury to conclude from the actions of Hernandez and Recio when the police entered the house that Hernandez and Recio were involved in a cocaine conspiracy. Furthermore, after making credibility choices, a jury could draw a reasonable inference that the white plastic bag that Recio removed from his trunk was the same white plastic bag containing marijuana police found in the U-Haul box with the green bag holding 16 clear bags of marijuana. Finally, both the cocaine and marijuana were present in distributable quantities. See United States v. Pineda-Ortuno, 952 F.2d 98, 102 (5th Cir. 1992) (possessing "a larger quantity of cocaine than an ordinary user would possess for personal consumption supports the finding that appellants intended to distribute the drug"). The evidence was sufficient to support both conspiracy convictions.

B.

Recio asserts that the district court abused its discretion in denying his motion in limine to exclude evidence of a seven-year-old conviction for possession of marijuana with intent to distribute. This contention is without merit. Any error in denying the motion was harmless. The prosecution never introduced the conviction; Recio acknowledged the conviction in his direct examination as discussed below.

C.

Recio alleges that reversible error occurred during the cross-examination of his wife, Ramona Recio. The defense called Mrs. Recio to testify. Defense counsel concluded her direct examination as follows:

Q: Mrs. Recio are you aware of your husband being involved in drug dealing of any kind?

A: I am conscious that my husband is innocent. I have been with him -- I have been married to him for four and a half years, and we have worked and fought. For this to happen now. It's the truth. It's the truth.

The government approached the bench to express its intention to question Mrs. Recio concerning her husband's conviction, because she had "opened the door" by leaving the impression that Recio had a clean past. Over defense counsel's objection, the district court permitted the question but cautioned the government as to the phrasing:

The Court: Why don't you ask her if she's aware that her, instead of that. Why don't you ask her if she knows whether or not her husband ever was.

The government's cross-examination included the following:

Q: Mrs. Recio, are you aware that your husband --

The Court: That wasn't the question.

Q: Do you know whether or not your husband has a prior conviction for a narcotics, a drug offense?

A: No.

Recio first argues that the court erred in allowing the government to question Mrs. Recio about her knowledge of any convictions. Second, he contends that the his Fifth Amendment rights were violated, because the government's attempt to ask the question "are

you aware?" implied the fact of his conviction to the jury, leaving Recio with no choice but to take the stand to tell his story to the jury and acknowledge the conviction, which he did.

Allowing the prosecution to inquire about convictions was proper. Counsel may cross-examine a witness who testifies as to the defendant's good character by asking whether the witness has heard of prior misconduct which is inconsistent with the witness's direct testimony. United States v. Bright, 588 F.2d 504, 511 (5th Cir. 1979); see also United States v. Lemaire, 712 F.2d 944, 948-49 (5th Cir. 1983) (applying the doctrine of "invited error").

We also can not agree that the government, through its aborted question, forced Recio to testify in violation of the Fifth Amendment. It is not at all certain that Recio was not going to testify before the cross-examination of his wife. Recio was listed as a possible witness, and defense counsel had said that the strategic decision whether Recio would testify had not been made. But even assuming Recio knew from the beginning that he would not testify, the government did not force him to the stand. If Recio was that concerned about the jury thinking he had a prior conviction, he could have requested a curative instruction. The judge could have instructed the jury that "the questions asked of the witnesses were not themselves evidence," United States v. Carter, 953 F.2d 1449, 1457 (5th Cir. 1992), or that there was no evidence before the jury that Recio had ever been convicted of a narcotics offense. Recio requested no instruction.

D.

Recio also argues that prosecutorial misconduct deprived him of due process by rendering the trial fundamentally unfair. Recio refers to three instances of alleged misconduct: 1) the prosecutor's cross-examination of Mrs. Recio already discussed; 2) the prosecutor's "in globo" introduction of Guerra's phone records, allegedly in a manner designed to hide their presence; and 3) the prosecutor's comments regarding the telephone records in his closing arguments. We ask "whether the misconduct casts serious doubt upon the correctness of the verdict" by considering 1) the magnitude of the prejudicial effect of the statements; 2) the efficacy of any cautionary instructions; and 3) the strength of the evidence of the appellant's guilt. Carter, 953 F.2d at 1457.

