

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3360
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

GILDA A. GREEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 91-017(01)(M2))

(January 21, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:¹

Gilda Green (Green) appeals her conviction on drug trafficking and a related weapons offense. We affirm.

I.

Green was convicted by a jury of possessing cocaine with intent to distribute, in violation of 18 U.S.C. § 924(c)(1) and of using a firearm in relation to a drug trafficking crime, in violation of 21 U.S.C. § 841(a)(1).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

On the morning of July 14, 1990, federal agents executed a warrant to search Green's apartment at 3377 Desire Parkway in New Orleans. During the search, the agents discovered two semi-automatic pistols, thirteen ounces of cocaine individually packaged in plastic baggies, approximately \$15,500 in cash, needles, syringes, mirrors, a razor blade, an electronic scale, bottle caps containing cocaine residue, a propane burner, and a telephone bill for Gilda Green.

Federal agents noted that the bathroom window curtains were blowing out, and a pair of shower shoes and approximately one quarter ounce of cocaine were found beneath the open window. Bernadette Griffin (Griffin), a special agent for the Bureau of Alcohol, Tobacco, and Firearms (BATF), observed a man and woman crouched beneath the open bathroom window outside the Green apartment shortly after the other federal agents made their initial entry into the apartment. Griffin chased the man and woman into another part of the Desire housing project, identifying herself as a police officer and ordering them to stop. When Griffin realized she was headed into an area of the Desire project where there were no other agents, she gave up the chase and returned to Green's apartment.

Donnie Mims, a Government witness, testified that he had personally bought cocaine at Green's apartment on at least two occasions, and that he had prepared crack cocaine in the kitchen of the apartment. He testified that Green was in the apartment during his visits and aware of the activity.

Jacob Johnson, the security supervisor for the Housing Authority of New Orleans (HANO), testified that Green was designated as the head of the household at the address searched and that HANO records indicated that she remained at that address through the date of the search.

Green's infant daughter, Kiera Green, was found in one of the bedrooms of Green's apartment at the time of the search. Before the end of the search, Neomia Lewis, Green's mother and Kiera Green's grandmother, appeared at the scene to retrieve her infant granddaughter. Neomia Lewis testified that she received an anonymous call on the morning of the search asking her to go to the apartment and pick up her granddaughter.

A number of Green's neighbors confirmed Green's occupancy of the apartment around the time of the search. Margaret Hogan testified that she saw Green leaving the apartment at approximately 9:00 in the morning the day before the search. Bridget Jordan testified that she saw Green at the apartment three or four times per week before the date of the search, and that she saw Green enter the apartment at around noon on the day before the search carrying a bag of fried chicken. Crystal Jordan testified that Green had not moved out of her apartment, that she "kept seeing her [Green] enter into her apartment a lot," and that she observed Green enter the apartment at approximately 9:00 the night before the search. Both Crystal and Bridget Jordan testified that Green did not return to the apartment following the search.

Green was arrested shortly after midnight in early January

1991 in a Desire project apartment approximately two blocks from the apartment the agents searched. At the time of the arrest, she denied being Gilda Green and gave the false name Connie Lewis. She later admitted to being Gilda Green and stated that she had intended to turn herself in within the next couple of days.

Employees of WDSU-TV, New Orleans, video-taped the search of Green's apartment. The video portion of the tape was shown to the jury, but the audio portion was not played.

During the rebuttal argument, the Government attorney made statements which are challenged on appeal and discussed in more detail below.

Green raises three issues on appeal: 1) the evidence is insufficient to support the verdict; 2) the district court erred in admitting the videotape of the search of the apartment; and 3) the improper argument of government counsel rendered her trial fundamentally unfair. We consider each argument below.

A.

Green argues first that the evidence is insufficient to support her conviction. On a challenge of insufficient evidence, this court reviews the evidence presented at trial in the light most favorable to the verdict. **United States v. Nixon**, 816 F.2d 1022, 1029 (5th Cir. 1987), **cert. denied**, 484 U.S. 1026 (1988).

The Government presented sufficient evidence of guilt. The testimony of Donnie Mims, Green's neighbors, and Jacob Johnson (the HANO security officer) is persuasive evidence of Green's control over the apartment. Physical evidence such as telephone bills and

housing authority records strongly corroborate this fact. The presence of thirteen ounces of cocaine packaged for distribution; over \$15,000 in cash; Green's infant daughter, Kiera Green supports the jury's apparent conclusion that Green was engaged in selling cocaine and possessed weapons to facilitate this activity. **United States v. Ruiz**, 860 F.2d 615, 617 (5th Cir. 1988). The jury's verdict was adequately supported.

B.

Green argues next that the prejudice created by the videotape outweighed its probative value. She claims that any probative value was cumulative of evidence already before the jury. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Fed. R. Evid. 403. Unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly an emotional one. **Id.** advisory committee's note. The admission or rejection of items such as video tapes and photographs is within the discretion of the trial court and should not be upset unless there is an abuse of discretion. **United States v. Authement**, 607 F.2d 1129, 1131 (5th Cir. 1979).

