

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3443

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KERRY CUREAUX and LEHMAN K. LUNDY,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana
(#CR-91-405-M)

(November 12, 1993)

Before SNEED¹, REYNALDO G. GARZA, and JOLLY, Circuit Judges.

SNEED, Circuit Judge:²

¹ Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

² 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Defendants Kerry Cureaux and Lehman Lundy appeal their convictions on three counts of drug-related offenses. Cureaux challenges the district court's denial of his requested jury instruction on accomplice testimony, and he further alleges that the court interfered with his cross-examination. Lundy challenges the district court's refusal to instruct the jury on his proposed intoxication defense. We affirm.

I.

FACTS AND PRIOR PROCEEDINGS

An informant, Donald Mims, told Special Agent Charles E. Smith, an undercover officer for the Bureau of Alcohol, Tobacco and Firearms (ATF), that appellant Cureaux was distributing cocaine. Agent Smith and Mims drove around a New Orleans housing project several times until a man, later identified as Jesse Smith, recognized Mims. Jesse Smith and appellant Lundy were together. Jesse Smith directed Lundy to go to the car to find out what Mims and Agent Smith wanted. According to Agent Smith, when Lundy arrived, Mims informed him that he and Agent Smith wanted to purchase one quarter ounce of cocaine for \$300. After some brief negotiations as to price and quantity, Lundy and Jesse Smith took Agent Smith to an apartment (the Desire Street apartment) later identified as that of Cureaux's live-in girlfriend Gilda Green. Cureaux did not allow Agent Smith to enter the apartment, as a consequence of which Agent Smith waited outside in the common hallway.

Shortly thereafter, Jesse Smith, followed by Cureaux and Lundy, came out of the apartment carrying what appeared to be cocaine wrapped in plastic. Lundy then asked Agent Smith to pay before he would deliver the cocaine, but Agent Smith demanded that he receive the drugs first. When his request was denied, Agent Smith aborted the attempted drug purchase.

Agent Smith thereafter obtained a search warrant for the Desire Street apartment, based on the attempted purchase. ATF officers executed the search warrant the next morning and found Lundy, Cureaux, and another man and a child in the apartment, along with approximately 350 grams of cocaine, various drug paraphernalia, and firearms.

At Cureaux's and Lundy's trial, Mims and Gilda Green testified for the Government and implicated Cureaux in the drug distribution scheme. Green characterized Lundy as a look-out who primarily came to the apartment to use drugs.

After a three-day joint trial in the district court, Cureaux and Lundy were convicted of (1) conspiracy to possess cocaine with the intent to distribute, (2) possession of cocaine with the intent to distribute, and (3) possession of a firearm in relation to a drug trafficking offense. Cureaux was sentenced to 74 months on counts one and two, to be served concurrently. Lundy was sentenced to 98 months on counts one and two, to be served concurrently. Both were sentenced to 60 months on count three, to be served consecutively. Cureaux and Lundy appeal their

convictions.

II.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1441 and 1443. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

We review a district court's refusal to include a defendant's proposed jury instruction for abuse of discretion. United States v. Chaney, 964 F.2d 437, 444 (5th Cir. 1992). Abuse of discretion in this context occurs only when the failure to give a requested instruction prevents the jury from considering a defense. United States v. Masat, 948 F.2d 923, 928 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992).

In determining whether the district court should have given an instruction, we consider the evidence in the light most favorable to the defendant. United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir. 1979). However, the trial court retains substantial latitude in deciding whether to give a requested instruction when the theory of defense is highlighted elsewhere in the charge. United States v. Rubio, 834 F.2d 442, 446-47 (5th Cir. 1987).

In reviewing the effect of the trial court's comments on the management of cross-examination, this court looks for a substantial demonstration that the trial judge had overstepped his or her bounds. United States v. Davis, 752 F.2d 963, 974

(5th Cir. 1985).

III.

DISCUSSION

A. Cureaux's Requested Accomplice Instruction

Cureaux argues that the trial court committed reversible error by refusing to dilute the strength of Green's testimony with an "accomplice instruction" to the jury.³ Although a trial court's refusal to issue a requested accomplice instruction may be grounds for reversal under some circumstances, those circumstances do not exist in this case. Cureaux relies on United States v. Bernal, 814 F.2d 175 (5th Cir. 1987), which provides that a defendant is generally entitled to an accomplice instruction if:

important elements of the accomplice's testimony are uncorroborated by other direct evidence and if circumstantial evidence tending to corroborate the accomplice's testimony is not compelling or supports that testimony only through a chain of inferences that is less than immediate and not altogether clear.

Id. at 183-84 (footnote omitted). These circumstances are not present here.

Green's testimony also was not the only evidence of Cureaux's participation in the drug distribution scheme. A review of the record provides compelling circumstantial evidence

³ An accomplice instruction is designed to warn the jury that an alleged accomplice who testifies against a defendant for his personal advantage should be held to a more stringent level of scrutiny by the jury than an ordinary witness. See, e.g., United States v. D'Antignac, 628 F.2d 428, 435-36 n.10 (5th Cir. 1980), cert denied, 450 U.S. 967 (1981).

to link Cureaux to the drug distribution scheme and the firearm offenses. For example, Mims testified that he had purchased cocaine in the Desire Street apartment on four or five different occasions and that the drugs were only available for sale when Cureaux was present. Moreover, the AFT agents found guns in the Desire Street apartment, and Agent Smith testified that he saw Jesse Smith with a firearm when he and Lundy walked up to the Desire Street apartment to initiate the drug transaction. Agent Smith also testified that he observed Cureaux take part in the attempted drug transaction. Finally, the defense did not provide any evidence contradicting the accomplice's testimony. We therefore find no merit in Cureaux's arguments on this issue.