We quickly dismiss the claim of misconduct as to the cross-examination of Mrs. Recio. Any prejudice Recio suffered was negated when Recio testified on direct examination about his prior conviction. The remaining three instances concern Guerra's telephone records. Recio argued to the jury that he and Hernandez had only recently met and that they were not friends. On cross-examination, Guerra claimed that she met Recio for the first time three nights before their arrest. She stated that she knew of no one who lived in Bay St. Louis, Mississippi. She had never telephoned anybody in Bay St. Louis before her arrest, and moreover, she knew of no one else who would have called Bay St. Louis. The prosecutor then questioned her about her telephone bill

which showed over 20 calls to Recio's number in Bay St. Louis.¹ The government had introduced the records during its case through Officer DeLaughter, the custodian of the evidence seized from Hernandez' house.

The first claim of misconduct regarding these records concerns the manner in which the government put them into evidence. The records were contained in Government Exhibit 12, an in globo exhibit identified by DeLaughter as "assorted paperwork." When introducing the exhibit, the prosecutor told DeLaughter several times, that he did not have to go through the papers one by one. Exhibit 12 was admitted without objection. Recio claims that by introducing the records via an in globo exhibit and not allowing the witness to identify each and every item, the government "slipped" the records into evidence. Recio's claim is without merit. The government provided the records to Recio during discovery and counsel did not object to their admission.

Recio next points to misconduct during closing arguments. The prosecution summarized Guerra's testimony, concluding that the phone bills were "direct and clear-cut evidence that Celia Guerra took that witness stand and lied." There was no wrongdoing here. In its rebuttal argument, the government stated that Recio had not denied the numbers and that Guerra had made the phone calls to Recio's number in Bay St. Louis. Recio objected to the statement

¹During his case-in-chief, Recio introduced a speeding ticket he received in Texas just before he was arrested. Recio's phone number appeared on the citation and was the same as the number on Guerra's phone bill.

that Recio had not denied the numbers. The court responded with an instruction to the jury reminding the jury that the government bears the burden of proof at all times. The court responded sua sponte to the suggestion that Guerra made the calls by telling the jury that the evidence did not show who made the calls. Any prejudice from these statements was cured by the court's instructions. None of these events, by themselves or taken together, casts serious doubt over Recio's convictions.

E.

Finally, Recio argues that the instructions to the jury concerning the use of "mere presence" to infer a conspiracy were misleading. We review "a jury instruction to determine whether "the charge, as a whole, is a correct statement of the law and whether it clearly instructs the jurors as to the principles of law applicable to the factual issues confronting them." United States v. Pretel, 939 F.2d 233, 240 (5th Cir. 1991). The district court charged the jury:

As to each of the four charges, mere presence at the scene of an alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of any crime alleged. Also, a person who has no knowledge of any crime alleged, but who happens to act in a way which advances some object or purpose of that crime, does not thereby become guilty of the crime.

Although "mere presence" at the scene of a crime will not support an inference of participation in a conspiracy, it is a significant factor to be considered within the context of the circumstances under which it occurs.

However, you may not find the defendant guilty unless you find beyond a reasonable doubt that every element as defined in these instructions was committed by some person or persons,

and that the defendant voluntarily participated in its commission with the intent to violate the law.

Recio argues that the second paragraph, which was added at the government's request, was misleading. This argument is without merit. The second paragraph is taken verbatim from United States v. Evans, 941 F.2d 267, 272 (5th Cir. 1991). Any confusion created by defining "mere presence" as a significant factor is clarified when the instruction is read as a whole. Finally, it is of no consequence that the definition of mere presence was applied in a sufficiency of the evidence analysis in Evans.

AFFIRMED.