Green points to several of the scenes presented on the tape that were prejudicial. These include: the showing of three black males in a drugged condition (with one experiencing an overdose), the "zoom" shot showing needle track-marks on the arms of one of the black males, and a scene with the infant, Kiera Green, crying. In addition, she claims that the tape sensationalized the raid.

But the tape also presented probative evidence helpful to the jury in deciding the case. For example, it showed: 1) approximately 350 grams of cocaine in small individual packages probative of Green's intent to distribute; 2) \$15,000 in small bills, which was not available to the Government at the time of trial; 3) consumer products used by women, indicating the presence of Green at the apartment; and 4) circumstantial evidence that Green jumped from the bathroom window and escaped during the search. The Government argues that the tape of the three black males in a drugged state shows that Green's apartment was used as a location for the distribution and use of narcotics. We conclude that the district court did not abuse its discretion in deciding that the tape's probative value outweighed its prejudice. The video tape allowed the Government to show evidence in its precise condition at the time of the search. **Authement**, 607 F.2d at 1131.

C.

Green argues finally that the Government by making improper argument engaged in prosecutorial misconduct, resulting in an unfair trial. Our task is to determine whether the argument affected Green's substantial rights. **United States v. Simpson**, 901 F.2d 1223, 1227 (5th Cir. 1990). To do this we examine (1) the magnitude of the statement's prejudice, (2) the effect of any cautionary instructions given, and (3) the strength of the evidence of the defendant's guilt. **Simpson**, 901 F.2d at 1227. This analysis is equivalent to review for harmless error. **Simpson**, 901 F.2d at 1223.

The first statement Green challenges is as follows:

But she was there, ladies and gentlemen. And he said we can't put her there. We're not trying to put her anywhere. We're trying to bring out the truth, bring out the facts and bring out what happened. That's my only job. My job is not to convict, convict, convict under any circumstances and I resent any insinuation to that effect. Our job is to bring out the truth, what happened, the good, the bad and the ugly.²

R. 7, 104-105. Green argues that this statement presumes the whole Government apparatus pre-determined her guilt.

We disagree. These statements, taken in context, did not unfairly prejudice Green. Moreover, the government sought to refute Green's insinuation that the government wanted to convict at all cost. When defense counsel "invites" a response from the Government and the Government "rights the scale" in its response, such comments do not warrant reversing a conviction. **United States v. Young**, 470 U.S. 1, 12-13, 84 L.Ed.2d 1, 105 S.Ct. 1038 (1985). Green's argument is therefore meritless.

The second statement Green challenges is as follows:

² Green also challenges another statement on grounds that it constitutes impermissible vouching. In that statement the government counsel stated:

And on four different occasions the day before the police executed this search warrant neighbors saw her there. They saw her there in the morning, out with the baby, they saw her at lunch coming in with Church's fried chicken and you're going to see the evidence of that in the picture and they saw her again sitting in the car at five o'clock and then see her going in the apartment at nine o'clock. But she is not there? These people are lying? Why would they lie? What reason would they have to lie about that?

We find nothing improper about this argument.

And I also was pretty calm until he started talking about those girls, those neighbors. Those are people who have to go back and live in that Project tonight. They're to live with the fact that they testified here today against someone who is dealing dope in the Project. But they might be lying to you? I'd like to tell you about the talk I had with those girls about their fears.

R. 7, 105.

The Government concedes that this statement should not have been made because it refers to conversation outside of the trial between the Government and the witnesses. However, the Government argues that the statement is not prejudicial enough to affect the fairness of the trial, because it was stated only once, was not commented upon, was not highlighted, and was not repeated.

Green argues that this statement led the jury to believe that the Government possessed extrinsic evidence which convinced the prosecutor of Green's guilt. **See United States v. Ellis**, 547 F.2d 863, 869 (5th Cir. 1977). Green also asserts that this statement constitutes improper vouching because of the insinuation that threats made to Government witnesses increased the witness' credibility and prejudiced the jury against Green.

We agree with the government's argument. While the statement may have bolstered the credibility of the witnesses to a minimal degree, this isolated reference to the risks the witnesses were exposed to in the Desire project did not significantly prejudice Green.

In addition, at the end of the trial, the court specifically admonished the jury to consider that:

The arguments by the lawyers are not evidence in this case. The function of the lawyers is to point out things

they think are significant or helpful to their side of the case, and thus, to call your attention to certain inferences or contentions that might otherwise escape your notice. In the end, it is your recollection and your interpretation of the evidence that governs your verdict. You should make your own determination of what happened, based on the evidence that you heard. You may consider the arguments of the attorneys, but they are not evidence.

Id. at 116-17. Any prejudice cultivated by the Government's comment was neutralized by the district court's cautionary instructions. **See United States v. Anchondo-Sandoval**, 910 F.2d 1234, 1237-38 (5th Cir. 1990). Finally, the government's case was strong enough to minimize any prejudice caused by the statement.

The judgment of the district court is affirmed.

AFFIRMED.