B. Judicial Interference with Cureaux's Defense

Cureaux also argues that the trial court committed reversible error by interfering with his ability to cross-examine his accusers, Mims and Green, and generally trivializing his attempts to impeach them. Cureaux, however, does not allege a specific injury.

To constitute reversible error, the trial court's intervention, taken as a whole, must be such that it could have led the jury to be predisposed to find the defendant guilty. Any such intervention improperly confuses the functions of judge and prosecutor. Davis, 752 F.2d at 974. Applying the standard announced in Davis, we find that the trial judge's actions, taken as a whole, were proper. Regarding Green, Cureaux specifically

complains that the trial court did not allow him ample opportunity to explore on cross-examination the timing of Green's agreement with the government. However, contrary to Cureaux's contentions, it is abundantly clear from the trial transcript that Cureaux had ample opportunity to cross-examine Green, that he took advantage of it, and that he extensively developed the nature of Green's relationship with the government. Cureaux's counsel even stated that "with emphatically repeated and restated questioning," Green admitted her knowledge of the agreement with the government for a recommendation of leniency in sentencing in exchange for her testimony against Cureaux. Thus counsel's rigorous cross-examination was effective. It revealed the oft-employed technique of promising leniency to less involved participants in exchange for their testimony directed at the more involved.

Regarding Mims, Cureaux specifically complains that the trial court, through a series of rulings and remarks, diminished and criticized Cureaux's attempt to prove the arrangement between the Government and Mims. A thorough review of the trial transcript reveals that the trial court rebuked Cureaux's counsel because he alluded to the existence of a letter written by the government on Mims's behalf without following the proper evidentiary or procedural rules for producing the letter. The court made clear that it was not obligated to assist counsel's efforts unless he followed the correct procedures. The court

further explained that it was inappropriate for defense counsel, who was neither a witness nor under oath, to testify that he had not found nor discovered the letter in order to admit the next best evidence of the letter's contents.

None of the comments of the trial judge relating to either witness were directed at Cureaux or his counsel personally; instead, the judge's comments were directed to the relevancy and admissibility of the evidence and to expediting the trial. None of the judge's comments were improper. See Davis, 752 F.2d at 975. Moreover, the trial judge specifically criticized both the government and defense counsel for reiterating points while examining witnesses. Such even-handed reminders defeat any finding of prejudice.

We find no merit in Cureaux's complaint about judicial interference.

C. Lundy's Requested Intoxication Instruction

Lundy argues that the district court committed reversible error by refusing to instruct the jury pursuant to his intoxication defense. Lundy argues that drug-induced intoxication negated the specific intent necessary for conviction of the crimes.

The trial court's charge should be reviewed in its entirety to determine whether the charge as a whole was correct. United States v. Chaney, 964 F.2d 437, 444 (5th Cir. 1992). We will only find that a district court's refusal to provide a requested

instruction is reversible error when: (i) the requested instruction is substantively correct; (ii) the requested instruction is not substantially covered in the charge actually given to the jury; and (iii) the requested instruction concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present a given defense effectively. Id.

Applying Chaney to the instant case, we find no reversible error. Although Lundy's requested instruction is substantively correct, we find that the requested instruction was substantially covered in the charge to the jury and that the absence of the requested instruction did not seriously impair the defendant's ability to present his defense. The charge, when viewed as a whole, sufficiently covered the distinction between the mental state necessary to constitute simple possession of a drug as opposed to possession with intent to distribute or conspiracy with intent to distribute. This distinction was made clear by the stress the district court placed upon the word "voluntary." For example, in the jury charge, the trial court mentioned no less than 23 times that the acts making up the charged offenses must be done knowingly, intentionally, or voluntarily. In addition, the trial court defined "knowingly" and "intentionally"; both definitions included the word voluntary. Thus, the omitted intoxication instruction would not have added so much more concerning the voluntariness of the crime to require

inclusion. See United States v. Branch, 989 F.2d 752, 757 (5th Cir. 1993); see also United States v. Rubio, 834 F.2d 442, 449-50 (holding that the definition of "knowingly" was sufficient to give the defendant an opportunity to present his defense that he lacked the requisite mental state for the commission of the crime).

Further, Lundy had an opportunity to effectively present his intoxication defense to the jury. Lundy's counsel introduced evidence of Lundy's intoxication through Agent Smith's testimony. Lundy's counsel also thoroughly argued the defense of intoxication in his opening statement and closing argument. Accordingly, we find that the omission of Lundy's requested intoxication instruction did not seriously impair Lundy's ability to present an effective intoxication defense. Therefore, the district court's refusal to give the intoxication instruction proposed by Lundy was appropriate and does not constitute reversible error.

AFFIRMED